20 Forum shopping and the evolution of rules of choice of law

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1. **Introduction**

In a perfect world, the outcome of litigation would be entirely independent of the choice of forum, and the outcome would be the same, no matter where the suits were brought. In the world as it exists, with a variety of legal regimes, jurisdictions that overlap, and interests that might conflict, the choice of forum can sometimes be a matter of life and death (Ghei and Parisi 2004). The fact that the choice of forum can be outcome-determinative is intuitively troubling, particularly in that this offers an opportunity for forum shopping, with all the accompanying possibilities of efficiencies. However, this can also offer an opportunity for forum selection, which might enhance efficiency, as will be discussed later.

A variety of theoretical approaches have been suggested to correct this perceived problem, and, in reality, a complex jurisprudence exists to deal with issues when more than one sovereign’s law might possibly apply to the litigation at hand. While in many situations this might be a matter of two or more sovereign nations, the United States is peculiar in its federal structure, in that the various states retain considerable sovereignty. Consequently, conflicts law has emerged from the common law, and has evolved over time, to correct some of the more significant problems of moral hazard (Shavell 1979), with the additional bound imposed by constitutional restrictions on personal jurisdiction (McDougall, Felix and Whitten 2004).

2. **A Brief History**

The conflict of laws developed on the Continent in Europe, and in England, under the influence of concepts of international law, which consequently

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1. Among other examples, Ghei and Parisi (2004) discuss the widely publicized case of the “Beltway Snipers” from 2002. John Allen Muhammed and John Lee Malvo were alleged to have committed murders in the state of Maryland, the District of Columbia, and the Commonwealth of Virginia. They were eventually tried in Virginia, where the death penalty was a possibility for Muhammed, as an adult. He was executed in 2009. At the time Muhammed and Malvo were charged, Maryland had a moratorium on the death penalty, a factor that played into the decision to choose Virginia as the forum, though Maryland had, arguably, at least as strong an interest in prosecuting the case, in view of the fact that several of the murders took place within its boundaries.
influenced American conflicts law, even though it largely deals with interstate matters (McDougal, Felix and Whitten 2001).

The earliest developments of conflicts law, for modern purposes, originate in the “rediscovery” of Roman law in the Middle Ages in Italy. Scholars in Italy began to study Roman law as the universal law, and started with the assumption that multistate issues required a choice among competing local laws. “A Glossator called Magister Aldricus, . . . believed to be the founder of our discipline gave a simple answer: he favored application of that law which is better and more useful” (Juenger 1993). Medieval jurists also experimented with multilateralism, and other approaches, which modern courts have developed more fully.

History intervened, however (McDougal et al. 2004). With the coming of the Industrial Revolution, and the rise of capitalism, along with increased explorations, mercantile and maritime law regulated an increasing share of litigation. The rise of nation states, and concentration of power into sovereign authority, resulted in conflicts law largely explained by the doctrine of territoriality in conflicts, dominated by the influential seventeenth century Dutch scholar Ulrich Huber, who relied on international law principles, particularly comity.

English common law courts, on the other hand, remained relatively isolated. The common law was uniform. The English courts did not entertain suits having to do with matters of maritime or mercantile law, nor did they entertain foreign suits. As such, the English common law did not need to develop until the middle of the nineteenth century, when the countries in continental Europe had long had well-developed rules for conflicts (Sack 1956).

This late-developed English law was imported into the American colonies, and augmented by case law, but was also heavily influenced by Joseph Story (starting with the first edition in 1834). The first modern treatment of conflicts in the United States was given by Joseph Beale as the Reporter of the first Restatement of Conflict of Laws (Leflar 1981). The Restatement (First), as is discussed in more detail in the next section, emphasized “vested rights” rather than comity, and consequently favored a territorial approach to conflicts of laws. This was, over the second half of the twentieth century, replaced by a multitude of more flexible approaches in the majority of the states, while the United States Supreme Court developed its own jurisprudence for choice of law for federal courts sitting in diversity2 (Roosevelt 2010).

