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Forum Shopping: A Practitioner's Perspective

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Forum shopping is often regarded as disreputable. It is argued that the phenomenon is rather the inevitable result of the expansion of global trade and of competition between judges and lawmakers in different jurisdictions. The resulting differential evolution of legal regimes is given publicity by the global media, creating a "market" in competing legal jurisdictions. Governments have tried to intervene, mainly through international conventions, but these have limited scope and have often had unintended consequences. Given that divergence of judicial jurisprudence is here to stay, insurers should refine and use techniques designed to reduce the wastage of money that can otherwise result.
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It is curious how describing an activity as a type of "shopping" conveys an implied criticism of that activity. It suggests that the activity is at best frivolous and at worst sordidly materialistic. This pejorative approach to efforts by litigants to choose the forum in which the litigation is to take place[2] is understandable, particularly from the point of view of a defendant facing a telephone-number-like claim for punitive damages in a jurisdiction with which it has little connection. However, the use of this mildly abusive term obscures both its causes and important aspects of the process, and it can impede the fashioning of an appropriate response when faced with forum selection by claimants.

My starting point for this view is that real-world litigants do in fact face choices of jurisdiction. This is because the possibility of there being more than one forum in which a particular dispute can be litigated is inherent in the basic ideas which legal systems use to determine their jurisdiction.

One of the most common starting points for defining the scope of the jurisdiction of a particular legal system is the idea of territoriality: the jurisdiction of the legal system is coterminous with the national boundaries of the state which supports it. This seemingly simple, and indeed conservative, idea contains within itself, however, a number of elements, which give rise to the possibility of overlapping jurisdictions. The first of these is that there can be considerable diversity in how the concept of territorial jurisdiction is applied. At a simple level it can be applied to the physical presence of a person or thing within the territory. This can be made more sophisticated by relating jurisdiction not only to physical presence but additionally, or alternatively, to the more abstract concept of the domicile of a person or corporation. In addition to these

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[1] I acknowledge the contribution of Jonathan Loftus, one of my partners of Ince & Co.
[2] William Tetley (1994) gives the following, marvellously pejorative, definition of forum shopping, "Forum shopping is the improper choice of jurisdiction by the manipulation of connecting factors, in order to prevent the court of the proper jurisdiction from hearing a claim."

"personal" jurisdictions it is common for jurisdiction also to be exercised over events – or merely injury or damage – that occur within the territory. It is interesting that already, in this relatively undeveloped view of jurisdiction the possibility of overlapping jurisdictions exists. To take a simple example from a case to which we will return later, an aircraft manufactured in the United States of America and operated by a British company crashes in British territorial waters with the unfortunate loss of the lives of the passengers and crew. On the basis of simple, territorial, jurisdiction the courts of both the United States and England will have jurisdiction: those of the United States because of the presence there of one of the defendants, those of the United Kingdom because of the presence there of the other potential defendant and, more significantly for our purposes, because the event giving rise to the claim occurred in British territory.

This example also points the way to an expansion of jurisdictional scope, which increases the likelihood of overlapping jurisdictions, namely that of extra-territorial jurisdiction. In the example, the occurrence of the event in one jurisdiction (England) raises the possibility of a claim in that jurisdiction against a company (the manufacturer) resident in another jurisdiction (the United States). This can be seen as an example of either territorial or extra-territorial jurisdiction. The interesting point, however, is that the basic territorial jurisdiction has created the possibility of jurisdiction over a corporation not domiciled in Britain. It is not a large step from this for a legal system to begin to explore other circumstances in which it will exercise extra-territorial jurisdiction – for example through the concept of the additional foreign party whose presence is "necessary" for some reason. This produces an associated rise in the number of instances of overlapping jurisdictions. Inevitably different legal systems will adopt different levels of extra-territorial jurisdiction. Some will be relatively conservative while others will adopt an expansionist approach.

Once overlapping jurisdictions exist for a particular type of claim it is inevitable at some point that lawyers will consider the available options. This will inevitably lead to their clients becoming interested in gaining an advantage by seeking to bring the claim in the jurisdiction that will produce the most favourable result.[3] It may well be that the traditional adversarial approach adopted in common law systems has a tendency to amplify this effect, though we have certainly seen examples in code-based jurisdictions.

