

THE CONFLICT OF LAWS AND FORUM SHOPPING: SOME RECENT DECISIONS ON JURISDICTION AND FREE ENTERPRISE IN LITIGATION

C. Granger*

A. INTRODUCTION

The purpose of this paper is to outline and discuss, in the light of some recent decisions, the principles and rules of law which limit a litigant's choice as to where to bring action in connection with a situation which involves contacts with more than one jurisdiction and legal system. The primary emphasis is upon English and Canadian Law. The rules dealt with fall within the field known as Conflict of Laws, and the problem they attempt to control is that of "forum shopping."

What is forum shopping? Is it a bad thing? Here is what two members of the House of Lords had to say about it in a very recent decision, which is commented on in the next section of this paper.

"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.¹

There have been many recent criticisms of "forum shopping" and I regard it as undesirable.²

Voices, both academic and judicial, have been raised criticizing forum shopping before. J. G. Collier, in a recent case note³ describes it as "a nightmare of private international lawyers." Dr. Morris calls it "deadly sin" and "shocking."⁴ Judicial disapproval of forum shopping was clearly evident in the judgments of four out of five Law Lords who participated in the famous *Chaplin v. Boys* decision.⁵

* Associate Professor of Law, Faculty of Law (Common Law section), University of Ottawa.

¹ The Atlantic Star, [1973] 2 W.L.R. 795, at 817 (H.L.) (per Lord Simon of Glaisdale).

² The Atlantic Star, *supra* note 1, at 810 (per Lord Reid).

³ [1973] CAMB. L.J. 49, at 52 (commenting upon the Court of Appeal decision in *The Atlantic Star*).

⁴ See MORRIS, CONFLICT OF LAWS 149-50 ("deadly sin") and at 273 ("shocking") (1971).

⁵ [1969] 3 W.L.R. 322 commented upon by Clarence-Smith, *Conflict of Laws Survey*, 4 OTTAWA L. REV. 176, especially 180 (1970).

Forum shopping is not in itself necessarily bad. A plaintiff will naturally seek to obtain the fullest advantage to himself and his objectives which the law permits, and he will rightly expect his legal adviser to tell him how to do it. If the law permits him a choice of forum, he will select the best for his purposes. He surely cannot be blamed for doing this, and going "forum shopping." The question is how far he should be permitted to go in forum shopping. His freedom must be controlled to some degree to prevent its abuse and to secure its protection. His legal right must be defined and given meaningful existence by legal limits. Obviously from the above, some academics and members of the judiciary feel that the limits set by the existing legal rules are not restrictive enough, and condemn certain kinds of forum shopping permitted under them. Others, who are prepared to allow greater freedom of choice and leeway to the would-be litigant, argue that the existing legal rules are relatively satisfactory and do not condemn forum shopping done within the limits of those rules.

If, indeed, one of the major objectives of conflict of laws systems is to achieve uniformity of result, regardless of locality of suit, then the very existence of forum shopping points to failure in achieving this goal. Uniformity of result would eliminate the incentive for forum shopping, leaving the question of forum selection and allocation to be based on the relative convenience of all parties involved in the suit. And surely, one of the major objectives of conflict of laws should be to achieve uniformity of result. We should, therefore, at least lean in the direction of greater control over forum shopping, whilst working at the same time to reduce the incentives to indulge in it. Efforts to unify domestic and/or conflicts systems are of course highly desirable. Unfortunately, they are also plagued with delays. In the meantime, re-examination and perhaps reformation of our own rules relating to jurisdiction may be worthwhile.

Conflict of laws rules are often categorized into three kinds: those relating to jurisdiction, "choice of law" rules, and rules on recognition and enforcement of foreign judgments. Obviously there is no magic in this classification, which is one of convenience. The categories represent three possible stages in the legal disposition of a situation which calls for the application of conflict systems. All of these categories of rules may, of course, contribute to forum shopping, since the litigant will, if well advised, take into consideration the totality of the legal systems involved (both his own legal system and any possibly relevant foreign legal systems, and, in all these, both the conflicts and non-conflicts rules of law) to decide how and where the result he desires may be obtained. However, the rules which have traditionally been more directly concerned in the limiting and controlling of forum shopping are those relating to jurisdiction.⁶

⁶ A choice of law rule which refers a substantive question of law to the law of the forum, or tends to prefer the law of the forum, naturally tends to encourage forum shopping. This was, of course, a problem with the rules of choice of law (some have argued that they are more jurisdictional rules than rules of choice of law) found in *Phillips v. Eyre* and *Machado v. Fontes*, and which were under discussion in *Chaplin v.*

The next section of this paper contains a basic examination of the limitations imposed upon the would-be forum shopper through existing principles relating to jurisdiction. This section is organized as follows. Firstly, it outlines the basic framework of the game—the fundamental rules on jurisdiction in English and Canadian conflict of laws. This is followed by a more detailed consideration of forum selection by prior agreement (i.e. before the cause of action or the dispute arises). Finally, it deals with what might be called unilateral forum selection (after the cause of action or dispute has arisen). The latter parts of the section will be mainly concerned with the exercise of discretion by the court, either to take an “unusual” jurisdiction, (e.g., by an order for service *ex juris*), or to stay proceedings which have already commenced either domestically or in a foreign court on an accepted “usual” basis of jurisdiction. Although an attempt will be made in this section of the paper not only to provide an accurate statement of existing rules of law, but also constructive criticism thereof, a separate and final section of the paper will contain conclusions and submissions.

B. LIMITATIONS ON THE WOULD-BE FORUM SHOPPER.

1. *Jurisdiction in English and Canadian Conflicts Law.*

No attempt will be made here to enter into a detailed statement of the precise rules of a particular system of law on the adjudicatory jurisdiction of its courts. This is a task beyond the scope of this paper, and the interested reader should refer to the relevant standard works dealing with the legal system with which he is concerned. All that is required for the purposes of this paper is a general outline of the fundamental approaches to, and “usual” bases of, adjudicatory jurisdiction in the common law jurisdictions with whose systems of conflicts law we are concerned. This, then, is the simplified picture which emerges.

Our present rules were not developed through a process of careful analysis of the proper or desirable limits on adjudicatory jurisdiction for the purposes of conflict of laws. As has been pointed out many times,¹ they are a doubtful heritage of the procedural history of the common law in England. Some of them have attracted more discussion and change than others. Those in the area of matrimonial causes fall into this category. Others appear to have entrenched themselves so firmly that criticism almost seems like heresy. Nevertheless, criticism has been, and should be, made of

Boys, referred to above. This is also one of the problems involved in categorizing a matter as being procedural, and, therefore, for the forum rather than substantive.

The unreality of concentrating on one of these categories, such as choice of law rules, and subordinating or failing to consider the other is forcefully pointed out in Inglis, *Jurisdiction, The Doctrine of Forum Conveniens, and Choice of Law in Conflict of Laws*, 81 L.Q.R. 380 (1965).

