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# Forum Shopping in the International Commercial Arbitration Context

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# Forum Shopping in the International Commercial Arbitration Context: Setting the Stage\*

Franco Ferrari

## I. Introduction

For many, “forum shopping” is, if not a dirty word,<sup>1</sup> at least a term with disparaging or pejorative connotations,<sup>2</sup> indicating something that commentators and courts consider to be “evil”<sup>3</sup> and, therefore, must be avoided.<sup>4</sup> And it is to reach that result that various policies against forum shopping exist.<sup>5</sup> In the United States, for instance, the doctrine laid down in *Erie*<sup>6</sup> is, among others, a manifestation of such a policy on an intra-State level:<sup>7</sup> it tries to avoid forum shopping<sup>8</sup> between state and federal jurisdictions by imposing upon federal courts the application of state law on issues of substantive law when sitting in diversity.<sup>9</sup> Similarly, *Guaranty Trust Co. v. York*<sup>10</sup> and *Klaxon Co. v. Stentor Electric Manufacturing*

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<sup>1</sup> See *Atlantic Star v. Bona Spes*, [1974] A.C. 436, 471 (opinion of Lord Simon) (hereinafter: *The Atlantic Star*), stating that “[f]orum shopping is a dirty word”.

<sup>2</sup> See *F. Juenger*, Forum Shopping, Domestic and International, *Tulane Law Review* 553, 55 (1989); *Atlantic Star v. Bona Spes*, [1974] A.C. 436, 471.

<sup>3</sup> See *C. E. Stewart*, The Government Suspension Provision of the Clayton Act’s Statute of Limitations: For Whom Does It Toll?, 60 *St. John’s Law Review* 70, 70 (1985); in case law see *Ruiz v. Conoco, Inc.*, September 29, 1993, 868 S.W.2d 752, 760 (Tex., 1993) (referring to the “perceived evils of forum shopping”); *Wheeler v. Shoemaker*, March 3, 1978, 78 F.R.D. 218, 227 (D.R.I., 1978) (referring to the “evils of forum shopping”).

<sup>4</sup> See *R. U. Whitten*, Improving the “Better Law” System: Some Impudent Suggestions For Reordering and Reformulating Leflar’s Choice-Influencing Considerations, 52 *Arkansas Law Review*, 177, 226 (1999).

<sup>5</sup> See, e.g., *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202 (7th Cir. 1996) (referring to “a strong and long-established policy against forum-shopping”).

<sup>6</sup> *Erie R. Co. v. Tompkins*, April 25, 1938, 304 U.S. 64 (1938).

<sup>7</sup> See *In re Coudert Bros. LLP*, 673 F.3d 180, 188-190 (C.A. 2 N.Y.).

<sup>8</sup> The Supreme Court itself makes it very clear that one of the aims of *Erie* was the avoidance of forum-shopping; see *Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 498 (2001); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 n.6 (1988); *id.* at 33 (Scalia, J., dissenting); see e.g., *Walker v. Armco Steel Corp.*, 446 U.S. 740, 744-45 (1980).

<sup>9</sup> See *Erie R. Co. v. Tompkins*, April 25, 1938, 304 U.S. 64, 78(1938) (“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state”).

<sup>10</sup> *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

Co.,<sup>11</sup> cases following the wake of *Erie*, also are evidence of an anti-forum shopping attitude of federal courts in the intra-State context, *i. e.*, where the choice is between state and federal court.<sup>12</sup> On an inter-State level, the policy against forum shopping is behind, for instance, the Uniform Conflict of Laws – Limitations Act (promulgated in 1982). This Act<sup>13</sup> was introduced to prevent the inter-State forum shopping possibilities<sup>14</sup> originating from the statute of limitations traditionally being characterized as “procedural” for conflict of laws purposes – which resulted in the application of the limitation period prescribed by the forum state’s law.<sup>15</sup> Unlike the “borrowing statutes” the Act intended to replace, *i. e.*, those statutes which try to prevent forum shopping by providing that a cause of action, irrespective of whether it has a statutory basis or a judge-made one, is barred in the forum if it is barred in the state where the claim accrued, the Act tried to prevent forum shopping by characterizing the statute of limitations as substantive for conflict of laws purposes, thus pairing the state law applicable to questions of liability and recovery with that state’s statute of limitations, regardless of whether it would be longer or shorter than that of the *lex fori*.

The anti-forum shopping stance is, however, not only characteristic of given national legal systems; it can also be discerned on a wider basis. This is true, for instance, as regards the European level, where, to give just one example,<sup>16</sup> one of the overall justifications for efforts towards the unification of private international law in that region was the avoidance of forum shopping. This can be derived not only from Recitals 6 of both the Regulation (EC) No. 593/2008

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<sup>11</sup> *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941).

<sup>12</sup> See *E. T. Lear*, Federalism, Forum Shopping, and the Foreign Injury Paradox, 51 *William and May Law Review* 87, 90-91 (2009).

<sup>13</sup> This Act was preceded by another attempt at unifying issues relating to the statute of limitations to avoid forum shopping, namely the Uniform Statute of Limitations on Foreign Claims Act (promulgated in 1957).

<sup>14</sup> *P. Caroll*, Uniform Laws in Arkansas, 52 *Arkansas Law Review* 313, 325 (1999).

<sup>15</sup> See also *K. C. Kettering*, Codifying a Choice of Law Rule For Fraudulent Transfer: A Memorandum to the Uniform Law Commission, 19 *American Bankruptcy Institute Law Review* 319, 345 n. 106 (2011); *K. C. Kettering*, Harmonizing Choice of Law in Article 9 with Emerging International Norms, 46 *Gonzaga Law Review* 248 (2010-2011).

<sup>16</sup> For references to the anti-forum shopping stance on the European level in other areas, see, e.g., *Purrucker v. Vallés*, (Case C-256/09), para. 91 (expressly referring to the anti-forum shopping objective of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000; *N.S.* (Case C-411/10), para. 79 (expressly referring to the anti-forum shopping objective of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national).

of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)<sup>17</sup> and the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II),<sup>18</sup> both of which refer to the “proper functioning of the internal market creat[ing] a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law *irrespective of the country of the court in which an action is brought*”,<sup>19</sup> but also, and even more explicitly, from the Giuliano/Lagarde Report accompanying the 1980 Convention on the law applicable to contractual obligations.<sup>20</sup> In that Report, it is expressly stated that it is “[t]o prevent [...] “forum shopping” that it was decided “for the rules of conflict to be unified in fields of particular economic importance so that the same law is applied irrespective of the State in which the decision is given.”<sup>21</sup>

On an international level, too, an anti-forum shopping stance can be discerned. By way of example, it may suffice to recall that one of the declared major goals behind the drafting of the 1980 United Nations Convention on Contracts for the International Sale of Goods is, according to the UNCITRAL Secretariat,<sup>22</sup> “to reduce the search for a forum with the most favourable law”.<sup>23</sup>

<sup>17</sup> Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Official Journal L 177, 4 July 2008, p. 6.

<sup>18</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Official Journal L 199, 31 July 2007, p. 40.

<sup>19</sup> See also *G.-P. Calliess*, Introduction, in *G.-P. Calliess* ed., *Rome Regulations. Commentary on the European Rules of the Conflict of Laws*, 2011, 1, 5-6 (examining the Regulations’ “[l]imiting effects on forum shopping”).

<sup>20</sup> Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I, Official Journal C 282, 31 October 1980, p. 11.

<sup>21</sup> *Id.* at 5.

<sup>22</sup> Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat (“Secretariat Commentary”)/UN DOC. A/CONF. 97/5; for commentators stating that one of the Convention’s goal is to prevent forum shopping, see *F. Burkart*, *Interpretatives Zusammenwirken von CISG und UNIDROIT Principles*, 2000, 8; *I.I. Dore*, *Choice of Law under the International Sales Convention: A U.S. Perspective*, 77 *American Journal of International Law* 521, 532 (1983); *J. Erauw*, *Wanneer is het Weens Koopverdrag van toepassing?*, in *H. van Houtte et al.* eds., *Het Weens Koopverdrag*, 1997, 21, 23; *D. Matthews*, *International Sales Law: Goodbye Soon to All Forum Shoppers?*, 1 *ICC Business World* 12, 12 (1983).