Some of the factors which influence the likelihood of litigants and their lawyers actively choosing which forum to bring their claim in are worth considering in more detail, but before leaving the relationship between theories of jurisdiction and choice of forum we should observe that, particularly in common law systems, a symbiotic relationship can develop between litigants' wish to exercise choice over forum and the expansion of extra-territorial jurisdiction. Once lawyers in a particular jurisdiction believe there are features in that jurisdiction which make it attractive to claimants, the cases which they bring there will have a tendency to seek to expand the scope of that jurisdiction. If this is coupled with an expansionist view of jurisdiction among the

[3] Favourable, in this context, can relate to many aspects of the litigation process: cause of action, burden of proof, evidential standards, investigative techniques but, most commonly, it will relate to the level of compensation available to the claimant.

judiciary, the effect can easily be significant expansion in the scope of that jurisdiction. Legislators in more affluent countries can also become enthusiastic to expand the options to the benefit of their electorates who, in their roles as "consumers", demand increasing levels of personal protection and compensation for every ill that befalls them anywhere in the world.

While the phenomenon of overlapping jurisdictions has existed from the early days of legal systems it seems to be the case that active choice of forum by claimants is relatively recent in origin[4] and has become both more frequent and more inventive. It is not hard to identify factors that contribute to this trend and, to some extent, they can be divided into general cultural and economic factors and those peculiar to the development of legal systems. The cultural and economic factors can be summarized as the effect of globalization but it is perhaps useful to touch upon a few individual strands that have particular relevance.

The first is the expansion of global trade.[5] This has both direct and oblique effects. The direct effect tends to be in the field of contract law. In general terms, issues as to choice of forum are more muted in relation to contract law because of the frequency with which choice of law and jurisdiction or arbitration clauses are incorporated into contracts. Issues do still, however, arise as to the effectiveness and scope of a particular choice of law or jurisdiction/arbitration clauses and there are some areas where such clauses have not been used. One oblique effect is that exposure to other legal systems increases the familiarity of lawyers with dealing with multi-jurisdictional litigation thereby expanding their frame of reference from their own legal system – as well as their familiarity with the relative merits of different legal systems. More obliquely still increased trade leads to increased movements of people and goods, which increase the number of circumstances in which multi-jurisdictional tort claims can arise. A specific example of this is the recent increase in travel both for business and for leisure purposes. This both makes multi-jurisdictional casualties more numerous and increases familiarity with other cultural norms.

Familiarity with other cultural norms is also expanded by developments in the written and broadcast media, including importantly the internet. Television programmes produced in one country are often broadcast in other countries and this is particularly the case with programmes produced in the U.S. Such programmes obviously reflect American cultural norms and expectations and provide an often idealized view of living standards. This can both increase familiarity with (say) American legal approaches and make foreign legal systems seem familiar.[6] The systems can be researched extensively, and at no cost, through the internet. The more familiar and advantageous a system appears to be, the more likely it is that a litigant would look favourably on making use of that system.

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[4] It is notable that within common law jurisdictions there are relatively few instances of cases dealing with overlapping jurisdiction before 1800.

[5] It is notable that English law in this area underwent its first phase of development during the 19th century at a time when English commercial law was developing rapidly in response to the growth in the volume of international trade connected with London.

[6] It is notable that in Britain the general public's view of court-room practice is often in some respects shaped by their experience of American court-room dramas.

More specifically, legal developments that favour active choice of forums by litigants are probably familiar to many readers and are strongly influenced by developments in America. They include the existence of a strong, well-organized and politically influential claimants' bar. This ensures that foreign claimants can easily obtain representation (and in some cases may be solicited for that purpose). It provides a strong lobby in favour of an expansive approach to jurisdiction and to those aspects of the legal system that aid claimants and augment damages awards.[7] These factors are amplified in jurisdictions in which claimants' lawyers are remunerated on the basis of contingency fees as these provide both a strong incentive to the lawyers and are appealing to tortious claimants (particularly in jurisdictions which do not award a defendant legal costs against an unsuccessful plaintiff). Similarly they are amplified by jurisdictions that make use of class actions that augment the size of claims without any real participation by most members of the class.