¹ See, e.g., McClean, *Jurisdiction and Judicial Discretion*, 18 INT'L & COMP. L.Q. 321, especially at 331-33 (1969), and other sources referred to therein and Auburn, “*La Poesie*” and the Conflict of Laws, 51 CANADIAN B. REV. 529 (1973).

them. Into this category fall, for example, the rules relating to jurisdiction in actions *in personam*.

A distinction has been traditionally drawn between actions *in personam* and actions *in rem*. It may be an unhelpful and perhaps somewhat less than rational distinction, but it does exist. With respect to actions *in personam*, the traditional view has been that, in the words of Mr. Justice Dickson in a very recent and interesting decision of the Supreme Court of Canada:⁸ "jurisdiction in a personal action rests upon physical power and the ability of the Court to enforce any judgment it may render. Jurisdiction, therefore, normally depends upon the presence of the defendant within the territorial limits of the Court or upon the voluntary submission of the defendant to the authority of the Court: *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A.C. 670; *Lung v. Lee*, (1928) 63 O.L.R. 194."

Basically, you must serve the defendant with a writ when he is within the territorial jurisdiction of the Court. However, a person who would not otherwise be subject to the Court's jurisdiction may submit to it, precluding himself from objecting to its taking jurisdiction. Such submission may be inferred from the terms of a contract (more on this shortly). Apart from this basic approach to jurisdiction in personal actions, our systems have also made provision for serving a defendant outside the territorial jurisdiction of the Court, or, as it is termed, service *ex juris*. This "longarm" extension beyond the traditional jurisdictional reach is discretionary. It might be noted in passing that it may cause difficulties in connection with recognition of the judgment of the Court elsewhere and it involves having to take care about stepping upon the sensitive toes of another's sovereignty.⁹

Whereas traditional jurisdiction in personal actions depended on control over, and the allegiance of the person, jurisdiction *in rem* depended on control over the *res*. One example of this kind of jurisdiction and action is afforded by *The Atlantic Star*¹⁰ referred to above, which involved the admiralty jurisdiction *in rem*.¹¹

Next, some mention should be made of jurisdiction in actions concerning status, or, as they have been rather quaintly called on occasion, actions *quasi in rem*.¹² Insofar as it is possible to generalize here, jurisdiction in such actions has been traditionally based on the domicile of the parties involved,¹³ or, in certain actions, on residence. This whole area has, of course, been the subject of considerable study and development, both

⁸ *Moran v. Pyle National (Canada) Ltd.*, Supreme Court, judgment rendered on December 21, 1973, as yet unreported, (an important decision on the *locus commissi* of tort in relation to jurisdictional issues).

⁹ See, for example, *Canadian Westinghouse Co. v. Davey*, [1964] Ont. 282.

¹⁰ See, *supra* note 1.

¹¹ See, further, e.g., DICEY & MORRIS, *CONFLICT OF LAWS* c. 11 (8th ed. 1967).

¹² See, e.g., R. H. GRAVESON, *THE CONFLICT OF LAWS* at 94 (5th ed. 1965).

¹³ The problems created by strict adherence to this, and by the peculiarities of the rules which English law developed and clung to governing the concept of domicile and its acquisition, are well known, and will not be dealt with at all in this paper.

academic and judicial (encompassing as it does the whole field of international and interprovincial domestic relations), and stands out as the area in Anglo-Canadian conflicts law where, perhaps, the most heartening advances and reforms have been implemented in recent years.

Before concluding this sketch outline of the traditional bases of jurisdiction in Anglo-Canadian conflicts law, it is necessary to refer to a number of miscellaneous, but significant, points and rules which must be added to the above principles, and which restrict their application in some instances.

Firstly, there are a number of things the Anglo-Canadian Courts will not do. They will not entertain an action to determine title to foreign land.¹⁴ This is the result of the historical distinction between "transitory" and "local" actions. They will not enforce, directly or indirectly, the penal or revenue laws of a foreign state.¹⁵ They will not entertain actions against certain entities or persons to whom the law accords sovereign or diplomatic immunity.¹⁶

Secondly, the Courts possess a considerable degree of discretion in respect to jurisdiction. If, for example, an Ontario Court is asked to give leave to issue a writ for service out of the jurisdiction, it has the discretion to grant or refuse leave as it sees fit.¹⁷ Or, if the Ontario Court already has jurisdiction on one of the "usual" bases mentioned above, it still has the discretion to decline to exercise that jurisdiction. The Court can stay an action before it, and its discretion to do this is an inherent one, although it usually also appears in statutory form.¹⁸ Arguments have been made by several learned commentators that these discretions are actually part of a general discretion which permits the court to decline jurisdiction in any case of any kind where it feels it should do so, because, for example, it is a *forum non conveniens* and that the action could, and, should be tried more conveniently elsewhere.¹⁹ Unfortunately, it is submitted that most of the authorities so far do not bear out or support such arguments.

We shall now examine in more detail some aspects of forum shopping control through the operation of this framework of law governing jurisdiction to adjudicate, as illustrated specifically by some recent cases of interest in England and in the Canadian common law jurisdictions.

¹⁴ See, e.g., *British South Africa Co. v. Companhia de Mocambique*, [1893] A.C. 602.

¹⁵ See, e.g., *Huntington v. Attrill*, [1893] A.C. 150 (1892); *Government of India v. Taylor*, [1955] A.C. 491; and *United States v. Harden*, [1963] Sup. Ct. 366; but see, *Weir v. Lohr*, 65 D.L.R.2d 717 (Man. Q.B. 1967).

¹⁶ See, e.g., *Gouvernement de la République Démocratique du Congo v. Venne*, [1971] Sup. Ct. 997, commented on by Tung-Pi Chen, *International Law Survey*, 5 OTTAWA L. REV. at 499 (1972).

¹⁷ See, e.g., *Curley v. Clifford*, [1941] Ont. W.N. 154 (High Ct.); *Empire-Universal Films Limited v. Rank*, [1948] Ont. 235.

¹⁸ See, e.g., Ontario Judicature Act, ONT. REV. STAT. c. 228 §§ 18 & 24 (1970) and Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. 5, c. 49 (U.K.).

¹⁹ See, for example, J. G. Collier's note on *The Atlantic Star* (Court of Appeal decision) in [1973] CAMB. L.J. 49.

2. *Forum Selection by Prior Agreement.*

The parties to a contract may seek to pre-select the forum in which they wish to litigate any disputes arising between them concerning that contract, in the same way as they may wish to pre-select the law which will govern such disputes. Just as an international contract may contain a choice of law clause, it may also contain a forum selection clause. To what extent will such clauses be recognized and enforced by our Courts?

Provided, of course, that the parties choice of law to govern their contracts is "bona fide" and "legal" in the eyes of the court, it is given "conclusive" effect.²⁰ The court will give full effect to the expressed intentions of contracting parties, provided there is no strong reason for denying such effect. One would, therefore, naturally expect the courts to take much the same attitude to forum selection clauses, and, in general, recent decisions at least indicate that they will now do so, although this has not always been the case.