<sup>23</sup> It has been pointed out repeatedly that the United Nations Convention on Contracts for the International Sale of Goods is not able to prevent forum shopping; see *F. Ferrari*,

The international legislator seems to be driven by a negative attitude towards forum shopping in other areas as well. The Hague Convention on the Civil Aspects of Child Abduction,<sup>24</sup> for instance, was specifically designed, according to both scholars<sup>25</sup> and courts, “to restore the status quo prior to any wrongful removal or retention, and to deter parents from engaging in international forum shopping in custody cases”<sup>26</sup> “by denying jurisdiction to hear the custody dispute in the abducted-to forum.”<sup>27</sup>

As for the reasons adduced in justification of the aforementioned anti-forum shopping stance, they include the assertion that forum shopping goes against the principle of consistency of outcomes,<sup>28</sup> or, as one commentator puts

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International Sales Law and the Inevitability of Forum shopping: A Comment on Tribunale di Rimini, 26 November 2002, 23 Journal of Law and Commerce 169 (2004).

- <sup>24</sup> Hague Convention on the Civil Aspects of International Child Abduction, 1343 U.N.T.S. 89 (entered into force on December 1<sup>st</sup>, 1983).
- <sup>25</sup> See, e.g., C. L. Blakesley, Comparative Ruminations from the Bayou on Child Custody Jurisdiction; The UCCJA, the PKPA, and the Hague Convention on Child Abduction, 58 Louisiana Law Review 449, 466-468 (1998); D. L. Brewer, The Last Rights: Controversial Ne Exeat clause Grants Custodial Power under *Abbott v. Abbott*, 62 Mercer Law Rev. 663, 680 (2011); T. Jones, A Ne Exeat Right is a “Right of Custody” for the Purposes of the Hague Convention: *Abbott v. Abbott*, 49 Duquesne Law Review 523, 541 (2011); M. Sattler, The Problem of Parental Relocation: Closing the Loophole in the Law of International Child Abduction, 67 Washington and Lee Law Review 1709, 1716 and 1734 (2010); S. I. Winter, Home is Where the Heart is: Determining “Habitual Residence” under the Hague Convention on the Civil Aspects of International Child Abduction, 33 Washington University Journal of Law and Policy 351 (2010); G. Zohar, Habitual Residence: An Alternative to the Common Law Concept of Domicile?, 9 Whittier Journal of Child and Family Advocacy 169, 187 (2009).
- <sup>26</sup> *Karkkainen v. Kovalchuk*, 445 F.3d 280, 287 (3d Cir. 2006); see more recently *Walker v. Kitt*, 24 October 2012, 2012 WL 5237262, at \*3 (N.D.Ill. 2012); *Font Paulus ex rel. P.F.V. v. Vittini Cordero*, 29 June 2012, 2012 WL 2524772, at \*1 (M.D.Pa. 2012); *Saldivar v. Rodela*, 22 June 2012, 2012 WL 2914833, at \*3 (W.D.Tex. 2001); *Khan v. Fatima*, 4 May 2012, 680 F.3d 781, 788 (2012); *Maurizio R. v. L.C.*, 5 December 2011, 201 Cal.App.4th 616, 633 (2011); *Kufner v. Kufner*, 519 F.3d 33, 38 (1st Cir., 2008); *Mendez-Lynch v. Piz-zutello*, 13 February 2008, 2008 WL 416934, \*2 (N.D. Ga. Feb. 13, 2008); *Kijowska v. Haines*, 20 July 2006, 463 F.3d 583, 586 (7th Cir.2006).
- <sup>27</sup> B. E. Lubin, International Parental Child Abduction: Conceptualizing New Remedies Through Application of the Hague Convention, 4 Washington University Global Studies Law Review 415, 422 (2005).
- <sup>28</sup> See, e.g., G. S. Koppel, Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process, 58 Vanderbilt Law Review 1167, 1191 (2005) (stating that forum shopping promotes the “risk that similarly situated litigants may be treated differently and, as a result, unfairly”).

it, “decisional harmony”;<sup>29</sup> apparently a fundamental tenet of virtually any legal system,<sup>30</sup> that forum shopping overburdens certain courts<sup>31</sup> and creates unnecessary expenses as litigants pursue the most favorable, rather than the simplest or closest, forum,<sup>32</sup> that forum shopping contrasts with the idea of a “level playing field”<sup>33</sup> in that it may distort the playing field,<sup>34</sup> and that forum shopping may create a negative popular perception about the equity of the legal system.<sup>35</sup>

It is worth pointing out that in the last decades the negative attitude vis-à-vis forum shopping has been questioned by scholars, as have the justifications for that attitude.<sup>36</sup> Even legislators are not absolute in their condemnation of forum shopping. On a European level, it is worth pointing out that, even though some

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<sup>29</sup> *Calliess*, *supra* note 19, at 6.

<sup>30</sup> See *H. L. A. Hart*, *The Concept of Law*, 1961, 155.

<sup>31</sup> In this respect, see, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947), stating that “administrative difficulties follow for the courts when litigation is piled up in congested centers instead of being handled at its origin”; see also *Gantes v. Kason Corp.*, 679 A.2d 106, 113 (N.J. 1996) (stating that “the policy against forum shopping is intended to ensure that New Jersey courts are not burdened with cases that have only ‘slender ties’ to New Jersey”).

<sup>32</sup> See 135 Cong. Rec. E2243 (daily ed., 21 June 1989), where the following statement by Rep. Luken is reproduced: “The losers [from forum shopping] are the American public who end up paying excessive legal fees that are silently encapsulated in the price of products”. In scholarly writing see *M. H. Gottesman*, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 *Georgetown Law Journal* 1, 13 (1991), referring to the “significant costs” created by forum shopping.

<sup>33</sup> See *G. D. Brown*, *The Ideologies of Forum Shopping – Why Doesn’t a Conservative Court Protect Defendants*, 71 *North Carolina Law Review* 649, 668 (1993); Note, *Forum Shopping Reconsidered*, 103 *Harvard Law Review* 1677, 1685 (1990); *N. Vlavianos*, *The Regulation of Wind Power in Alberta: The Case of Municipalities*, 22 *Journal of Environmental Law and Practice* 125, 127 (2011).

<sup>34</sup> See *D. Crump*, *The Case for Restricting Diversity Jurisdiction: The Undeveloped Arguments, From the Race to the Bottom to the Substitution Effect*, 62 *Maine Law Review*, 1, 9 (2010) (referring to the fact that “litigants engage in forum shopping that is not designed to find the “best” forum, but rather to win, even by distorting the playing field”).

<sup>35</sup> See *Hanna v. Plumer*, April 26, 1965, 380 U.S. 460, 468 (1965); in scholarly writing see *K. J. Norwood*, *Shopping for a Venue: The Need for More Limits on Choice*, 50 *University of Miami Law Review* 267, 305 f. (1996), referring to erosion of public confidence in the court system as one of the consequences of forum shopping.

<sup>36</sup> See, apart from the author cited *infra* in note 62, e.g., *J. H. Ely*, *The Irrepressible Myth of Erie*, 87 *Harvard Law Review* 693 (1974); *M. Petsche*, *What’s Wrong with Forum Shopping? An Attempt to Identify and Assess the Real Issues of a Controversial Practice*, 45 *International Lawyer* 1005 (2011).

anti-forum shopping attitude is discernible,<sup>37</sup> both the Brussels Convention and the Brussels I Regulation actually provide for forum shopping possibilities, despite their general anti-forum shopping attitude,<sup>38</sup> as both instruments provide for a general head of jurisdiction on the basis of the principle “actor sequitur forum rei”<sup>39</sup> as well as competing special heads of jurisdictions, thus clearly granting the plaintiff the choice where to legitimately start proceedings.<sup>40</sup> Not only, “[t]he choice afforded by this co-existence is given to the claimant and is not to be pre-empted by the court which is not allowed to restrict this choice by employing a doctrine of forum non conveniens.”<sup>41</sup>

Forum shopping possibilities are also provided for by international conventions. In this respect, it may suffice to refer to the so-called 1999 Montreal Convention,<sup>42</sup> which, depending on what kind of damage was suffered, allows

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<sup>37</sup> See, e.g., apart from the references accompanying notes 16 *et seq.*, Recital 4 to the Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, stating that “[i]t is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)”; for case law pointing to the anti-forum shopping stance evidenced by the foregoing Recital, see *Seagon v. Deko Marty*, (Case C-339/07), (2009) ECR I-767, para. 23; *Commission v. AMI Semiconductor Belgium*, (Case C-294/02), para. 55.

<sup>38</sup> See *Roche Nederland and others*, (Case C-539/03), (2006) ECR I-6569, 6582 para. 38;

<sup>39</sup> See, e.g., *Besix v. Kretschmar*, (Case C-256/00), (2002) ECR I-1718, 1733 para. 52; *Group Josi Reinsurance Company SA v. Universal General Insurance Company (UGIC)*, (Case C-412/98) (2000) ECR I-5925, I-5952 para. 35.