3. Approaches to Conflicts
Modern approaches to conflicts of laws largely reflect these origins in their effort to address three main issues: adjudicatory jurisdiction; substantive

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2 Allowing federal courts to sit in diversity cases, and act as state courts, is an effective check to the adverse selection/ moral hazard forum shopping problem within the United States dual sovereign federal system, as is discussed below.
Production of legal rules

competence and choice of governing law; and recognition of judgments (Parisi and O’Hara 2002). The goals of the rules of conflicts, traditionally, were uniformity, predictability and avoidance of forum shopping, though Brainerd Currie (1963) de-emphasized them in his interest analysis approach, changing the focus to other values, including the interests of the state. Nonetheless, a legal system is considered a success to the extent that it achieves uniform and predictable outcomes. The gold standard for a conflicts regime remains the “mirror image test” (Ghei and Parisi 2004): the same set of facts should result in the application of the same substantive law, no matter the forum where the suit is filed, eliminating the incentive to forum shop.

Approaches to conflicts can be divided into three broad categories, all of which largely seek a balance between the goals of uniformity, predictability and avoidance of forum shopping. The first, and simplest, is a unilateral approach, exemplified by *lex fori*, where the law of the forum is always applied, as was the custom in England several centuries ago. The second is a multilateral approach, where the court attempts to balance the interests of the jurisdictions involved. Most conflicts regimes fall within this category. Rules-based regimes, such as of the civil law countries; Rome I and Rome II of the European Union; and the Restatement (First) are multilateral in their approach. So too are standards-based regimes such as Currie’s interest analysis and the multifactor tests of Restatement (Second). The third is a substantive approach, which tries to apply the best law to the fact pattern. Leflar’s “better rule of law” approach best exemplifies this category (Cox 2001) (though the Glossator Magister Aldricus foreshadowed him).

None of these approaches is perfect in avoiding forum shopping, but each has its own advantages in its applications.

3.1 Unilateral Approach

The unilateral approach has the advantages of clarity, predictability and economy. The rule is simple to understand. It creates valuable precedent, which is a public good, and thus increases social welfare (Mueller 2003). Knowledge of applicability of forum law removes one source of uncertainty in structuring transactions. As long as there is an exit option, a *lex fori* approach forces a jurisdiction to internalize the costs of bad laws, and promotes competition among jurisdictions to improve laws – a matter of some importance in a federal system that exists in the United States. On the other hand, it can allow interest groups to organize and lobby the legislature for laws to favor them (Olson 1971), such as, for example, the plaintiff trail bar lobby for plaintiff-favoring law, which in turn would mean that certain tort suits could be filed in those jurisdictions with the knowledge that the forum law would be applied. This suggests the counter-intuitive conclusion that uncertainty about which forum’s law will apply might actually reduce forum shopping.
3.2 Multilateral Approach

Under a multilateral approach, the court tries to balance the interests of the sovereigns impacted by the litigation. This can be done either by bright-line rules, or through the use of a standards-based regime.

The European Union, through Rome I and Rome II, favors the use of a rules-based regime, which is not surprising, given that, historically, civil law jurisdictions favor such an approach. The purpose of the Convention on the Law Applicable to Contractual Obligations (Rome I), effective in 1991, was to establish uniform rule concerning choice of law in contract among EU member states (Zhang 2009). In 2007, the EU promulgated the Regulation on the Law Applicable to Non-Contractual Obligations (Rome II), to cover conflicts of laws in certain other situations within the EU. In the United States, the Restatement (First) of Conflicts was also a rules-based approach. It was based on a vested-rights theory, with territoriality as a guiding principle (Brilmayer and Goldsmith 2002).

In theory, a rules-based approach should work well. The court is not supposed to consider the forum interests in making the determination as to which substantive law applies. As long as the rules are applied consistently, the same fact patterns should result in the application of the same substantive law. The result should be the same outcome always, and in theory, should eliminate forum shopping. In theory, a rules-based multilateral approach is highly successful in terms of the “mirror image test.”