The basic policy which has influenced the attitude of Anglo-Canadian courts with respect to both choice of law and choice of forum clauses has been to implement the maxim *pacta sunt servanda* and protect the reasonable expectations of parties to transactions. The traditional emphasis on this, and on the concept of freedom of contract, has led them to be reluctant in stating qualifications restricting the effect and enforceability of express choice of law clauses. However the presence of rather different policy considerations weighing against the basic ones already mentioned has often led the courts to evince somewhat less reluctance to state and apply restrictions on the enforceability of forum selection clauses.

The courts have faced the problem of what effect they wish to give to such clauses in two basic types of situation. In the first, the court is asked to take jurisdiction itself through such a clause. This is the "submission" situation already mentioned previously. In the second, the court is asked to decline, because of the clause selecting a foreign forum, to exercise a jurisdiction it otherwise possesses, or to refrain from permitting steps (e.g., service *ex juris*) which would give it jurisdiction contrary to the intention of the clause. These two types of situation clearly involve slightly different factors which the court may take into consideration in deciding whether to deny effect to the clause and frustrate the express intentions of the parties to the contract.

Unfortunately, (and this is not limited simply to the case law dealing with forum selection clauses) one tendency which is evident in some of the Anglo-Canadian cases, and in U.S. case law until very recently, is that of jealous protectiveness towards the courts own jurisdiction, and a marked reluctance to relinquish the action to a foreign (and hence, one almost feels from the language in some of the judgments, inferior or in some way un-

²⁰ See, e.g., *James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd.*, [1970] A.C. 583; and *Compagnie d'Armement Maritime v. Compagnie Tunisienne de Navigation*, [1970] 3 All E.R. 71 (H.L.);

trustworthy) tribunal. Surprisingly, even Lord Denning has opened himself to accusations of evincing such an attitude in several judgments in forum shopping cases.²¹

This tendency, which emphasizes technical jurisdiction rather than the reduction of litigation to the natural or reasonable forum, is more likely, it is submitted, to have the effect of encouraging, rather than restricting, forum shopping of possibly the worst kind. It is suggested that the "ouster of jurisdiction" objection to the enforcement of forum selection clauses should be avoided, as it often tends to emphasize the wrong question to ask when considering possibly valid restrictions on giving effect to such clauses. Why should a court, after all, object to being saved time and energy? If its real objection is that the loss of jurisdiction over the particular case in question is "contrary to public policy" in a valid way, then that particular phrase surely requires expansion and specific explanation in terms of the interests and reasonable expectations of the parties and the legal system which is considering asserting its own ideas on jurisdiction in contradiction to those apparently desired by the parties when they planned their transaction.

We shall now examine two transactions (the one involved a recent Canadian court decision, and the other brought about recent litigation before the English and United States courts) to illustrate the existing law on forum pre-selection, and to introduce suggestions as to what that law should be.

In *E. K. Motors Limited v. Volkswagen (Canada) Ltd.*²² the plaintiff, a distributor of the defendant's vehicles for Northern Saskatchewan, with its head office located in Saskatchewan, started action in that province for sums claimed to be owing from its previous relationship with the defendant. The defendant sought a stay of the Saskatchewan action, relying on a forum selection clause, in one of two contracts with the plaintiff, which read as follows: "[T]his agreement is subject to the laws of the Province of Ontario and to the exclusive jurisdiction of her courts."²³

²¹ See, e.g., *The "Fehmarn"*, [1957] 2 Lloyd's Rep. 551, at 555 (C.A.), "no one, by his private stipulation, can oust these Courts of their jurisdiction in a matter that properly belongs to them," and *The Atlantic Star*, [1972] 3 W.L.R. 746, at 757 and 758 (C.A.) "No one who comes to these courts asking for justice should come in vain . . . 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." This part of Lord Denning's judgment evoked the following rebuke from Lord Reid on appeal to the House of Lords, "My Lords, with all respect, that seems to me 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." *Supra* note 1, at 800.

²² [1973] 1 W.W.R. 466 (Sask. 1972), reversing, *E. K. Motors Ltd. v. Volkswagen (Canada) Ltd.*, [1972] 2 W.W.R. 700 (Sask. Q.B.).

²³ *E. K. Motors Ltd. v. Volkswagen (Canada) Ltd.*, [1972] 2 W.W.R. 700 (Sask. Q.B.).

At first instance, the stay was refused. Mr. Justice MacPherson stated that:

Our law does not consider that a clause in a contract which has the effect of ousting the ordinary jurisdiction of our courts is contrary to public policy. . . . Parties to a contract are entitled to select the law which shall govern its interpretation and the courts in which any conflict arising from it may be resolved. While recognizing this power to contract, however, our law does not regard a clause which ousts jurisdiction as absolutely binding. The courts will, in their discretion, refuse to grant a stay of proceedings. The problem arises in the exercise of that discretion: see "The Contractual Forum, A Comparative Study" by Cowen and Da Costa, (1965) 43 Can. Bar Rev. 453, for a discussion of the authorities²⁴

and cited the judgment of Mr. Justice Brandon in *The Eleftheria*,²⁵ as accurately summarizing the law on this. The relevant part of Brandon's judgment says this:

The principles established by the authorities can, I think, be summarised as follows:

(I) where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

(II) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

(III) The burden of proving such strong cause is on the plaintiffs.

(IV) In exercising its discretion, the court should take into account all the circumstances of the particular case.

(V) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded:

(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts;

(b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects;

(c) With what country either party is connected, and how closely;

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages;

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would — (i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a Time-bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.²⁶

MacPherson then considered the facts of the case in the light of these points, concluded that "the balance of convenience is strongly in favour of the plaintiff," and hence refused the stay, defeating the intended effect of the forum selection clause.

²⁴ *Id.*

²⁵ [1969] 2 All E.R. 641. (P.D. & A.).

²⁶ *Id.* at 645.

The Saskatchewan Court of Appeal reversed this decision, and granted the stay. Mr. Chief Justice Culliton, delivering the judgment of the court, cited authorities for the proposition that an express choice of law clause, if not contrary to public policy, should be given effect as conclusively determining the proper law of a contract,²⁷ and concluded that the proper law of the contracts in the case at bar was the law of Ontario. He noted that a clause in the 1955 contract did no more than grant concurrent jurisdiction to the Ontario courts,²⁸ and that if an action was commenced in Saskatchewan relating to that contract "it would be a matter for the court to decide, in the exercise of its discretion, whether such action be stayed to enable the litigation to be carried on in the Ontario courts."²⁹ He went on to hold that the clause in the 1965 agreement gave, in specific and definite terms, exclusive jurisdiction to the Ontario courts and hence 'ousted the jurisdiction' of the Saskatchewan court in respect to litigation arising out of that contract, and that the doctrine of balance of convenience therefore had no application to the case. It should be noted that he found it significant that counsel had agreed that under no circumstances should there be two trials in the case, but that there should only be a single trial to dispose of all the issues, and further that the Statute of Limitations would not be pleaded as a defence to any Ontario action in the case.