<sup>40</sup> Most recently, see *A. Vezyrtzi*, *Jurisdiction and International Sales under the Brussels I Regulation: Does Forum Shopping Come to an End?*, 15 *Columbia Journal of European Law Online* 83, 87 (2009), available at <http://www.cjel.net/wp-content/uploads/2009/06/vezyrtzi1.pdf>, stating that “mere existence of “special jurisdiction” in section 2, Chapter II, of the Regulation and the increase in potential jurisdictions for a plaintiff to choose from in deciding where to bring a case inevitably continue to produce incentives for forum shopping”.

<sup>41</sup> *P. Mankowski*, Art. 5, in *P. Mankowski/U. Magnus* eds., *Brussels I Regulation* 2<sup>nd</sup> ed., 2012, 88, 112-113; in case law, see *Mahme Trust Reg v. Lloyd’s TSB Bank plc*, 2 *Lloyd’s Rep.* 637, 641 (Ch.D., 2004).

<sup>42</sup> *Convention for the Unification of Certain Rules for International Carriage by Air – Montreal*, 28 May 1999.

<sup>43</sup> See, most recently, *G.N. Tompkins, Jr.*, *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States*. From *Warsaw 1929 to Montreal 1999*, 2010, 243; in case law, see, most recently, *Cour de Cassation*, 7 December 2011, available at: [http://www.courdecassation.fr/jurisprudence\\_2/premiere\\_chambre\\_civile\\_568/1201\\_7\\_21658.html](http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/1201_7_21658.html).

<sup>44</sup> See *P.D. Dempsey/M. Milde*, *International Air Carrier Liability: The Montreal Convention of 1999*, 2005, 217-221.



plaintiff to bring suit in any of five alternative – but exclusive<sup>43</sup> – fora,<sup>44</sup> thus clearly granting plaintiff an ample choice.<sup>45</sup> The choice granted to the plaintiff is actually so extensive – and the forum shopping possibility so ample – that U.S. courts have – wrongly<sup>46</sup> – tried to limit that choice and, thus, the forum shopping possibility by applying what is a domestic anti-plaintiff forum shopping device, namely the *forum non conveniens* doctrine.<sup>47</sup>

Like the 1999 Montreal Convention, the CMR, the 1956 Convention on Contracts for the Carriage of Goods by Road, also provides an exhaustive<sup>48</sup> list of exclusive<sup>49</sup> fora where the plaintiff can, at the plaintiff's choice,<sup>50</sup> start court

<sup>45</sup> See Article 33 of the 1999 Montreal Convention: “1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.”

<sup>46</sup> For this critical assessment, see, most recently, Cour de Cassation, 7 December 2011, available at: [http://www.courdecassation.fr/jurisprudence\\_2/premiere\\_chambre\\_civile\\_568/1201\\_7\\_21658.html](http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/1201_7_21658.html).

<sup>47</sup> See *In re West Caribbean Airways*, 16 May 2012, 2012 WL 1884684 (S.D.Fla., 2012); *In re Air Crash Over Mid-Atlantic on June 1, 2009*, 4 October 2010, 760 F.Supp.2d 832 (N.D.Cal., 2010); *Delta Air Lines, Inc. v. Chimet, S. p. A.*, 30 August 2010, 619 F.3d 288 (C.A.3 (Pa.), 2010.); *Khan v. Delta Airlines, Inc.*, 12 August 2010, 2010 WL 3210717 (E.D.N.Y., 2010); *Pierre-Louis v. Newvac Corp.*, 8 October 2009, 584 F.3d 1052 (C.A.11 (Fla.), 2009); *Seales v. Panamanian Aviation Co. Ltd.*, 18 February 2009, 2009 WL 395821 (E.D.N.Y., 2009); *In re West Caribbean Airways, S. A.*, 27 September 2007, 619 F.Supp.2d 1299 (S.D.Fla., 2007);

For scholars approvingly commenting on the use of the *forum non conveniens* doctrine under the 1999 Montreal Convention, see, e.g., *A. I. Mendelsohn*, The United States and the European Union in International Aviation, 55 Federal Lawyer 36, 41-42 (2008); *A. I. Mendelsohn/C. J. Ruiz*, The United States v. France: Article 33 of the Montreal Convention and the Doctrine of Forum Non Conveniens, 77 Journal of Air Law and Commerce 467 (2012); *Tompkins*, *supra* note 43, at 250-252.

<sup>48</sup> See *I. Koller*, Transportrecht, 6<sup>th</sup> ed., 2007, 1430.

<sup>49</sup> See *K. Otte*, Art. 31 CMR, in *F. Ferrari et al.* eds., Internationales Vertragsrecht, 2<sup>nd</sup> ed., 2012, 1201, 1206.

<sup>50</sup> *Koller*, *supra* note 48, at 1430.

proceedings,<sup>51</sup> thus clearly promoting forum shopping by the plaintiff.<sup>52</sup> Unlike under the 1999 Montreal Convention, however, under the CMR, it appears that the court of a contracting State to the CMR “has no power to decline, on *forum conveniens* grounds, to exercise its jurisdiction once established, because a power to stay on *forum conveniens* grounds is inconsistent with the right conferred on the claimant to choose in which of the competent jurisdictions his action will be tried.”<sup>53</sup>

As one can gather from the foregoing remarks, there is not one uniform position on forum shopping. But whatever position one takes vis-à-vis forum shopping, there seems to be no doubt as to the fact that “forum shopping is a reality”;<sup>54</sup> a fact,<sup>55</sup> something “every litigant who files a lawsuit engages in”;<sup>56</sup> so much so that forum shopping has been labelled a “national legal pastime”;<sup>57</sup> which is not that surprising. In effect, as pointed out by what was formerly known as the House of Lords, “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

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<sup>51</sup> See Art. 31(1) of the CMR: “In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory: (a) The defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made, or (b) The place where the goods were taken over by the carrier or the place designated for delivery is situated.”

<sup>52</sup> For this conclusion, see also *F. Ferrari*, Forum Shopping et Droit matériel uniforme, *Journal du droit international* 383, 386 (2002); *S. Grignon-Dumoulin*, Forum shopping – Article 31 de la CMR, *Uniform Law Review* 609, 616 (2006).

<sup>53</sup> *Hatzl v XL Insurance Co Ltd.*, 19 March 2009, [2009] EWCA Civ 223 at [26]; in scholarly writing see *M. Clarke*, *International Carriage of Goods by Road: CMR*, 4<sup>th</sup> ed., 2003, 139 (rejecting the idea of recourse to the *forum non conveniens* doctrine under the CMR).

<sup>54</sup> *K. F. Tsang*, Forum Shopping in European Insurance Litigation: A Comparison Between Jurisdictional Rules in the European Union and the United States, 32 *Loyola of Los Angeles International and Comparative Law Review* 239, 267 (2010); see also Brown, *supra* note 33, at 650; *M. H. Gottesman*, Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes, 80 *Georgetown Law Journal* 1, 2 (1991).

<sup>55</sup> See *N. S. Ellis*, The Class Action Fairness Act of 2005: The Story Behind the Statute, 25 *Journal of Legislation* 76, 109 (2009) (“forum shopping is always characterized as bad and manipulative in our story. The story ignores that fact that forum shopping is a fundamental fact”).

<sup>56</sup> *Texas Instruments, Inc. v. Micron Semiconductors, Inc.*, 815 F. Supp. 994, 996 (E.D. Tex. 1993).

<sup>57</sup> *S. Wright*, The Federal Courts and the Nature and quality of State Law, 13 *Wayne Law Review* 317, 333 (1967).

presented: this should be a matter neither for surprise nor for indignation.”<sup>58</sup> Indeed, “every lawyer thinks about the best forum before filing a case or before answering a complaint.”<sup>59</sup> Actually, “lawyers ethically are compelled to seek the most favorable forum to further clients’ interests.”<sup>60</sup> This means, however, that “forum shopping is not [necessarily] an evil to be avoided, but is rather an inherent part of our [...] court network.”<sup>61</sup> Still, given the negative attitude against forum shopping, it cannot surprise that some commentators felt not only the need to write papers “in defense of forum shopping,”<sup>62</sup> but also the need for “exorcising the evil of forum shopping.”<sup>63</sup>

## II. An Attempt at Defining “Forum Shopping”

The fact that forum shopping is, as mentioned earlier, a “reality”, does not mean that defining what constitutes “forum shopping” is easy. The difficulties arise, among others, from the fact that “[forum shopping] encompasses a broad range of actions”,<sup>64</sup> that it “lie[s] on a continuum of activities”,<sup>65</sup> thus making “the permutations of forum shopping [...] almost limitless.”<sup>66</sup>

To complicate matters, the legal system within which forum shopping occurs also has a bearing on the definition of forum shopping, thus making a one-size-fits-all definition even more difficult, as the following examples will show.