The problem is, of course, that rules are not followed consistently. Under the Restatement (First), courts often used the public policy exception to avoid applying the clear rule. Matters were made even less clear when the suit could be characterized as either tort or contract. The problem was further compounded when courts engaged in dépeçage, or renvoi. The use of escape devices

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3 The Restatement (First) is now a minority view in the United States (Symeonides 2001).
4 See e.g., Paul v Nat’l Life, 352 S.E.2d 550 (W. Va. 1986). Two West Virginia residents drove into Indiana, where they were involved in a one-car accident, resulting in their deaths. The estate of the passenger sued the estate of the driver for wrongful death. Indiana had a guest statute which granted immunity to the defendant. The West Virginia trial court applied Indiana law, as being consistent with Restatement (First) rules, that is, the law of the place of the tort applies. On appeal, Judge Neely used the public policy exception to reverse the trial court’s decision, holding that West Virginia law should apply. The Restatement (First)’s rule of place of injury for tort was circumvented by this decision, even as the judge explicitly stated his preference for the rules-based approach of the Restatement (First) to other approaches to conflicts.
5 Nor is the problem limited to the United States, or to the Restatement (First). The Supreme Court of England, in November 2010, handed down a judgment in Dallah Real Estate and Tourism Holding Co. v The Ministry of Religious Affairs, Gov’t of Pakistan, [2010] UKSC 46. It was a case of enforcement of judgment of an arbitral award made
Production of legal rules reduces the probability of uniform outcomes, and correspondingly increases the incentive to forum-shop.

Standards-based regimes, on the other hand, accept the increased probability of forum shopping, and decreased clarity and predictability, as a trade-off for the objective of furthering state interests. In a standards-based approach, such as the Restatement (Second) and Currie’s interest analysis, the court undertakes multistep analysis, and not surprisingly, the result is a multifactor test, with no clear a priori rules. In addition to the lack of clarity and predictability, the focus on state interests makes these approaches particularly vulnerable to special interest lobbying at the legislative level (Olson 1971; Mueller 2003).

3.2.1 Substantive approach In this approach, the court is freed from considering the interest of any particular sovereign, and focuses on choosing the best applicable law. This is Leflar’s “better law approach” and should spur a race to the top. It is costly, however, and can be accomplished efficiently only if the judge is fully knowledgeable in all foreign law. Furthermore, it is irrelevant when the parties have made a choice of law ex ante, as in a contract. It is likely to work best in mass litigation situations, which span multiple jurisdictions.

Thus, no approach is free of the possibility of forum shopping, and no approach entirely passes the mirror image test.

4. Moral Hazard and Forum Shopping

The possibility of forum shopping, and the moral hazard associated with it, arises only in the presence of uncertainty. In litigation, there are two sources of uncertainty: the choice of opposing party, and the choice of forum. In terms of game theory, this is a sequential game. At step one, either defendant chooses plaintiff or plaintiff chooses defendant. A third option is that neither party exerts full control – as in a contract claim, which begins with a consensual transaction. To the extent that there is private information, and one party is exerting control, there will be some degree of adverse selection (Akerlof 1970; Gale 2001).

At step 2, typically, the plaintiff has the choice of forum, since the plaintiff files the suit. If the same substantive law applies, there is no strategic advantage for choice of forum. Choice of forum matters only if there is non-zero, positive

in France. In an interesting point about conflicts, the issue was which law governed the validity of an arbitration agreement. English law provides, in the absence of the choice by the parties, that it is the law of the country where the agreement was made – France, in this case. The French Cour de Cassation, however, has held that transnational law governs arbitration agreements made in France, not French local law. The Law Lords chose to not renvoi, and apply French law to the case – surely not the result to be expected in a rules-based regime.

6 This section draws heavily upon Ghei and Parisi (2004).
probability that the outcome will vary depending on the choice of forum. In that case, the plaintiff will choose the forum most likely to yield a favorable outcome (O’Hara and Ribstein 2001). However, the defendant can choose to remove the suit to another forum, if possible.