The second transaction, which involved both English and United States decisions, has become a cause célèbre. The decision of the U.S. Supreme Court in the case has radically altered U.S. law on the enforceability of forum selection clauses in admiralty matters, and has attracted considerable recent comment. The transaction and decisions provide a most apt illustration of how differing approaches to the conflicts jurisdiction problems under discussion could cause chaos and involve parties to a suit in double trouble and expense, whilst at the same time involving the courts of two countries in embarrassing and futile conflict.

The situation revolved around a self-elevating drilling-rig romantically named "The Chaparral." This rig was owned by Zapata, a Houston-based American corporation, who chartered a tug from a German enterprise, Unterweser. The latter undertook to tow the rig from Louisiana to Italy. The contract exempted Unterweser from responsibility for default or error in navigation of the tow, and provided that any dispute was to be litigated before the English courts in London. While being towed by Unterweser's tug, "Bremen", the rig suffered serious damage during a storm in international waters in the Gulf of Mexico, and, on instructions from Zapata, was towed to port in Florida.

²⁷ *Rex. v. International Trustee for Protection of Bondholders, A.G.*, [1937] A.C. 500; *Vita Food Products Inc. v. Unus Shipping Co. Ltd.*, [1939] A.C. 277; *James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd.*, [1970] A.C. 583; *Westcott v. Alsco Products of Canada Ltd.*, 24 D.L.R.2d 302 (Nfld. Sup. Ct. 1960).

²⁸ The clause in question read, in part, "the parties agree to submit to the jurisdiction of the Courts of the Province of Ontario . . ."

²⁹ *E. K. Motors Ltd. v. Volkswagen (Canada) Ltd.*, [1973] 1 W.W.R. 466, at 469 (Sask. 1972).

Zapata commenced action in Florida, ignoring the choice of forum clause and Unterweser claimed damages for breach of contract in London, obtaining permission to serve Zapata *ex juris*.³⁰ Zapata was served in Delaware. Unterweser took steps to defend themselves in Florida, but also instituted proceedings to set aside or stay that action. Zapata moved in England to set aside the writ and the order for service *ex juris*.

In the English courts, Mr. Justice Karminski dismissed Zapata's motion and the Court of Appeal dismissed Zapata's appeal from his decision.³¹ Zapata had argued that the English court was not a convenient forum; proceedings had already commenced in the Florida court, and the writ was not properly served.

Karminski held against Zapata on all points, and made it clear that in his view, although the court had a discretion to deny effect to the choice of forum clause, and should consider the "balance of convenience" to decide whether it should do so, in this case the parties should stick with their bargain, and that Zapata had not established that the English forum was sufficiently inconvenient to justify its motion.

The Court of Appeal noted the fact that the American court had granted an injunction to restrain Unterweser from proceeding with their English action pending determination of American proceedings, and that this was one of the matters now relied upon by Zapata to establish the "inconvenience" of allowing the English action to proceed. Further noted were certain limitation period complications. Lord Justice Wilmer, having stated that the law on the question before the court was "not open to doubt",³² said that, although *prima facie* it was the policy of the court to hold parties to their bargains, it may in its discretion decline to do so where there were strong reasons relating to the balance of convenience. He concluded that there was no reason to interfere with the trial judge's exercise of this discretion. Lord Justices Diplock and Widgery agreed with him.

Turning, however, to the American side of the litigation, we do not find such harmonious solidarity in judicial attitude. The Florida District Court found that it had jurisdiction and overrode the forum selection clause.³³ The United States Court of Appeals affirmed this decision,³⁴ by a vote of 2 to 1, on the basis of the decision of the same court in *Carbon Black Export Inc. v. S. S. Monrosa*.³⁵ They accepted the propositions that agreements whose object is to oust the jurisdiction of the courts are contrary to public policy

³⁰ Under Order 11, Rule 2, of the Rules of the Supreme Court.

³¹ *Unterwasser Reederei G.m.b.H. v. Zapata Off-Shore Company: The "Chaparral,"* [1968] 2 Lloyd's Rep. 158 (C.A.).

³² *Id.* at 162.

³³ *In re Unterwasser Reederei, G.m.b.H.,* 296 F. Supp. 733, [1970] A.M.C. 1276 (D.C. Fla. 1969).

³⁴ *Zapata Off-Shore Co. v. The "Bremen" and Unterwasser Reederei, G.m.b.H. (The "Chaparral"),* 428 F.2d 888 (5th Cir. 1970), [1970] A.M.C. 1241; [1971] 1 Lloyd's Rep. 122 (C.A. 1970).

³⁵ 254 F.2d 297, [1958] A.M.C. 1335 (5th Cir. 1958).

and should not normally be enforced; secondly, such agreements certainly should not be enforced unless the selected forum would provide a more convenient forum than the state in which the suit is being brought. The majority decided that the Florida court was the most convenient. They were clearly influenced to some degree also by the fact that the difference between English and American law on exculpation clauses might well result in the American party losing in England. The dissenting judge on the panel, Mr. Justice Wisdom (most appropriately named), wanted to overrule the *Carbon* case and give effect to forum selection clauses which were not unreasonable. *En banc* rehearing resulted in affirmation by 8 to 6. Then the matter went before the Supreme Court.³⁶

The Supreme Court adopted the minority opinion in the Court of Appeals, and held that the forum clause should be given effect, condemning as a legal fiction and unsuited to modern-day trade and commerce the attitude that ouster of jurisdiction by such clauses is against public policy. The Court said, in effect, that such a clause, unless the result of negotiation tainted with fraud, undue influence, or "overweening bargaining power", should be given effect, subject to the party arguing against this showing that it was "unreasonable." Having made it clear what the lower courts should do with the issue, the Supreme Court thus changed American law on this problem, and, in the specific litigation, avoided the conflict between English and American courts which might well have resulted from the situation.

The *Chaparral* litigation has been the subject of considerable comment, from both sides of the Atlantic.³⁷ While general approval of the Supreme Court decision is manifest, some reservations have been indicated about its effect. Professor Nadelmann suggests, for example, that abuse of forum selection clauses may be widespread in these days when "equal bargaining power cannot be 'presumed'."³⁸ The principles enunciated, certainly through their very flexibility, leave a great deal of discretion to a court to decide whether a choice of forum clause is 'unreasonable.' However, this is so in many areas of law, and at least the principles state the position clearly and openly, instead of hiding behind more technical terminology or legal fiction.

How close, after this decision, are American and Anglo-Canadian laws on the enforceability of forum selection clauses? Professor Nadelmann suggests that it puts American law in line with the English rules. An English barrister commenting on the case suggests that it "represents a change from the previous pattern of parallel development with the English courts in this area of the law" but that "recent English decisions show a growing sympathy"

³⁶ The "Bremen" and Unterwasser Reederei, G.m.b.H. v. Zapata Offshore Co., 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513, INT'L LEG. MATERIALS 832, [1972] A.M.C. 1407 (1972).

³⁷ See, e.g., Nadelmann, *Choice-of-Court Clauses in the United States: The Road to Zapata*, 21 AM. J. COMP. L. 124 (1973); Keys, *Comment*, 5 LAW & POLICY IN INTERNATIONAL BUSINESS 688 (1973); Cawley, *Forum Selection Clauses*, J. BUSINESS L. 340 (1973); Delaume, *Choice of Forum*, 4 J. MARITIME L. & COMMERCE 295 (1973); and Edwards, *Comment*, 3 CALIF. WEST. INT'L. L.J. 397 (1973).