There are also the well-known developments which have occurred relatively recently in tort law in various American states. The growth in awards of punitive damages has been apparent for some time as, to a lesser extent, has been the growth in the level of compensatory damages. Less obviously there appear to be some indications that in practice, if not always in theory, liability for tort in cases involving consumers has been shifting towards a quasi-strict liability: once it has been established by the plaintiff that injury was caused by the defendant's product it is sometimes difficult for a defendant to avoid a finding of liability.[8]

The growth in forum selection by claimants has prompted a variety of responses from legislatures and judiciary depending in part upon whether they view such selection as a good thing or not. Governmental intervention has largely[9] taken the form of international conventions regulating the forums in which actions may be brought. Some of these deal with specific subject matters, for example, the Warsaw and more recently the Montreal Convention as part of their regulation of claims arising from international air travel prescribe the jurisdictions in which claims against carriers may be brought. Others seek to provide entire sets of jurisdictional rules (thereby, in theory, dealing with the problem at its inception). A good example of these is the Brussels/Lugano Convention system, which was created to define the jurisdictional rules for States members of the European Union and European Free Trade Area.

There are two striking features to both of these types of convention. The first is that they are relatively limited in scope. There are comparatively few conventions dealing with specific subject matters and, by their inherent nature, the jurisdictional conventions are limited to regulating jurisdiction between their participant states. It seems unlikely that these approaches can be expanded comprehensively to prescribe

[7] Most obviously the preservation of jury trials including the use of juries to fix both compensatory and punitive damages.

[8] Depending upon one's perspective the *Vioxx* litigation could be seen as an example of this.

[9] There are some examples of specific legislative intervention intended to prevent claims of particular types being brought in certain jurisdictions, for example by refusing to recognize judgments of those jurisdictions on certain matters.

the available choice of jurisdiction.[10] The second is that each of these approaches tends to generate unexpected (and, in the view of critics of unrestricted choice of forum, undesirable) consequences. The Warsaw Convention, for example, sought to place monetary limits on the compensation that could be recovered from international air carriers and prescribed the forums in which such limited actions could be brought. In response, claimants sought, where possible, to circumvent these restrictions by bringing claims against the manufacturers of the aircraft and others not protected by the Convention. Similarly, the approach adopted by the Brussels[11] and Lugano Conventions, of defining the member state which has jurisdiction over claims and then requiring all issues as to jurisdiction to be determined by the court which first becomes seized of the case, has led to a rush by claimants and defendants to commence proceedings in the court which they feel will reach the jurisdictional and substantive outcome which is most favourable to them. This effect has been seen strongly in the insurance and reinsurance fields.

The judicial response to active choice of forum by litigants has been to develop jurisprudence defining when a particular court will decline jurisdiction in favour of another and when it will require those subject to its jurisdiction not to litigate in other forums. The first of these approaches is usually referred to as the doctrine of *forum non conveniens* and requires a court which has an overlapping jurisdiction with another forum to determine which it considers to be the "natural" forum for the dispute based upon all of the circumstances which give rise to it. The second approach is the mirror image to this: if the court considers that it is the natural forum it may seek to prevent litigants subject to its jurisdiction from litigating in other forums.

It is interesting to note that the doctrine of *forum non conveniens* can appear in two guises. Most commonly it functions as an additional requirement in circumstances in which the court has jurisdiction but is deciding whether to exercise it. It can also be used, however, in the case of extra-territorial jurisdiction as one of the criteria for determining whether jurisdiction exists at all.[12]

The tension, which exists between the inherent possibilities for choice of forum and legislative, governmental and judicial attempts to restrict it, raises the question of what developments are likely to occur in this area in the near future.

The initial point to be made is that forum shopping is unlikely to disappear. As long as overlapping potential jurisdictions and juridical advantages exist, lawyers and litigants will be faced with choices, which will be explored. It is unrealistic to think that they will not seek to litigate in the jurisdiction that is in some sense the most favourable to them. The combination of unintended consequences and political

[10] The difficulty of regulating choice of forum by international convention is illustrated by the difficulties experienced in negotiations to replace the Warsaw Convention with a more modern regime. The replacement *expands* the permissible choice of jurisdiction from four possible choices to five.

[11] Now largely subsumed into EU Regulation 44/2001.