According to an Italian decision of 26 November 2002,<sup>67</sup> a decision which drew a lot of attention, since it not only provides the first ever definition of

<sup>58</sup> *Atlantic Star v. Bona Spes*, [1974] A. C. 436, 471; in legal writing see, most recently, *Tsang*, *supra* note 54, at 239 (“[a]s long as the jurisdictional rules of different countries are different, litigants (in most cases, plaintiffs) will likely try to take advantage of more favorable forums when bringing a lawsuit”).

<sup>59</sup> *A. B. Morrison*, *Removing Class Actions to Federal Court: A Better Way to Handle the Problem of Overlapping Class Actions*, 57 *Stanford Law Review* 1521, 1524 (2005).

<sup>60</sup> *D. L. Bassett*, *The Forum Game*, 84 *North Carolina Law Review* 333, 395 (2006).

<sup>61</sup> *U.S. v. Cinemark USA, Inc.*, 66 F.Supp.2d 881, 889 (N.D. Ohio, 1999); see also *In re Coudert Bros. LLP*, February 28, 2012, 673 F.3d 180, 189 (C.A., 2<sup>nd</sup> Cir., 2012) (stating that “interstate forum shopping has come to be perceived less as a necessary evil of federalism and more as a right to be enjoyed by plaintiffs and protected for their benefit”).

<sup>62</sup> *M. G. Algero*, *In Defense of Forum Shopping: A Realistic Look at Selecting Venue*, 78 *Nebraska Law Review* 79 (1999).

<sup>63</sup> *K. M. Clermont/T. Eisenberg*, *Exorcising the Evil of Forum Shopping*, 80 *Cornell Law Review* 1507 (1995).

<sup>64</sup> *Brown*, *supra* note 33, at 653.

<sup>65</sup> Note, *supra* note 33, at 1677.

<sup>66</sup> *Id.* at 1679.

<sup>67</sup> See Tribunale di Rimini, 26 November 2002, available at: <http://cisgw3.law.pace.edu/cases/021126i3.html>; for comments, see, apart from the paper cited in note 23, *F. Fer-*

forum shopping in Italian case law, but also a list of reasons – which will be referred to later in more detail – that may induce one party to opt for the courts of one country rather than another, forum shopping compares to the “activity which aims at reaching the most favorable jurisdiction for the interests of the plaintiff”.

From this definition one can easily gather that the understanding in Italy, but this holds true in many other Civil Law countries as well, is that it is the plaintiff, and the plaintiff only, who can forum shop. There is no space for forum shopping by the defendant. Once a case is pending, the defendant can object to the jurisdiction of the court seized, arguing that there is no head of jurisdiction that allows the court to hear the case, or raise an *lis alibi pendens* exception, but this does not amount to forum shopping by the defendant.

The foregoing definition is, however, noteworthy for other reasons as well. By simply referring to the aim of “reaching the most favorable jurisdiction for the interests of the plaintiff”, the Rimini court defined forum shopping rather broadly. Unlike one U.S. district court’s definition, pursuant to which forum shopping amounts to a “[s]election of a court with an eye towards gaining an advantage based on the forum’s favorable substantive law or the avoidance of unfavorable law in an alternative forum”,<sup>68</sup> the definition given by the Rimini court does not require for an activity to qualify as forum shopping that the shopping be done to take advantage of a given set of favorable rules, such as the substantive rules. As long as the court seized is seized to get to the most favorable jurisdiction for the interests of the plaintiff, there is forum shopping, irrespective of what actually renders a jurisdiction “the most favorable jurisdiction for the interests of the plaintiff”.

Furthermore, and this is to be appreciated, the definition is value neutral. When defining forum shopping, the court did not take any position on whether forum shopping is right or wrong, desirable or undesirable. For the Rimini court, forum shopping is simply a “reality”, a “fact”, to use expressions employed earlier.<sup>69</sup>

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*rari*, Vendita internazionale tra forum shopping e diritto internazionale privato: brevi note in occasione di una sentenza esemplare relativa alla Convenzione delle Nazioni Unite del 1980, *Giurisprudenza Italiana* 896 (2003); *L. Graffi*, Spunti in tema di vendita internazionale e forum shopping, *Diritto del commercio internazionale* 807 (2003); *G. Mecarelli*, A propos du caractère inévitable du Forum Shopping dans la vente internationale, *International Business Law Journal* 935 (2003).

<sup>68</sup> *Zokaites v. Land-Cellular Corp.*, 424 F. Supp. 2d 824, 839 (W.D. Pa. 2006) (quoting *Oak Associates, Ltd. v. Palmer*, 2006 WL 293385 (E. D. Pa. 2006); see also *Teknor Apex Co. v. Hartford Acc. & Indem. Co.*, 14 December 2012, 2012 WL 6840498, at \*6 (D. R. I., 2012); *Util. Workers Union of Am., AFL-CIO v. Dominion Transmission, Inc.*, 27 September 2006, 2006 WL 2794568, at \*3 (W.D. Pa. 2006).

<sup>69</sup> See *supra* the text accompanying notes 56 and 57 respectively.

Value neutrality does generally not characterize definitions by U.S. courts – or scholars, for that matter,<sup>70</sup> as can be gathered, for instance, from the definition of forum shopping as “a pursuit not simply of justice but of justice blended with some harassment.”<sup>71</sup> This may not appear too surprising in light of the anti-forum shopping stance generally discernible in the U.S., leading courts to continuously state, for instance, that forum shopping must be discouraged,<sup>72</sup> prevented<sup>73</sup> or, to use an even stronger word employed by some courts, “eradicated”.<sup>74</sup>

One has to wonder, however, whether forum shopping really needs to be defined in such value laden terms. In other words, one has to wonder whether forum shopping amounts to forum shopping solely if it pursues some kind of “unfair” goal, as often suggested.<sup>75</sup> On a European level, this question has been answered in the negative, despite the aforementioned European anti-forum

<sup>70</sup> See, e.g., *R. Maloy*, Forum Shopping? What’s Wrong With That?, 24 Quarterly Law Review 25, 28 (2005) (defining forum shopping as “the taking of an unfair advantage of a party in litigation”).

<sup>71</sup> *Lazare Kaplan Intern., Inc. v. KBC Bank N. V.*, 2012 WL 3854618 (S.D.N.Y., 2012), at \*6; *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 14 December 2011, 665 F.3d 384, 405 (2<sup>nd</sup> Cir., 2011); *Heck-Dance v. Inversiones Isleta Marina*, 25 August 2010, 2010 WL 3810013 (D. Puerto Rico, 2010), at \*4; *In re Air Cargo Shipping Services Antitrust Litigation*, 26 September 2008, 2008 WL 5958061 (E.D.N.Y., 2008), at \*27; *E.ON AG v. Acciona, S. A.*, 9 January 2007, F.Supp.2d 559, 587 (S.D.N.Y., 2007); *Dichiara v. Ample Faith Investments Ltd.*, 29 November 2006, 2006 WL 3431197 (S.D.N.Y., 2006), at \*6; *Kirch v. Liberty Media Corp.*, 8 November 2006, 2006 WL 3247363 (S.D.N.Y., 2006), at \*3; *Overseas Media, Inc. v. Skvortsov*, 27 July 2006, 441 F.Supp.2d 610, 616 n. 4 (S.D.N.Y., 2006); *Norex Petroleum Ltd. v. Access Industries, Inc.*, 21 July 2005, 416 F.3d 146, 155 (2<sup>nd</sup> Cir., 2005).

<sup>72</sup> See *In re Wi-Sky Inflight, Inc.* October 30, 2012, F.Supp.2d, 2012 WL 5353550 (N.D. Ga., 2012), at \*7 (“forum shopping is to be discouraged”); see also *Walker v. Kitt*, October 24, 2012, F.Supp.2d, 2012 WL 5237262, at \*3 (N.D.Ill., 2012); *Nuveen Mun. Trust ex rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith*, August 16, 2012, 692 F.3d 283, at \*302 (3<sup>rd</sup> Cir., 2012); *Altamiranda Vale v. Avila*, 538 F.3d 581, 583 (7th Cir., 2008).