³⁸ See Nadelmann, *supra* note 37, at 134.

with the trend towards greater enforcement of such clauses.³⁹ The same writer observes that the discretion to deny enforcement of such clauses has been exercised on widely divergent bases in recent years, and contrasts the English Court of Appeal decision in the *Chaparral* with the earlier decision by the same court in *The Fehmarn*,⁴⁰ in which a forum selection clause which sought to give exclusive jurisdiction to U.S.S.R. tribunals was overriden on the grounds that, applying an objective test of connections with the breach, the Russian element was relatively minor, and English technical jurisdiction should be maintained. He also refers to *The Eleftheria*,⁴¹ as an example of a more satisfactory and liberal exercise of the discretion than occurred in *The Fehmarn*, and more in line with the Supreme Court approach in the *Chaparral* case. It will be recalled that the judgment of Brandon J. in *The Eleftheria* was relied upon by MacPherson J. in the Canadian decision discussed above, *E. K. Motors Ltd. v. Volkswagen (Canada) Ltd.*⁴²

It is suggested that the effect of the *Chaparral* litigation is that American and English law on the enforceability of forum selection clauses have been brought closer together. Both now proceed on the principles that, *prima facie*, such clauses are to be given effect, but that the courts may examine whether they truly represent the common intention of the parties, and have in addition a discretion to deny them effect in certain circumstances, the burden being upon the party seeking to have the court deny effect to the clause to establish a case for the court to exercise its discretion in his favour.

The difficult thing is to predict and define the circumstances which will induce a court to exercise its discretion against a forum selection clause. The phraseology used by the Supreme Court in the *Chaparral* case is very flexible and, although the judgments give some indications of what might or might not make a clause "unreasonable," there is room for considerable divergencies of interpretation. This is also clearly true when talking about the English and Canadian law. Whilst the existence of the discretion, and the idea that a weighing of factors relied upon by the party seeking to avoid the operation of the clause in question in terms of balance of convenience are clearly accepted, again, there is room for considerable difference of opinion and attitude to the guidelines which should govern, or be relevant to, the exercise of the discretion. The authorities do not reveal consistency in this. Clearly, some courts and judges are more willing than others to forego the usual jurisdiction in favour of a foreign forum selected by the parties. Clearly, some feel that the presence of such a clause renders considerations of balance of convenience virtually otiose. Others want to exercise greater control and investigate the measure of the parties' apparent choice against their own yardstick of convenience. Of the cases we have mentioned above, perhaps one could group *The Fehmarn*,⁴³ the first instance decision in *E.*

³⁹ See Cawley, *supra* note 37, at 340.

⁴⁰ [1957] 2 Lloyd's Rep. 551 (C.A.).

⁴¹ *Supra* note 25.

⁴² *Supra* note 22.

⁴³ *Supra* note 40.

K. Motors,⁴⁴ the District and Court of Appeals decisions in the *Chaparral* case,⁴⁵ and, possibly, *The Eleftheria*⁴⁶ together illustrating the latter judicial attitude of "more objective control". The English decisions in the *Chaparral* case,⁴⁷ the Court of Appeal decision in *E. K. Motors*,⁴⁸ and, possibly, the Supreme Court decision in *Chaparral*⁴⁹ represent the opinion favouring less control.

What should be the approach to forum selection clauses? It is suggested that the principles as formulated by the United States Supreme Court best state this. If parties have freely negotiated a contract and inserted therein a forum selection clause, we should give effect to it as far as may be reasonable. One line of attack on this is to show that, really, the clause does not represent the mutual and common intentions of the parties. In an age of contracts of adhesion and wide divergencies in bargaining power, this may lead into a consideration of the "unreasonableness" of the clause in question, and an analysis of the actual bargaining process which occurred. If the clause does not represent the true choice of the parties, it can be regarded as largely irrelevant, and the discussion then proceeds on the basis of the "unilateral" plaintiff-dictated jurisdiction selection considered in the next part of this paper, (this involves the question of the "natural" forum or *fora*, and the discretion to stay on *forum non conveniens* reasoning). If it does represent the true choice of the parties, there should surely be no question of considering the balance of convenience from their points of view, since they should have taken this into account when formulating their choice of forum, and one party should not now be allowed to renege and reopen that question. The only factors left which might still make the clause "unreasonable" or influence an Anglo-Canadian court to exercise discretion against it would be such things as the substantial policy attitudes of a "natural" forum when asked to forego jurisdiction because of the clause. As illustrated in the *Chaparral* case, the United States courts have an antipathy to exculpation clauses prevailing against an American plaintiff. Often, such factors, on close analysis, would be categorized as "local", and thus not deserving projection into a situation which is not purely domestic; or they may be cleared up in terms of choice of law. However, they remain as possibly valid reasons for overriding an otherwise acceptable forum selection clause as being "unreasonable." What is important is that it be clearly explained why a court regards such a clause as "unreasonable" before it overrides it, and that courts be most wary of projecting internal policies beyond their proper area of application. It is also, surely, highly desirable to escape the confusing strait-jacket of historical terminology, concepts, and the traditional 'precise', precedent analysis, in order to get at

⁴⁴ *Re E. K. Motors Ltd.*, *supra* note 22 (Sask. Q.B.).

⁴⁵ *Supra* note 33.

⁴⁶ *Supra* note 41.

⁴⁷ *Supra* note 31.

⁴⁸ *Supra* note 22.

⁴⁹ *Supra* note 36.

and solve explicitly and without unnecessary sophistry, the problems involved in setting limits on forum-shopping by forum selection clauses in contracts.⁵⁰

3. "Unilateral" Forum Selection.

Where there is no question of forum selection agreed to beforehand between the parties to an action, the plaintiff unilaterally seeks and selects the forum. Of course, the rules that different systems possess on jurisdiction to adjudicate may result in his being able to commence an action in more than one forum. The defendant may be most unhappy with the plaintiff's choice. The plaintiff may even pursue two actions in different forums on the same set of facts. What can be done to control this unilateral forum selection in Anglo-Canadian law?

The main weapon is the inherent discretion of the court to control its own process. Even if it has technical jurisdiction, the court may stay the action or even dismiss it.⁵¹ The court may, even, restrain by injunction the institution or continuation of foreign proceedings.⁵²

Another source of control in certain situations is the discretion which exists as to whether the court will grant leave for service *ex juris*.

Once again, however, there are differences of opinion as to when the discretion should be exercised against the plaintiff's selection of forum and why. A number of recent decisions in England and in Canada, some of which have already received academic comment, illustrate this and highlight the kinds of factors involved.