The situation, of course, is not always quite so clear cut, with the declaratory judgment action being the classic example. The declaratory judgment action is an interesting variation of an intentional tort (Moore 2001). The “natural” plaintiff is the holder of the patent, but, in a declaratory judgment action, the infringer, the “natural” defendant, becomes the plaintiff. In this case, the plaintiff controls the choice of both defendant and forum, because the potential infringer can choose the patent to infringe on, and the location where to conduct the infringing activity (the potential forum). The potential infringer can, in effect, \textit{ex ante} strategically forum shop for a jurisdiction that offers relatively low protection for patent rights. The result is inefficient for society as a whole as patent rights receive sub-optimal protection.

The situation, however, could be mitigated, if the strategic control is divided. Thus: defendant picks plaintiff (as in an intentional tort), but the plaintiff picks the forum. If the choice of the forum is the plaintiff’s, it is likely to be one that favors the plaintiff. This will act as a deterrent to the defendant from undertaking actions resulting in litigation.

Much of conflicts law, in conjunction with venue and transfer statutes, and, in the United States, constitutional restrictions on personal jurisdiction, create precisely this countervailing power. A striking example of this is the possibility of removing suits from state to federal courts under diversity jurisdiction. As long as the parties are from different states (that is, they are diverse), the defendant can ask to remove the suit to federal court. In such cases, the federal court will apply the state court’s law, but presumably, be free from local biases the removing party is concerned about.

\section{5. Evolution of Rules in Conflicts and Efficiency}

American conflicts law in particular, has been widely criticized and is seen as being in need of sweeping reform. In the case of American conflicts law, the proposals have included national legislation (Whitten 2001); a new Restatement (Symeonides 2000); and somewhat less radical modification using efficiency as a guideline (O’Hara and Ribstein 2001). The first is unlikely to happen, the second would still depend on the adoption by the courts for its effectiveness, and, arguably, the third is in the process of adoption.

The law is not immutable. This is particularly true for a common law system like that of the United States. Conflicts laws issues are not decided wholly separately from substantive claims, just as judges in the common law system do not decide cases deductively (Sterk 1994). Conflicts rules, however, have
evolved, as have rules about personal jurisdiction, in ways that work surprisingly well to limit the worst excesses of forum shopping, but allow ex ante forum selection that could be efficiency enhancing.

The most striking example is that of contracts. Rome I, in the EU, granted vast party autonomy for contract. Under the Restatement (First), however, enforcement of a choice of law made by contracting parties was generally disfavored as being “private law.” With the rule being that the place of contract applied. Restatement (Second) explicitly provided for honoring the voluntary choice of law by contracting parties. The modern rule is to honor the ex ante choice of law, even in the minority of states that otherwise adhere to Restatement (First) conflicts rules. This is both efficient and just. The term is bargained for before the contract is signed; it can be safely assumed that it is welfare enhancing for all contracting parties. The explicit choice eliminates uncertainty, and an issue for litigation, and therefore increases judicial economy as well.\(^7\) This is more correctly classified under ex ante forum selection, and is clearly efficiency enhancing.

Just as clear is the rule that has to with real property. The situs rule clearly attaches to all claims based on real property, including those of land use, title, ownership in interest, testamentary disposition or intestate succession. This clear ex ante rule is essential for efficiency due to the immovable nature of real property, and the very strong regulatory interest the state has in it. The unambiguous situs rule clarifies property rights, and makes transfers easier. It also eliminates strategic forum shopping. It is clearly welfare enhancing, and it is unsurprising that it has survived unchanged through time.

Most of the concern about conflicts law and confusion in conflicts law, quite correctly, arises from claims based on torts. This is the area where the possibility for strategic, illegitimate forum shopping is the greatest. The relationship between the tort-feasor and the victim is essentially non-consensual. In an intentional tort, the tort-feasor chooses the victim; that is, the defendant chooses the plaintiff. In an unintentional tort, the tort-feasor acts in such a way as to increase the risk of a class of persons becoming victims. Allowing the plaintiff to choose the forum is a way to offset the adverse selection problem.