<sup>73</sup> See *In re Rhodes Companies, LLC*, 7 November 2012, 2012 WL 5456084, at \*2 (D. Nev., 2012); *Dynergy Danskammer, L. L. C. v. Peabody Coaltrade Intern. Ltd.*, 7 November 2012, 2012 WL 5464619, at \*7 (S.D.N.Y., 2012); *In re LLS America, LLC*, October 11, 2012, Slip Copy, 2012 WL 4847000 (E. D. Wash., 2012); *Sec. Farms v. Int’l Bhd. of Teamsters, Chauffers, Warehousemen & Helpers*, 124 F.3d 999, 1008 (9th Cir.1999).

<sup>74</sup> *Jerry Beeman and Pharmacy Services, Inc. v. Anthem Prescription Management*, July 19, 2011, 652 F.3d 1085, 1107 (9<sup>th</sup> Cir., 2011).

<sup>75</sup> See also *Petsche*, *supra* note 36, at 1008, suggesting that the term forum shopping necessarily indicates “certain practices of forum selection [that] are indeed “bad” (for example, because they are “unfair”[.])”

shopping stance.<sup>76</sup> In *GIE Groupe Concorde and Others*, Advocate General Colomer stated that forum shopping amounts to “[c]hoosing a forum according to the advantages which may arise from the substantive (and even procedural) law applied there”,<sup>77</sup> thus providing a value neutral definition (albeit one, which requires for the activity to be directed towards the taking of advantages arising either from substantive or procedural laws).

Similar value neutral definitions can also be found in U.S. case law. Forum shopping has been defined, for instance, as “[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard”.<sup>78</sup> According to a different definition, “forum-shopping occurs when a party attempts to obtain a perceived advantage over its adversary by choosing the most favorable venue.”<sup>79</sup> Similarly, forum shopping has also been defined as the “attempt to have [one’s] action tried in a particular court or jurisdiction where [one] feels [one] will receive the most favorable judgment or verdict”.<sup>80</sup>

These definitions clearly show that for an activity to amount to forum shopping it does not necessarily have to be reproachable. This becomes even more evident if one considers how many courts go out of their way to qualify a given practice as “blatant forum shopping”,<sup>81</sup> “bad faith forum shopping”,<sup>82</sup> “inap-

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<sup>76</sup> See *supra* the text accompanying notes 16 *et seq.*

<sup>77</sup> AG Colomer in *GIE Groupe Concorde and Others* Case C-440/97 (1999) ECR I-6309, 6314 para. 19.

<sup>78</sup> *Gorom v. Old Dominion Freight Line Inc.*, 13 January 2013, WL 195377, at \*5 (C. D. Cal., 2013); *Bushansky v. Armacost*, 9 August 2012, WL 3276937, at \*5 (N. D. Cal., 2012); *R. R. Street & Co. Inc. v. Transport Ins. Co.*, 656 F.3d 966, 981 (9th Cir., 2011).

<sup>79</sup> See, e.g., *Walker v. Packer*, 827 S. W.2d 833, 849 n. 3 (Tex.1992).

<sup>80</sup> *In re Boheme*, 256 S. W.3d 878, 883 (Tex. App.–Houston, 2008); *Oglesby v. County of Kern*, 2005 WL 3031466, at \*7 (E. D. Cal., 2005); *American Employers’ Ins. Co. v. Elf Atochem North America, Inc.*, 280 N. J. Super. 601, 613 (N. J. Super. A. D., 1995).

<sup>81</sup> *Warsaw Orthopedic, Inc. v. NuVasive, Inc.*, 2012 WL 5472143, at \*4 (N. D. Ind., 2012); *McGinnis v. Eli Lilly and Co.*, 181 F. Supp. 2d 684, 691 (S. D. Tex., 2002); *John Akridge Company v. Travelers Companies*, 944 F. Supp. 33, 34 (D. D. C. 1996); *In re Si Yeon Park, Ltd.*, 198 B. R. 956, 963 (Bkrtcy. C. D. Cal., 1996); *Mass v. McClenahan*, 1993 WL 267418, at \*2 (S. D. N. Y., 1993); *Green v. Nevers*, 1993 WL 1620511, at \*14 (E. D. Mich., 1993); *Hall American Center Associates Ltd. Partnership v. Dick*, 726 F. Supp. 1083, 1086 (E. D. Mich., 1989); *International Paper Co. v. Gonzalez*, 1988 WL 428586, at \*4 (S. D. Miss., 1988); *Woods v. Ohio High School Athletic Association*, 1981 WL 6063 at \*2 (Ohio App., 1981); *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 25 Fed. R. Serv. 2d 485, 487 (D. C. Del., 1978).

<sup>82</sup> *Bolton v. U.S. Nursing Corp.*, 2012 WL 5269738, at \*5 (N. D. Cal., 2012); *Mastercard Int’l Inc. v. Fédération Internationale de Football Association*, 2007 WL 631312, at \*8 (S. D. N. Y. 2007).

propriate forum shopping,"<sup>83</sup> etc..<sup>84</sup> The implication of this qualification is that there are forms of forum shopping that are not to be stigmatized. Therefore, this author believes that a value neutral definition of forum shopping should be adopted. If forum shopping really was an activity that in and by itself was reproachable, there would be no need to label it in a value laden way, for instance, as "improper,"<sup>85</sup> "impermissible,"<sup>86</sup> or "unacceptable,"<sup>87</sup> or in any other negatively nuanced way.

It is worth pointing out that all of the foregoing U.S. definitions, whether value laden or not, have one trait in common that distinguishes them from the aforementioned Italian definition, and which show how important the context is in which forum shopping occurs: Unlike the Italian definition, they do not state that forum shopping is the prerogative of the plaintiff, because in the U.S. it is not. The defendant also can forum shop,<sup>88</sup> although that type of forum shop-

<sup>83</sup> *Pragmatus AV, LLC v. YahooA Inc.*, 2012 WL 4889438 at \*7 (D. Del., 2012); *In re Witt*, 2012 WL 4049590, at \*2 (Bkrcty. N.D. Ind., 2012).

<sup>84</sup> *Allstate Texas Lloyds v. Sawyer*, 2007 WL 2471057, at \*4 (N. D. Tex., 2007) ("wrongful forum shopping")

<sup>85</sup> *Fitzgerald v. Gann Law Books, Inc.*, 2013 WL 2758886, at \*2 (N.J. Super. A. D., 2013); *Eureka Resources, LLC v. Range Resources-Appalachia, LLC.*, 2012 WL 5949201, at \*6 (Del. Super., 2012); *Mid-Continent Cas. Co. v. Classic Star Group, LP.*, 2012 WL 4195262, at \*4 (N. D. Tex., 2012); *In re Optimal U.S. Litigation*, 2012 WL 3264372, at \*5 (S.D.N.Y., 2012); *Pacific Coast Federation of Fishermen's Associations v. U.S. Dept. of Interior*, 2012 WL 3236163 at \*6 (N.D. Cal., 2012); *Progressive Emu, Inc. v. Nutrition & Fitness, Inc.*, 2012 WL 2479612, at \*3 (N.D. Ala., 2012); *Thatcher v. Hanover Ins. Group, Inc.*, 2012 WL 1933079, at \*1 (W.D. Ark., 2012).

<sup>86</sup> *Foxfield Villa Associates, LLC v. Regnier*, 2013 WL 183749, at \*4 (D. Kan., 2013); *Williams v. Williams*, 61 Va.App. 170, 190 (Va. App., 2012); *THI of New Mexico at Hobbs Center, LLC v. Spradlin*, 2012 WL 4466639, at \*8 (D.N.M., 2012); *North American Ins. Agency, Inc. v. Bates*, 2012 WL 3100758 at \*2-3 (W.D. Okla., 2012).

<sup>87</sup> *Jefferson Insurance Company of New York v. Maine Offshore Boats, Inc.*, 2001 WL 484040, at \*4 (D. Me., 2001); *Lenco, Inc. v. New Age Industrial Corp., Inc.*, 2001 WL 492386 at \*3 (D. Kan., 2001); *In re Phelps Technologies, Inc.*, 238 B. R. 819, 826 (Bkrcty. W.D.Mo., 1999).

<sup>88</sup> See *P. J. Borchers*, Punitive Damages, Forum Shopping, and the Conflict of Laws, 70 Louisiana Law Review 529, 530 (2010); *A. Kanner*, Consumer Class Actions after CAFA, 56 Drake Law Review 303, 312 (2008); *J. Lind*, "Procedural Swift": Complex Litigation Reform, State Tort Law, and Democratic Values, 37 Akron Law Review 717, 717 (2004); *D. E. Steinberg*, Simplifying the Choice of Forum: A Response to Professor Clermont and Professor Eisenberg, 75 Washington University Law Quarterly 1479, 1489 *et seq.* (1997).