(a) *Discretion to Stay Action*:—Two recent interesting English decisions dealt with the exercise of this discretion. One is the decision of the Court of Appeal, in *Maharanee of Baroda v. Wildenstein*.⁵³ The other is the decision of the House of Lords in *The Atlantic Star*.⁵⁴ Both were cases where the English court possessed clear technical "usual" jurisdiction, (in the one case *in personam*, in the other *in rem*), but was being asked by the defendant to decline to exercise it. In *Maharanee of Baroda* the stay was refused. In *The Atlantic Star* it was granted.

⁵⁰ It is submitted that a "distinction" often drawn between situations where this kind of issue arises in the context of an order for service *ex juris* and those where a stay is sought in an action where the court already has clear jurisdiction on a basis other than the forum selection clause is one which, though relevant to certain technical points, may and should lose its significance on analysis.

⁵¹ See, *supra* note 18 and Clarence-Smith, *Conflict of Laws Survey*, 4 OTTAWA L. REV. 176, at 202-03 (1970); also DICEY & MORRIS, *CONFLICT OF LAWS* 1081, Rule 183 (8th ed. 1967).

⁵² This is a power which "should be exercised with great caution to avoid even the appearance of undue interference with another court," *see*, *Cohen v. Rothfield*, [1919] 1 K.B. 410, at 413, (C.A. 1918), although it is technically not an attempt to order the foreign court around, but an order to a specific party to the action.

⁵³ [1972] 2 All E.R. 689, [1972] 2 W.L.R. 1077 (C.A.); commented upon by Collier in [1973] *CAMB. L.J.* 49 and by Auburn in 51 *CAN. B. REV.* 529 (1973).

⁵⁴ [1973] 2 W.L.R. 795, [1973] 2 All E.R. 175 (H.L.), commented upon by Bridge in 36 *MODERN L. REV.* 649 (1973).

The Maharanee of Baroda had bought a painting, said to be by Boucher, from the defendant in Paris. Both parties lived in France, though they were "citizens of the world" with extensive interests in, and connections with, other countries, including England. Wildenstein certified the authenticity and value of the painting on notepaper from his London offices. The Maharanee sent the painting to England, and it was put up for auction at Sotheby's. Doubts about its authenticity arose. Experts informed the Maharanee that the painting was not by Boucher and was worth considerably less than the price she had paid for it. The Maharanee issued a writ in England, against Wildenstein claiming the rescission of the contract and the repayment of the purchase price. She gave as her address on that writ the hotel in London at which she was staying temporarily, and gave as the defendant's address his London office. The defendant was not in England but visited England later to attend the Ascot races. Whilst doing so, he was served with the writ, nine months after its issue. The service was later described by Lord Justice Edmund Davies as what "some might regard as bad form" but clearly not in itself "an abuse of legal process."⁵⁵

Wildenstein entered an appearance and sought to have the writ set aside. He argued that it was oppressive, vexatious, and very inconvenient. The master and judge at first instance agreed with him. The Court of Appeal did not.

The judge at first instance, Mr. Justice Bridge, in affirming the master, said that a presumption existed that, where a defendant is served during presence within the jurisdiction on a short visit, discretion should be exercised in his favour. The Court of Appeal held that there is no such presumption, but that the principles governing the exercise of the discretion to stay are those found stated in the judgment of Scott L.J. in *St. Pierre v. South American Stores (Gath and Chaves), Ltd.* as follows:—

The true rule about a stay . . . 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.⁵⁶

Lord Denning stated that the case was different from those in which a plaintiff seeks service *ex juris* (where the court is considering whether to acquire jurisdiction) or where there is multiplicity of actions (*lis alibi pendens*). Here, the court very clearly possessed jurisdiction, and the defendant had to show that "it would plainly be unjust to the defendant to

⁵⁵ *Supra* note 53, at 694, [1972] 2 W.L.R. at 1085.

⁵⁶ [1936] 1 K.B. 832, at 398 (C.A. 1935).

require him to come here to fight it, and that injustice is so great as to outweigh the right of the plaintiff to continue" her one and only action in the case in England.⁵⁷ He and the other members of the court made it very plain that expense and inconvenience to the defendant is not enough to add up to a successful argument that the continuation of the action would cause him "injustice" as being oppressive or vexatious, or an abuse of the court's process. Cases relied upon by the judge at first instance to support his "presumption"⁵⁸ which would have shifted the burden of proof to the plaintiff to show good cause for his selection of forum were distinguished on the ground that they involved clear harassment and vexation (and issues suited only to an Indian forum at a time when communicating between England and India was arduous).

Some reliance was placed on the idea that the issue in the case was largely one of fact, *i.e.*, the authenticity of the painting. Furthermore, the court accepted the argument that it might be difficult, if not unjust, to require the plaintiff to litigate the case in France. Apparently, delays in French courts might be greater than in an English forum, and also French law might create problems for the plaintiff in getting in evidence from expert witnesses.

As has been pointed out, nevertheless, the case is really one of action by one French resident against another in respect of a contract made in France and probably governed by French law, appearing in an English forum because the plaintiff has taken advantage of English law on jurisdiction in actions *in personam* by slapping a writ on the defendant during his short visit to the English horse races at Ascot.⁵⁹ Furthermore, one might beg to doubt if the delays in an English forum are so much less than in a French one.

Thus, the defendant was refused his stay because, whilst he could show some inconvenience, he could not show oppression or vexation creating injustice. At this point, one might raise the question: What would have happened if the Maharanee had been unable to "catch" Wildenstein in England, and had applied for leave to serve him *ex juris*? Would she have been denied such leave? If so, why would the fact that she did catch him in England enable her to sue him in England, whereas if she had not so caught him, she would not have been able to do so? The significance of this question will become more apparent when we turn to discretion in connection with service *ex juris*.

In *The Atlantic Star*⁶⁰ the House of Lords examined the law on "discretion to stay," in the context of an action instituted in the Admiralty court

⁵⁷ *Maharanee of Baroda v. Wildenstein*, [1972] 2 All E.R. 689, at 693, [1972] 2 W.L.R. 1077, at 1084 (C.A.).

⁵⁸ *Egbert v. Short*, [1907] 2 Ch. 205, and *In re Norton's Settlement*, [1908] 1 Ch. 471 (C.A.); and *see*, *Gorell Barnes, P.*, in *Logan v. Bank of Scotland (No. 2)*, [1906] 1 K.B. 141, at 152 (C.A. 1905).

⁵⁹ *See*, *Auburn*, *supra* note 53, at 530.

⁶⁰ *Supra* note 54.

in respect of a collision in Belgian waters. The rather complex history of this action was as follows.

A collision occurred in heavy fog on the River Schelde, Belgian waters, in which the Dutch vessel, *The Atlantic Star*, sank two other vessels, moored at the time, *the Bona Spes*, a Dutch barge, and the *Hugo Van Der Goers*, a Belgian barge. Aside from property damage and losses, the skipper and one crew member of the Belgian vessel were drowned.

First the owners of the Belgian barge, and then the owners of the Dutch barge, applied to the Antwerp Commercial Court for the appointment of a court surveyor to investigate the collision. This was done, and the surveyor made his report, which appeared to support the view that *The Atlantic Star* was not to blame for the collision, which was caused more by difficulties inherent in the dense fog and the site of the accident.