The Restatement (First) rule was the place of the wrong applied. The problem with this in the case of intentional torts is that it gave the control of forum to the tort-feasor (which would be particularly problematic in cases such as the declaratory judgment discussed earlier). While the rule was not quite so egregious for unintentional torts, it did violate expectations that would otherwise be justified, because it barred the separation of conduction regulation rules from

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\(^7\) The United States Supreme Court has upheld a choice of law clause even when it was that of neither party. See *The Bremen v Zapata Off-Shore Co.*, 407 US 1 (1972) (upholding choice of law of a third country).
loss regulation rules. It was therefore not surprising that courts often used escape devices to circumvent this strict *lex locus delicti* rule, in effect, vitiating the benefits of a rules-based regime. The result has been a move to multifactor tests, which are admittedly vague. On the other hand, the Restatement (Second) test list includes the consideration of the plaintiff’s domicile, which immediately reduces the strategic advantage in forum selection held by a defendant in an intentional tort claim.

O’Hara and Ribstein (2001) advocate a place of injury rule for non-market torts, and a place of sale rule for product liability cases, where there is no explicit choice of law clause. They advocate enforcing choice of law clauses to the extent that they exist for market-based torts. The United States Supreme Court would seem to agree. In *Carnival Cruise Lines, Inc v Shute*, 499 US 585 (1991), the Court upheld the choice of forum clause listed in a cruise ticket, even though the term had not been bargained for. Goldman (1992) criticized the decision, and the “Chicago School model” on the notion that it rested on perfect information and the idea that some consumers would bargain for the clause. The effect of enforcing the choice of law clause, however, is to eliminate a source of uncertainty for the party who will be the repeat player in the market, and faces a high probability of being a litigant. It also eliminates a source of *ex post* strategic forum shopping.

The final check on the forum shopping problem is personal jurisdiction, in the American system. As conflicts law has evolved to increase the availability of forums available to litigants, personal jurisdiction doctrine has evolved to limit strategic forum shopping. *Erie R.R. v Tomkins*, 304 US 64 (1938) ended the possibility of shopping between federal and state courts. Personal jurisdiction now requires the “purposeful availment” test of *McGee v Int’l Life Ins. Co.*, 355 US 220 (1957), which is a far cry from the tag jurisdiction of *Pennoyer v Neff* 95 U.S. 714 (1877).

6. Forum Selection or Forum Shopping

Forum selection is a multidimensional activity, and is an integral part of the legal process in a world with multiple jurisdictions and legal regimes. It will,
inevitably be a strategic choice. Some of it could be efficiency enhancing, while much of it, as has been discussed, will not.

The most egregious forum shopping, perhaps, is due to statutes of limitations. These are considered a procedural rule; the choice of forum determines which one applies. It is essentially arbitrary in nature, yet can determine whether a suit is heard or not. There are good reasons to have statutes of limitations, including repose and certainty, and states have good public policy reasons to have varying durations. There is no simple or fair way to eliminate this problem. It may well be that the cost of eliminating the problem might exceed the benefits, and one of the costs of living with multiple regimes that cannot be eliminated.

Lastly, there are efficiency-enhancing reasons to select a forum, even ex post. One might be speed of adjudication, which could reduce the deadweight losses associated with litigation. Another might be the expertise of the judges in a specialized area, such as Delaware for corporate law. In such cases, forum selection is efficiency enhancing, not a zero-sum, or a negative-sum game of forum shopping.

Nonetheless, as long as the world has multiple jurisdictions, with multiple legal regimes, it is impossible to eliminate forum shopping. The courts, as in the United States, have evolved a system, which seems chaotic on the surface, and is certainly by no means perfect, but seems to limit the worst excesses of strategic forum shopping surprisingly well.

References
Forum shopping and the evolution of rules of choice of law