[12] In English jurisprudence, from the end of the 19th Century until a change of direction in a series of cases in the 1980s, *forum non-conveniens* was treated as inapplicable where jurisdiction was founded territorially but formed part of the criteria for determining whether in a particular case an extra-territorial jurisdiction existed. More recently *forum non conveniens* has been held to be relevant in both circumstances.

sensitivity suggests that there will not be a substantial expansion in governmental interventions to limit litigants' choice of forum. Judicial control of choice of forum is likely to continue and in some areas will expand as judges are influenced by the sometimes negative effects and academic criticism of forum shopping. The extent of that control is likely to continue to be limited, however, by two factors: the natural reluctance of judges to reduce their own jurisdiction and their reluctance to be seen to be interfering in the judicial process of other states.

If those conclusions are correct then forum shopping by claimants will continue and there is likely to be an increase in efforts by defendants either to defend themselves from what they regard as unfair and inappropriate choices or, more controversially, to actively seek to control the choice of forum themselves. This is likely to lead to defendants increasingly taking the initiative in litigation as there is often a first mover advantage in forum disputes. This initiative can take a number of forms but the most common are likely to be pre-emptive proceedings and applications for either declarations of non-liability or attempts to restrain proceedings in another jurisdiction.

The example that I referred to at the start, that of an aircraft manufactured by an American company and operated by a British company which crashed in British territorial waters is an example of pre-emptive litigation. The operators of the aircraft feared that the passengers or the crew would commence proceedings in the U.S. (more specifically in Texas) against the manufacturer and against them. In an effort to forestall this they commenced proceedings in England against the widows of the victims and the aircraft manufacturer (whom my firm represented) in order to provide the basis for an argument that any subsequent claims should also be determined in England as proceedings were already pending. The various claims were subsequently settled – though the personal service of the proceedings on the widows shortly before their first Christmas without their deceased husbands did not aid the settlement process.

An example of an attempt to restrain foreign proceedings is provided by the consequences of the crash of an Airbus aircraft while landing at Bangalore in 1990.[13] Among those killed or injured were two families of Indian origin who were British citizens and lived in London. Their dependants commenced proceedings in India against the airline and the airport authority and in Texas against the aircraft's manufacturers. The manufacturers successfully applied to the Indian court for an order that the claimants should only pursue their claims in India. They then applied to the English courts for an order, in effect, to enforce the Indian order by restraining the claimants from pursuing the proceedings in Texas. The English court declined to make the order, even though it considered the proceedings in Texas vexatious, on the basis that there was no sufficient connection with England to justify it interfering with the Texan proceedings.

The decision is interesting both as an illustration of the type of techniques employed by both claimants and defendants and as an illustration of the propensity of forum

[13] Airbus Industrie G.I.E. v. Patel (1999).

disputes to generate extensive (and inevitably expensive) litigation in multiple jurisdictions.

This propensity leads to the final future trend, which I want to touch on, namely the use of pragmatic solutions to problems of forum shopping, particularly in cases involving consumers. This type of approach can be illustrated by the consequences of the *Piper Alpha* disaster. Piper Alpha was an oil production platform in the North Sea operated by Occidental Petroleum on behalf of a consortium of oil companies. In July 1988, an explosion and subsequent fire caused the destruction of the platform and the loss of 167 lives. My firm acted for Occidental Petroleum together with lawyers from Scotland and Texas and Occidental's own legal team.

An early question was where claims of victims and their relatives could be litigated, with the U.K. and America being obvious alternatives. American levels of damages would have been far in excess of U.K. levels, a fact quickly appreciated by the claimants' lawyers. The case could easily have developed into complex and drawn-out litigation, starting with a battle over jurisdiction. However, all of the loss of life claims were in fact settled relatively quickly on an amicable basis at a level which, while well in excess of what the claimants would have received had the matter been litigated in Scotland, was also considerably less than would have been likely to have been awarded in litigation in America. In other words, jurisdictional issues are just as amenable to a commercial compromise as any other area of doubt or dispute given the will on the part of the parties.

The case is often referred to as the earliest and certainly as the most extensive set of settlements on a "mid-Atlantic" basis. There were other important ingredients that allowed the claims to be resolved without extensive litigation with the claimants. These included a very high level of cooperation between Occidental and its liability insurers. This cooperation allowed Occidental to propose a settlement framework at a very early stage without requiring the claimants formally to establish liability. It also allowed for agreement on the principles governing the quantum of the settlement to be reached with the claimants' representatives and then for individual claims to be quantified on the basis of those principles. The approach taken to the victims and their lawyers was critical. The experience has led us to develop strategies to maximize the share of loss costs that go to victims by reducing the proportion that is lost in "frictional" costs paid to lawyers. Pragmatic approaches of this type should become increasingly common – unless insurers particularly wish to support the legal profession. There is no reason why disputes involving forum shopping should be a general exception to this type of approach.