Shortly prior to the submission of this report, the owners of the Belgian barge began action against the owners of *The Atlantic Star* (the Holland America Line) in the Antwerp Commercial Court. After the report was made, Belgian insurers liable to make payment to the dependants of the two drowned men claimed damages against Holland America in Antwerp Commercial Court.

The owners of the Dutch barge then learnt that *The Atlantic Star* was due in Liverpool, and began an action *in rem* in the Admiralty Court. In order to avoid arrest of the ship the Holland America Line accepted service of the writ and gave a guarantee of £80,000 for the claim. They entered a conditional appearance and then issued notice of motion to set aside the writ or stay the action.

Next, the owners of part of the cargo on the Belgian barge and the insurers of the cargo on the Dutch barge also started proceedings in the Antwerp Commercial Court against Holland America. Finally, the owners of the Dutch barge also began an action in that court against Holland America, but solely in order to preserve the time-limit in case their action in England should be stopped.

At first instance, Mr. Justice Brandon refused a stay and dismissed the motion, subject to an undertaking by the owners of the Dutch barge to discontinue their Antwerp action as soon as possible. He felt himself bound to refuse the stay on the basis of the existing law, even though he stated that he had "[n]o doubt at all that, so far as convenience is concerned, the Commercial Court of Antwerp is by far the more appropriate forum," and that "the case has absolutely no connection with England, except that, because the defendants' ship trades from time to time to an English port, she is liable to arrest here."⁶¹ Brandon noted the following additional reasons to support his first point, namely, that the collision occurred in Belgian waters, thus the case was governed by Belgian law and local regulations. Moreover, five other claims arising out of the collision were pending

⁶¹ The "*Atlantic Star*," [1972] 1 Lloyd's Rep. 534, at 539. (Admiralty Ct.).

in Antwerp, and, by reason of an offer by the defendant, full security was available there.

The Court of Appeal affirmed the decision⁶² relying on the "classic statement" of principles in the *St. Pierre* case quoted above.⁶³ Lord Justice Phillimore expressed dissatisfaction with the strict letter of the law, wondering whether it left much real discretion at all in the court.

The House of Lords reversed the lower courts, allowing the appeal and staying the English action. The decision was, however, a close one, with Lords Reid, Wilberforce and Kilbrandon in favour of allowing the appeal, and Lords Morris of Borth-y-Gest and Simon dissenting. The judges did not propound any new or exciting doctrine. All judgments in the decision appeared to be in basic agreement on the law and on previous authorities. The English Admiralty jurisdiction which may be involved in an action *in rem* against a ship to which a maritime lien has attached by virtue of its alleged responsibilities for a collision was unquestioned, and clearly in line with international standards. The *St. Pierre* formula was cited with approval. The differences arose over its interpretation and application.

The judges involved also clearly fully appreciated the practical considerations involved in the issue before them. It would appear that the surveyor's report, though not binding on the Antwerp court, carried considerable weight with it. That court in most cases accepts the findings of fact therein and is "more likely to accept . . . than to depart from" the surveyor's views on responsibility. The claim might fail in Belgium, but might have a better chance of success in England. Under maritime law, the alleged "offending" ship can be subjected to arrest in many different places. *The Atlantic Star* frequently sailed into Antwerp. Even if the process of arrest were used mainly to obtain security, such security could be provided in Antwerp. The only real advantage the plaintiffs sought in trying to pursue the English action was their hope to win in England because they expected to lose in Belgium. Nor did they really argue to the contrary.

It was also clearly agreed that the English Admiralty Court possesses a high international reputation and often entertains "foreign" suits for which it is well-equipped and well-accustomed to handle. It was also agreed, however, that "there are now in existence, in other maritime countries, courts with Admiralty jurisdiction with comparable, if not equal, experience,"⁶⁴ and that the Antwerp court might just fall into that category.

Finally, there could be no illusions about the strength of the practical connections with the Belgian forum (which also possessed clear jurisdiction), and the lack of any such connections with the English forum. Clearly the Belgian forum would be more convenient than the English one, from

⁶² *The Atlantic Star*, [1972] 3 W.L.R. 746 (C.A.).

⁶³ *Supra* note 61.

⁶⁴ *The Atlantic Star*, [1973] 2 W.L.R. at 815, 795, (per Lord Wilberforce).

all points of view except that of the plaintiff in the English action for the reason given above.

The majority judgments (Lords Reid, Wilberforce and Kilbrandon) favoured a more flexible and liberal interpretation of the wording of the *St. Pierre* rules which should not be given "quasi-statutory" force.⁶⁵ The words "vexatious" and "oppressive" are guidelines for the purpose of illustration only, and not to be regarded as "words of limitation."⁶⁶ Lord Reid felt that a distinction should be drawn between those instances where the plaintiff comes to the "natural" forum and those where he does not. In the former, the plaintiff should not be denied his choice except for very strong reasons. In the latter, he should be required to offer "reasonable" justification for his choice if the defendant seeks a stay of the action. He categorically declared that he regarded forum shopping as "undesirable" and gently chastised the Master of the Rolls for his "insular" statements in the Court of Appeal.⁶⁷ Lord Kilbrandon viewed the case as really one of *lis alibi pendens*, involving the need to avoid contradictory decisions in two different courts of competent jurisdiction on the same issues.⁶⁸ All agreed that the mere balance of convenience is not the correct equation, which should involve balancing the disadvantages to the defendant with the advantages to the plaintiff in his choice of forum, with the balance having to come down heavily in favour of the defendant before the plaintiff's basic right of choice will be displaced. They clearly saw disadvantages and inconvenience to the defendant, and no real and valid advantage to the plaintiff in continuing the action in England rather than letting it proceed in Belgium only.

The dissenting judges (Lords Morris and Simon) preferred the traditional narrow and literal approach to the *St. Pierre* formula, requiring proof virtually of "bad faith." They felt that the inconvenience to the defendant did not outweigh the advantage naturally sought by the plaintiff so as to render continuation "unjust." They stated that the Admiralty jurisdiction involved is based on an "open door" policy, perfectly in line with international standards, and thus, any changes tending to restrict this "open door" policy, which owners of ships and plaintiffs rely on and accept, in anticipation that arrest of ships will be made in forums favourable to the plaintiff, should be made only by Parliament.⁶⁹ They felt that forum shopping is a natural consequence of this peculiar jurisdiction, and that this is nothing to be indignant about.⁷⁰ They noted that international law obligations require that the freedom allowed by the Admiralty rules of arrest jurisdiction must be maintained in English law.

The judgments, which unanimously agreed that "fundamental" changes

⁶⁵ *Id.* at 810 and 813 (per Lord Wilberforce).

⁶⁶ *Id.* at 822 (per Lord Kilbrandon).

⁶⁷ See, *supra* note 2.

⁶⁸ *Supra* note 64, at 819.

⁶⁹ *Id.* at 808 (per Lord Morris) and 818 (per Lord Simon).