For references in case law to "defendant forum shopping", or, as one court put it, "reverse forum shopping" (*Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 264 n.19 (U.S. Pa., 1981)), see, apart from the cases cited in following notes, *Heck-Dance v. Inversiones Isleta*

ping seems to encounter even less favor than plaintiff forum shopping, at least in the context of transfer among federal courts under 28 U.S.C. § 1404(a).<sup>89</sup> In effect, in the U.S., “[a]lthough the defendant does not decide where suit is *first* filed, he often has the ability [...] to control where suit is to *remain* after filing. This type of control occurs most typically in the context of federal removal, and courts have recognized that a defendant’s removal decision can involve forum-shopping motivations.”<sup>90</sup> The context of federal removal does not constitute the only one in which a defendant can forum shop in the U.S. This can easily be gathered from the following statement to be found in *Iragorri*: “[c]ourts should be mindful that, just as plaintiffs sometimes choose a forum for forum-shopping reasons, defendants also may move for dismissal under the doctrine of *forum non conveniens* not because of genuine concern with convenience but because of similar forum-shopping reasons.”<sup>91</sup>

But this is just one more example of how the legal system in which the forum shopping occurs is effecting the very same definition of what amounts to forum shopping. Another such example is the distinction, existing only in legal systems similar to the U.S. one, where a distinction is made between state and federal courts, between “horizontal” and “vertical” forum shopping. In the U.S., the former “occurs when plaintiffs choose to pursue claims in a particular

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*Marina*, 2010 WL 3810013, at \*4 (D. Puerto Rico, 2010); *Trustar Funding v. Mruczynski*, 2010 WL 1539759, at \*10 (N.D. Ohio, 2010); *Ripley v. Eon Labs Inc.*, 622 F.Supp.2d 137, 141 (D.N.J., 2007); *City of Columbus v. Hotels.com, L.P.*, 2007 WL 2029036, at \*7 (S.D. Ohio, 2007); *Board of Trustees of Cement Masons & Plasterers Health and Welfare Trust v. GBC*, 2007 WL 1306545, at \*3 (W.D. Wash., 2007); *Goldman v. RadioShack Corp.*, 2003 WL 21250571 at \*5 (E. D. Pa., 2003); *U.S. v. Cinemark USA, Inc.*, 66 F.Supp.2d 881, 889 (N.D. Ohio, 1999); *NRG Barriers, Inc. v. Jelin*, 1996 WL 377014, at \*6 (Del. Ch., 1996); *International Broth. of Locomotive Engineers v. Consolidated Rail Corp.*, 1994 WL 808075, at \*4 (E.D. Mich., 1994); *Commercial Discount Corp. v. King*, 552 F.Supp. 841, 850 (D.C. Ill., 1982).

<sup>89</sup> See *U.S. v. Cinemark USA, Inc.*, 66 F.Supp.2d 881, 889 (N.D. Ohio, 1999) (“[U]nlike defendant forum shopping, plaintiff forum shopping is not an evil to be avoided, but is rather an inherent part of our federal court network”); *Trustar Funding v. Mruczynski*, 2010 WL 1539759, at \*10 (N.D. Ohio, 2010) (stating the same); *Sun Pharmaceutical Industries, Ltd. v. Eli Lilly and Co.*, 2008 WL 1902111, at \*4 (E. D. Mich., 2008); see also *Ferens v. John Deere Co.*, 494 U.S. 516, 527, 110 S. Ct. 1274, 1282 (1990); *Iragorri v. United Technologies Corporation*, 4 December 2001, 274 F.3d 65, 75 (2<sup>nd</sup> Cir., 2001).

<sup>90</sup> *In re Boheme*, 13 June 2008, 256 S. W.3d 878.

<sup>91</sup> *Iragorri v. United Technologies Corporation*, 4 December 2001, 274 F.3d 65, 75 (2<sup>nd</sup> Cir., 2001); more recently, see *Heck-Dance v. Inversiones Isleta Marina*, 2010 WL 3810013, at \*4 (D. Puerto Rico, 2010); *Can v. Goodrich Pump & Engine Control Systems, Inc.*, 711 F.Supp.2d 241, 261 (D. Conn., 2010); *DiRienzo v. Philip Services Corp.*, 294 F.3d 21, 29 (2<sup>nd</sup> Cir., 2002).



state that is known for plaintiff-friendly laws<sup>92</sup> or when they choose between various federal courts.<sup>93</sup> Vertical forum shopping, on the other hand, "refers to the choice to file suit in either federal or state court in a particular jurisdiction."<sup>94</sup>

In this author's opinion, any definition of forum shopping has not only to be value neutral, as suggested earlier, but also comprehensive of all of the foregoing types of forum shopping. Not only, in this author's opinion, the definition of forum shopping cannot be limited to the choice between legitimate fora, as suggested in legal writing. There is forum shopping also when proceedings are initiated in a forum that even *prima facie* is not competent to hear a case.<sup>95</sup> In some legal systems, this may well be the paradigm of forum shopping. In the European context, it may suffice to recall the so-called "torpedo actions", a means by which a potential defendant (normally in patent infringement cases) takes the initiative and starts negative declaratory judgment proceedings to take advantage of a given European *lis alibi pendens* rule<sup>96</sup> that obliges the courts of other jurisdictions, even of the jurisdiction agreed upon by the parties,<sup>97</sup> to stay any proceedings involving the same parties and the same cause of action<sup>98</sup> until the court first seized, normally a court that is notoriously slow,<sup>99</sup> has reached

<sup>92</sup> E. Guidi, Shady Grove: Class Actions in the Context of Erie, 77 Brooklyn Law Review 783, 814 note 211.

<sup>93</sup> See Lear, *supra* note 12, at 89; N. Ochi, Are Consumer LCass Actions and Mass Actions Dead? Complex Litigation Strategies After CAFA and MMTJA, 41 Loyola of Los Angeles Law Review 965, 1031 *et seq.* (2008).

<sup>94</sup> Y. Leychkis, Of fire and Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation, 9 Yale Journal of Law and Technology 193, 196 (2007); see also Guidi, *supra* note 93, at 814 note 211 (vertical forum shopping "occurs when plaintiffs choose to pursue claims in federal court over state court because of friendlier federal laws").

<sup>95</sup> But see *R. R. Street & Co. Inc. v. Transport Ins. Co.*, 656 F.3d 966, 981 (9th Cir., 2011), defining forum shopping as "[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard." This definition seems to exclude that choosing to initiate proceedings in a court that does not appear to have jurisdiction may amount to forum shopping. See also *Bushansky v. Armacost*, 2012 WL 3276937, at \*5 (N.D. Cal., 2012).

<sup>96</sup> See Art. 27 of the Brussels I Regulation.

<sup>97</sup> See S. Leible, Art. 27, in T. Rauscher ed., Europäisches Zivilprozess- und Kollisionsrecht. EuZPR/EUIPR. Brüssel I-Vo. LugÜbk 2007, 2011, 637, 653-654.

<sup>98</sup> It is in *Tatry* that the European Court of Justice first ruled that an action seeking that the defendant be held liable for causing loss and ordered to pay damages has the same cause of action and the same object as earlier proceedings brought by that defendant seeking a declaration that he is not liable for that loss; see "*Tatry*" v. *the owners of the ship "Maciej Rataj"*, Case C-406/92, (1994) ECR I-05439, para. 47.

<sup>99</sup> See S. Luginbuehl, European Patent Law: Towards a Uniform Interpretation, 2011, 55; for a more detailed explanation of the type of actions referred to in the text, see, e.g.,

a decision on the jurisdiction (thus allowing plaintiff, for example, to defer injunctions and paying damages, and to push the defendant to settlement).

Furthermore, this author believes that there is forum shopping even where the choice of one forum, including an arbitral forum, over another is based on an agreement between the parties. In other words, for forum shopping to occur it is irrelevant whether the choice in favor of a given forum is a unilateral one, which will often be the case, or one based on an agreement between the parties. The fact that the choice is based on an agreement of the parties or is an unilateral one may, however, impact on the appropriateness, acceptability or permissibility of the forum shopping, as well as on the reasons for forum shopping.

In light of all of the above, for the purpose of this paper, forum shopping shall be broadly defined as “the choice in favour of a given forum, based on the conviction that the chosen forum is the most favourable one for the purpose of reaching a given result”.

### III. Forum Shopping Reasons

This value neutral definition makes clear that the results aimed at and, thus, the reasons for a choice of one forum over another, including the choice in favour of an arbitral forum over a state court, do not have a bearing on the definition of forum shopping itself. They may impact, however, the specific choice’s acceptability or permissibility.