Thus, from a practitioner's perspective, forum shopping is neither good nor bad. It is the inevitable consequence of the fact that litigants faced with overlapping jurisdictions will discover, if they consider rationally where to proceed, that each jurisdiction offers its own advantages and disadvantages. There is no prospect that these overlaps will be eliminated in the near future and no real prospect that the juridical differences between jurisdictions will be eliminated. Forum shopping will continue to form part of the legal landscape particularly for defendants and their liability insurers for some time to come.

So far as concerns insurers, there are three main situations. The more frequent are the third party or tortious claimant (whether claiming against the insured or directly

against the insurer); and the second party (or contractual) claimant against the insurer. There is a third and perhaps increasingly important category arising from subrogation, in which the insurer takes the place of its insured as the third party claimant against (in effect) another insurer.

Whatever the circumstances, insurers have to recognize that jurisdictions are different, and insurers need to understand the differences. It is for them to decide whether to seek juridical advantages by pre-empting the jurisdictional choices of others. In the modern world driven by responsibilities of managements to shareholders, it is unlikely that they will leave the choice to be made by default if the difference matters.

However, just as forum shopping should not necessarily be seen as disreputable, neither should it be seen as inevitable. This is particularly the case in relation to contractual disputes such as insurance contracts and reinsurance arrangements, where the parties can at the outset avoid issues of forum shopping by appropriate law and jurisdiction/arbitration clauses.

The position with regard to third party claimants is more complex. Mass and class actions give rise to strategic and tactical considerations well beyond the scope of this paper.

However, claims from those who have suffered personal injury or bereavement arising from an accident or incident are worth discussing here. In such cases, insurers should begin by understanding what the claimants and their lawyers really want. Many victims want recognition that they have been hurt and an expression of regret; many want to understand how the unwanted event came about; some want to do what they can to prevent a repetition; and some may, particularly if poorly treated, wish for punishment, retribution and revenge. Of course they will wish for compensation, but for many, at least at the outset, the level of compensation may not be the most important issue so long as it is timely and seen to be fair. Claimant lawyers will often aim to maximize compensation for their clients. This will often be mainly for their clients' benefit, but in some cases the lawyer may be more interested in maximizing his share of the compensation pot and setting the stage for the next case. These various aims give rise to dynamics that need to be taken into account.

In these cases, what often makes the biggest difference is how the victims are dealt with. If the response of a potentially liable party is respectful and considerate, the injured may be perfectly reasonable. If the potentially liable parties are able to make a positive approach to victims, they may find an open door to resolving claims at reasonable levels – and with minimal "frictional" or legal costs. On the other hand, dealing with claimants in a way that is excessively legalistic or one which shows no regret for what has occurred and displays what appears to be arrogance and a lack of consideration almost inevitably leads to the polarization of victims. There is a world of difference between the thoughtful deployment of a possible defence to jurisdiction (or indeed liability) and the aggressive taking of the same points. The former, done with care, should leave the way wide open to an amicable compromise solution if this is desired. The latter is a particularly good way to achieve polarization, as such points will usually be seen as a cynical tactical ploy to delay and reduce compensation. Victims' initial aim, of obtaining reasonable compensation, may be translated into a

wish for retribution. Their lawyers will rub their hands with glee. Retribution pays lawyers well.

Questions of choice of jurisdiction are here to stay for the foreseeable future, but insurers do not have to enrich lawyers by aggressive use of forum shopping. There are far more efficient dispute resolution strategies available at least as regards personal injury victims in the context of event-related claims. Forum shopping does not have to mean litigation. Such points can be deployed in many ways – as the French say, "*c'est le ton qui fait la musique*". The challenge is for insurers and their insured to behave in a manner that reduces the number of claims that have to be litigated in order to achieve a fair result. That requires clear and strategic advice from lawyers who take account of the human dimension; and bold decision-making by insurers. Let there be more light and less heat.

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