⁷⁰ See, *supra* note 1.

in the relevant law were undesirable, revealed some degree of misunderstanding of the doctrine of *forum non conveniens* as it exists in Scots and United States law. They appear to conceive of that doctrine as operating merely on "the balance of convenience." Lord Kilbrandon, however, puts the Scots doctrine more into its correct perspective.⁷¹ As was subsequently pointed out by a learned commentator,⁷² the Scots plea of *forum non conveniens* cannot be sustained solely on the ground of inconvenience. The court has to be satisfied that "the ends of justice and the interests of all parties" require trial elsewhere.

The House of Lords decision, unlike that of the Court of Appeal in *Maharanee of Baroda v. Wildenstein*,⁷³ evidences a broader and more flexible approach to the use of the discretion to stay, and, perhaps, to the general control of forum shopping. It is submitted that it lays a desirable, if slightly restricted, foundation for further, perhaps better informed, analysis which could yet lead to a general doctrine of *forum non conveniens* similar to that in use in Scots and U.S. law.⁷⁴ It remains to be seen whether this initiative will be followed up in Anglo-Canadian law.

(b) *Discretion to Grant Leave for Service ex juris.*

As has been stated above, the court has discretion to allow a plaintiff to give the court *in personam* jurisdiction it does not ordinarily possess, through serving the writ (or notice thereof) outside the court's territorial jurisdiction. The kinds of situations and actions in which the court *may* permit this are spelled out, and are those involving certain *prima facie* connecting factors giving the court a valid interest in adjudicating in those situations and actions.⁷⁵

The peculiarity of the discretion involved here is that it employs a straight balance of convenience test. The court will refuse leave where the action can be more conveniently brought and tried elsewhere.⁷⁶ It has been said that any doubt should be resolved in favour of the foreign defendant, but possibly this is restricted to questions of doubt on whether the action falls within one of the specified situations where leave can be given at all.

The recent Ontario case of *ESB Canada Limited v. Duval*⁷⁷ confirms this, and contains a full discussion of the relevant authorities. Mr. Justice Lief in considering an appeal from an order of the Senior Master which

⁷¹ *Supra* note 64, at 820-21.

⁷² See, Bridge, *Changing Attitudes to Jurisdiction*, 36 MODERN L. REV. 649, at 651-52.

⁷³ *Supra* note 53.

⁷⁴ For United States law in this context, see, e.g., RESTATEMENT OF THE LAW SECOND: CONFLICT ON LAWS § 84 (1971).

⁷⁵ See, e.g., ONTARIO RULES OF PRACTICE Rule 25; and RULES OF THE SUPREME COURT, Order 11 (U.K.).

⁷⁶ See, e.g., *Curley v. Clifford*, [1941] Ont. W.N. 154 (High Ct.); and *Jenner v. Sun Oil Co.*, [1952] Ont. 240 (High Ct.).

⁷⁷ [1973] 3 Ont. 781 (High Ct.).

dismissed an application to set aside an order permitting service *ex juris*, considered the contention of the defendant that Ontario was *forum non conveniens* and concluded that it was not well founded. He made it clear that, although the rule as to *forum conveniens* had been put in different ways in different cases,⁷⁸ its essence is that it involves a test of the general balance of convenience, having regard to the substance of the matters to be decided: the interests of both parties, the costs, and the interests of justice in general. He suggests also that the principle of giving the benefit of the doubt to the "foreign" defendant is not only restricted as indicated above, but also probably does not apply to *interprovincial* as opposed to *international* situations.

It seems apparent that, at least in theory, the standards employed in considering whether to exercise discretion in favour of, or against an extension of the court's *in personam* jurisdiction by service *ex juris*, are different from those involved in deciding whether to stay an action already commenced on the basis of service *within* the jurisdiction. A fuller and less plaintiff-oriented inquiry is made in the first type of situation; it is designed to prevent the court from taking jurisdiction if it feels that it is not the "natural" and convenient forum. In the second type of situation, even after *The Atlantic Star's* more liberal approach, (but clear denial of a balance of convenience test), this kind of inquiry is not made, and the defendant theoretically has to do much more, to get the forum changed.

It is submitted that this is a deplorable situation. The question whether, (for example) *A's* dispute with *B* will be litigated in Ontario or elsewhere should not depend on whether the defendant wisely stays out of the jurisdiction thereby avoiding service therein. The standards governing the discretion not to assert jurisdiction by service *ex juris*, or to decline jurisdiction grounded on service *in* the territory, should be the same. It is suggested further, that these standards should involve the test of the general balance of convenience and *forum non conveniens*, at least so long as the technical basis of jurisdiction in personal actions continues to rest on catching the defendant inside your territory.

C. CONCLUSIONS

A plaintiff should be able to pursue his grievances before a forum from which he can expect "justice" without involving himself in excessive or unreasonable inconvenience. On the other hand, the defendant should not be subjected to an unreasonable inconvenience in defending the action. The problem is to establish a legal framework which will enable a reasonable compromise to be drawn between these equally valid points of view when they cannot be completely reconciled. At the same time, reasonable connections should exist between the dispute and a court before that court should accept jurisdiction to adjudicate it. Furthermore, the total process

⁷⁸ *Id.* at 785.

of dispute, adjudication, and enforcement of judgment should be as streamlined and uncomplicated as possible.

In the first place, the "usual" bases of jurisdiction to adjudicate should be carefully re-examined and perhaps reformed in the light of these points. Anachronistic or unrealistic bases of jurisdiction should be discarded. This is not, of course, to say that jurisdiction rules should be established to permit only one possible forum for each dispute. The availability of several forums may be most desirable and certainly not inconsistent with the above valid policies. But those forums should be "natural" forums, and established as far as possible on internationally acceptable bases.

Secondly, if parties to a dispute can themselves reconcile their respective desires for convenience by choosing an agreed forum, their agreement should generally be respected and upheld, as long as it is "not unreasonable" in the light of all the preceding. The court will have nothing further to do about "forum shopping" control in such cases. The parties will have done it all for them.

Thirdly, if the parties have not so reconciled their respective desires, the court may have to do this for them. Even if the court is a "natural" forum with a "reasonable connection" basis of jurisdiction to adjudicate in the dispute, it still should engage in the exercise of checking, or, where necessary because of the defendant's objections, resolving, whether it should actually go through with the adjudication, and should do this by examining the total and general balance of convenience. Thus, it would *always* have, though it would not always need to use, a general discretion to declare itself *forum non conveniens* or *forum conveniens*. In cases of multiplicity, it should co-ordinate its analysis on this with that of the foreign court or courts also involved.

It is submitted that, whether or not the basic jurisdiction rules are reformed, the other suggestions above should nevertheless be implemented. And although some have already argued for this, and some have stated that it already has in effect been done, I suggest that as yet only a few steps have been taken in this direction. Some of the decisions in this direction still reveal a certain confusion about the problem, and a reluctance to take bolder steps. Other decisions reveal perhaps illusory allegiance to supposedly "well settled" black letter rules, often developed for varying reasons in non-connected ways, and sometimes actually producing strangely inconsistent results. It is hoped that a less technical and disjunctive approach to the overall problem of defining and controlling undesirable forum shopping will be taken in the future.