As for the reasons that may push parties to choose one forum over another, the aforementioned decision by the Tribunale di Rimini lists some of them. After rightly disagreeing with the view that forum shopping can be avoided by drafting uniform substantive law rules,<sup>100</sup> the Rimini court states that “parties [...] may want to use the domestic procedural system which is more suitable to them”,<sup>101</sup> including the more favorable rules of evidence.<sup>102</sup> The Rimini court

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*M. Franzosi*, Worldwide Patent Litigation and the Italian Torpedo, 19 *European Intellectual Property Review* 382 (1997); *T. Simons*, Cross-border “Torpedo” Actions. The lis pendens rule in European cross-national litigation, *European Legal Forum* 287 (2003).

<sup>100</sup> For a discussion of the relationship between uniform substantive law and forum shopping, see *F. Ferrari*, Forum shopping despite international uniform contract law conventions, *ICLQ* 689 (2002); *F. Ferrari*, “Forum shopping” trotz internationaler Einheitssachrechtskonventionen, *Recht der internationalen Wirtschaft* 169 (2002).

<sup>101</sup> Tribunale di Rimini, 26 November 2002, available at: <http://cisgw3.law.pace.edu/cases/021126i3.html>; for a reference to this forum shopping reason, see also *L. Collins*, Contractual Obligations – The EEC Preliminary Draft Convention on Private International Law, *ICLQ* 35, 36 (1976).

<sup>102</sup> For this forum shopping reason, see, e.g., *D. Jasper*, Forum shopping in England und Deutschland 23 *et seq.* (1990); *M. Checa Martinez*, Fundamentos y limites del forum shopping: modelos europeo y anglo-americano, *Rivista di diritto internazionale privato*

also refers to “the varying conditions of efficiency and rapidity of the judicial process” as being a reason for forum shopping,<sup>103</sup> as well as the language of the proceedings,<sup>104</sup> “the reputation for impartiality” – or pro-plaintiff bias<sup>105</sup> – of the court, and “the enforceability of the judgment”.<sup>106</sup> Finally – and given the context in which the decision was rendered – unsurprisingly, the Rimini court also states that “the fact that [uniform substantive law] conventions may be interpreted differently in each country with the possibility of inconsistent results being reached on substantive issues”,<sup>107</sup> may push the parties to favor one jurisdiction over another.

When identifying the foregoing reasons for forum shopping, the Rimini court does so, and the text of the decision makes this unmistakably clear, with an eye towards state court proceedings. This is unsurprising, given the Rimini court’s narrow definition of forum shopping – which limits forum shopping to forum shopping by plaintiffs,<sup>108</sup> thus excluding from the realm of forum shopping all forum selection and, thus, the agreement to arbitrate. This does not mean, however, that the forum shopping reasons identified by the Rimini court – which, as just mentioned, solely refers to the choice between different state courts – do not have to be considered in a broader setting, such as the one proposed here, that also allows forum selection, including the choice to have a dispute solved by arbitrators, to amount to forum shopping.

Actually, all of the reasons identified by the Rimini court as reasons to favor the courts of one country over those of another country are at the same time factors that may push parties to arbitrate rather than litigate in state courts. In this respect it may suffice to point to the perceived advantages of arbitration,<sup>109</sup> which allow parties to prevent opposing party from taking advantage of the

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e processuale 521, 521 (1999); K. Siehr, “Forum Shopping” im internationalen Rechtsverkehr, *Zeitschrift für Rechtsvergleichung* 124, 128 (1984).

<sup>103</sup> In legal writing, see Juenger, *supra* note 2, at 573; see also the famous phrase by Lord Denning in *The Atlantic Star*, (1972) 3 All ER 705, 709: “England [...] is a good place to shop in, both for quality of goods and the *speed of service*”. (emphasis added)

<sup>104</sup> See also Ferrari, Forum shopping despite international uniform contract law conventions, *supra* note 100, at 690.

<sup>105</sup> Juenger, *supra* note 2, at 573.

<sup>106</sup> Tribunale di Rimini, 26 November 2002, available at: <http://cisgw3.law.pace.edu/cases/021126i3.html>.

<sup>107</sup> *Id.*

<sup>108</sup> See *supra* the text accompanying note 67.

<sup>109</sup> It is worth mentioning that “the vaunted advantages of arbitration are not guaranteed. Although arbitration can often be superior, as an empirical matter it is not clear that binding arbitration is necessarily faster, cheaper, and otherwise better than litigation”, *Rembert v. Ryan’s Family Steak Houses, Inc.*, 235 Mich.App. 118, (Mich. App., 1999), citing *J. R. Sternlight*, Panacea or corporate tool?: Debunking the Supreme Court’s preference for binding arbitration, 74 *Washington University Law Quarterly* 637, 678 (1996).

differences existing between the various jurisdictions, such as those identified by the Rimini court and relating, for instance, to the differences in the rules of evidence, the conditions of efficiency and rapidity of the judicial process, the language of the proceedings, the reputation for impartiality of the courts, and the enforceability of judgments. In effect, it is common knowledge – and has also been acknowledged in case law – that arbitration is perceived to allow for the speedy and efficient resolution of disputes.<sup>110</sup> Actually, “the parties to an arbitral agreement knowingly take the risks of error of fact or law committed by the arbitrators and [...] this is a worthy “trade-off” in order to obtain speedy decisions.”<sup>111</sup>

According to one court, “[t]he chief advantage of arbitration is[, however,] the ability to resolve disputes without aspects often associated with the legal system”,<sup>112</sup> that comes with “the range of flexibility given parties to adopt their own procedures”.<sup>113</sup> It is this flexibility – or informality<sup>114</sup> – that allows the parties to avoid, for instance, to have to submit to a given domestic procedural regime, including certain rules of evidence.

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<sup>110</sup> For this perceived advantage of arbitration, see *Lewis v. Fletcher Jones Motor Cars, Inc.*, 205 Cal.App.4th 436, 452 (Cal. App. 4 Dist., 2012); *Com. Dept. of Correction v. Massachusetts Correction Officers Federated Union*, 2012 WL 1994605, at \*5 (Mass. Super., 2012); *Sutherland v. Ernst & Young LLP*, 856 F.Supp.2d 638, 642 (S.D.N.Y., 2012); *Barron v. Evangelical Lutheran Good Samaritan Soc.*, 265 P.3d 720, 732 (N.M. Ct. App.2011); *Allied–Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995); *Soprano v. American Hardware Mutual Insurance Co.*, 491 A.2d 1008, 1011 (R.I. 1985); *Alascom, Inc. v. ITT North Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984); *United Food & Commercial Workers Union, Locals 197, 373, 428, 588, 775, 839, 870, 736 F.2d 1371, 1373 (C.A. Cal., 1984); Fairchild & Co., Inc. v. Richmond, F. & P. Railroad*, 516 F.Supp. 1305, 1313 (D.D.C.1981).

<sup>111</sup> *Gravillis v. Coldwell Banker Residential Brokerage Co.*, 106 Cal.Rptr.3d 70, 78 (Cal. App., 2<sup>nd</sup> Dist. 2010); *California School Employees Ass’n v. Bonita Unified School Dist.*, 77 Cal. Rptr.3d 486, 502 (Cal. App. 2 Dist., 2008); *Engalla v. Permanente Medical Group, Inc.*, 938 P.2d 903, 920 (Cal., 1997); *Moncharsh v. Heily & Blase*, 3 Cal.4th 1, 12 (Cal., 1992).

<sup>112</sup> *Delaware Coalition for Open Government v. Strine*, 2012 WL 3744718, at \*7 (D. Del., 2012), citing *L. Bernstein*, Understanding the Limits of Court Connected ADR: A Critique of Federal Court–Annexed Arbitration Programs, 141 University of Pennsylvania Law Review 2169, 2240–44 (1993); *S. Mentschloff*, Commercial Arbitration, 61 Columbia Law Review 846, 849 (1961).

<sup>113</sup> *Wierzbowski v. East Bay Medical Imaging Ass’n.*, 2002 WL 243564, at \*8 (Cal. App. 1<sup>st</sup> Dist., 2002); see also *Stolt-Nielsen, S. A. v. AnimalFeeds International Corp.*, 176 L.Ed.2d 605, 623 (2010).

<sup>114</sup> See *State v. P. G. Miron Constr. Co., Inc.*, 181 Wis. 2d 1045, 1055, 512 N. W.2d 499 (1994); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); *Fairchild & Co. v. Richmond, F. & P.R. Co.*, 516 F.Supp. 1305, 1313 (D.D.C.1981).

Another “[o]ne of the principal advantages is the ability to select impartial arbiters”,<sup>115</sup> thus permitting parties to overcome any bias domestic courts may succumb to. But the parties’ ability to select the arbiters, which in itself is perceived as being one of the most important advantages of arbitration over state court litigation,<sup>116</sup> does not only lead to a more impartial tribunal hearing a given case, but generally also leads to arbitral “tribunals consist[ing] of more competent and specialized members in the field in which the dispute arises”,<sup>117</sup> since the parties will appoint “arbiters with special knowledge of particular fields and areas of the law”.<sup>118</sup>

Furthermore, by opting for arbitration, parties can make sure that the result of their proceedings will be more easily enforceable,<sup>119</sup> as arbitral awards circulate much more freely than state court judgments, since “[a]rbitration enforcement treaties are more prolific throughout the international community than are agreements based solely on traditional litigation”,<sup>120</sup> the most famous such treaty being the New York Convention.<sup>121</sup>

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<sup>115</sup> *MCI Constructors, Inc. v. Hazen and Sawyer, P.C.*, 2009 WL 632928, at \*5 Fn. 8 (M.D.N.C., 2009).

<sup>116</sup> See, e.g., *Sholar Business Associates, Inc. v. Davis*, 138 N.C. App. 298, 302 (N.C. App., 2000); *Aviall, Inc. v. Ryder System, Inc.*, 913 F.Supp. 826, 835 (S.D.N.Y., 1996); *Crutchley v. Crutchley*, 306 N.C. 518, 523, 293 S. E.2d 793, 796 (1982); *Riess v. Murchison*, 384 F.2d 727, 735 (9<sup>th</sup> Cir., 1967).

<sup>117</sup> C. G. Warren, A Recent Summary of International Commercial Arbitration. The United States versus Mexico and Canada?, 10 Currents: International Trade Law Journal 75, 76 (2001), see also

<sup>118</sup> *MCI Constructors, Inc. v. Hazen and Sawyer, P.C.*, 2009 WL 632928, at \*5 Fn. 8 (M.D.N.C., 2009); see also *In re Ionosphere Clubs, Inc.*, 1990 WL 5203, at \*10 (S.D.N.Y., 1990) (stating that one of the advantages of arbitration is the “the familiarity of the arbitrator with the customs and usages of the industry”); *LCI, Inc. v. Chipman*, 572 N.W.2d 158, 161 (Iowa, 1997) (stating the same); *Oinoussian S. S. Corp. of Panama v. Sabre Shipping Corp.*, 224 F.Supp. 807, 809 (D.C.N.Y., 1963) (stating the same); *American Almond Products Co. v. Consolidated Pecan Sales Co.*, 144 F.2d 448, 450 (2<sup>nd</sup> Cir., 1944) (stating the same).

<sup>119</sup> See *H. Alvarez*, Jurisdiction Shopping/Selecting the Location, Forum, and Rules for Dispute Resolution, 53 Rocky Mountain Mineral Law Institute 24-1, 24-1 (2007) (“arbitration [...] enhances the likelihood of enforcement of the award”); *L. Mistelis*, International Arbitration – Corporate Attitudes and Practices – 12 Perceptions Tested: Myths, Data and Analysis Research Report, 15 American Review of International Arbitration 525, 548 (2004) (“there is hardly any doubt that an arbitration award is more easily enforceable than any foreign judgment”)

<sup>120</sup> *J.R. Shaffer*, Rescuing the International Arbitral Model: Identifying the Problem in Natural Resources Trade and Development, 114 West Virginia Law Review 309, 320 (2011).

<sup>121</sup> *G. S. Lipe*, The Hague Convention on Choice of Court Agreements: Creating Room for Choice in International Cases, 33 Houston Journal of International Law 1, 5 (2010) (“[a]n

Of course, there are factors other than those listed in the Rimini court's rather lengthy obiter dictum that may induce parties to shop for a given forum rather than another one, as there are factors other than the aforementioned ones that may play a role when choosing to arbitrate rather than to litigate, costs being one of them. Given the differences in how costs are being calculated in the various jurisdictions, it cannot surprise that forum shoppers take costs into account when deciding where to bring suit. Of course, costs are also an issue when having to decide whether to defer a dispute to arbitration; not only, the costs issue seems to tip the balance in favor of arbitration, generally considered to be less expensive than litigation in state courts even by state courts.<sup>122</sup>

There are, however, factors that parties will take into account when opting to arbitrate that are characteristic only of arbitration. Confidentiality<sup>123</sup> – or privacy<sup>124</sup> – is one of the principal ones, albeit not the only one.

Arbitration has another distinct advantage over state court litigation, as also pointed out by the U.S. Congress: at the outset, “it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties”.<sup>125</sup> In other words, at the outset, arbitration leads to a “minimization of the intense polarization of the parties that often occurs [in litigation]”.<sup>126</sup> Of course, “once the arbitration has been initiated, and the related costs start ac-

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arbitral award rendered in any one of the 144 jurisdictions that are parties to the New York Convention is easily enforceable”).

<sup>122</sup> In case law see, e.g., *Jones v. General Motors Corp.*, 640 F.Supp.2d 1124, 1138 (D. Ariz., 2009); *Citifinancial Mortg. Co., Inc. v. Smith*, 2007 WL 2409520, at \*4 (M.D. Ala., 2007); *Yuen v. Superior Court*, 121 Cal.App.4th 1133, 1141 (Cal. App. 4<sup>th</sup>, 2004); *Sholar Business Associates, Inc. v. Davis*, 138 N.C.App. 298, 302, (N.C.App., 2000); *State v. P. G. Miron Constr. Co., Inc.*, 181 Wis. 2d 1045, 1055, 512 N.W.2d 499 (1994); *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir.1993); *Henry v. Alcove Investment, Inc.*, 233 Cal.App.3d 94, 99-100 (Cal. App. 2<sup>nd</sup> Dist., 1991).

<sup>123</sup> See *Stolt-Nielsen, S. A. v. AnimalFeeds International Corp.*, 176 L.Ed.2d 605, 625 (2010); *Global Reinsurance Corp.-U.S. Branch v. Argonaut Ins. Co.*, 2008 WL 1805459, at \*1 (S.D.N.Y., 2008); *Guyden v. Aetna, Inc.*, 544 F.3d 376, 385 (2008).

<sup>124</sup> See *Yuen v. Superior Court*, 121 Cal.App.4th 1133, 1141 (Cal. App. 4<sup>th</sup>, 2004).

<sup>125</sup> H.R.Rep. No. 97-542, at 13 (1982) (“[t]he advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling”), quoted in *Jones v. General Motors Corp.*, 640 F.Supp.2d 1124, 1138 (D. Ariz., 2009); *Citifinancial Mortg. Co., Inc. v. Smith*, 2007 WL 2409520, at \*4 (M.D. Ala., 2007); *Allied-Bruce Terminix*, 513 U.S. at 280, 115 S.Ct. 834 (1995).

<sup>126</sup> *Faherty v. Faherty*, 97 N.J. 99, 107-108 (1984).

cruing, this has the effect of antagonising the parties and the arbitration tends to take a life of its own.<sup>127</sup>

Under the broad definition of forum shopping proffered here, the choice by the parties to arbitrate rather than to litigate – for any combination of the aforementioned reasons – amounts to forum shopping, albeit a consensual one. This does not mean, however, that once the parties have decided to defer their dispute to arbitration there is no place for other types of forum shopping. The parties' choice in favor of arbitration merely amounts to the necessary prerequisite of arbitration; it does not constitute a guarantee against forum shopping by either party after the choice is made. Forum shopping is a distinct possibility even after the initial – and consensual – choice to arbitrate, thus not only allowing the traditional reasons for forum shopping to come into play again, but also specific arbitration related ones, including to attempt to override an arbitration agreement or delay arbitral proceedings by initiating proceedings in state courts, as occurred, for instance, in the *West Tankers* case. In *West Tankers – Allianz SpA v West Tankers Inc.*<sup>128</sup> – the ECJ held that where a party brings court proceedings in an EU member state in breach of an arbitration agreement, and that court determines that it has jurisdiction under the regulation, as occurred in the case at hand on the basis of Article 5(3) of the Brussels I Regulation, it will also be for that court to decide whether there is a valid arbitration agreement.

As regards this ex post forum shopping, it can be divided into three categories, on the basis of when this forum shopping occurs: prior to the initiation of arbitral proceedings, during the arbitration itself and at a post-award stage. And it is the forum shopping that may occur at those stages that this conference will address.

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<sup>127</sup> *U. Draetta*, Leveraging the arbitral process to encourage settlement: some practical and legal issues, *International Business Law Journal* 487, 489 (2007).

<sup>128</sup> *Allianz SpA v West Tankers Inc.*, Case C-185/07 [2009] (10 February 2009).

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