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FORUM NON CONVENIENS IN ENGLISH JUDICIAL PRACTICE AND EUROPEAN UNION LAW

Abstract

Forum non conveniens is a legal doctrine used in countries that subscribe to the common law tradition. It relates to the issue of international jurisdiction of a court and signifies a discretionary power of a court to refuse to hear a proceeding brought before it for which it would otherwise be authorised to hear, when it ascertains that there is another, foreign court that is more appropriate to hear and deliberate on the proceeding. There are two basic presuppositions for the application of this doctrine. First is that the proceeding in question is one for which there is a concurrent jurisdiction of courts from at least two countries, and the other is that the court to which the proceeding is filed does possess a discretionary right to decide on its own jurisdiction.

The doctrine of forum non conveniens, which incidentally originates from Scottish law, has been first and foremost accepted and developed by the US and England, followed by other common law countries. It is an integral part of legal systems of these countries and is part of their national rules on international jurisdiction of courts. Seeing that Great Britain acceded to the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 that regulates these issues between European Union member countries and does not envisage application of this theory, the question was raised as to whether English courts can use this national rule still and in what cases. Decisions of English courts expressed diametrically different views on this issues until 2005 when the European Court of Justice in the case of Owusu gave its final answer to this question which says that the doctrine forum non conveniens may

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not be implemented not even in cases when the alternative forum is a court of a state that is not a member of the European Union. A detailed chronological analysis of all of these factors is the subject of this paper.

Key words: *international jurisdiction of the courts, discretionary powers of court, convenient forum, alternative forum, Brussels convention, European Court of Justice.*

INTRODUCTORY CONSIDERATIONS

The *Forum non conveniens* theory is one of the basis for the court to refuse to hear a proceeding with a foreign element for which it is otherwise competent to hear.[1] It is intrinsic for the common law countries in which the courts have discretionary powers to deviate from standardised rules on basic jurisdictions of courts. During its centennial development it firmly established itself and today it represents an integral part of their rules on court jurisdiction.[2]

England, which was, with the US, among the first to accept this practice from the Scottish law, and which formed it and developed it through the practice of its courts, is today in a position in which it cannot use it anymore. A critical moment for the onset of such a situation was England's 1978 accession to the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968. The objective of the Convention was unification and balancing of civil procedure rules of various EU member states so as to strengthen legal protection of persons who are residents within the EU. When it comes to sources of jurisdiction, the Convention reflects ideas and standards of the *civil law* tradition and consequently sets clear and firm rules about the issue. Yet, it did not expressly exclude application of the principle of *forum non conveniens*, as a traditional national rule of English courts, so the

[1] Other possible foundations for a refusal of international jurisdictions are: a proceeding that already goes on before a court of another state (lis pendis), agreement between parties on exclusive choice of a court of another country (*exclusive choice of court agreement*), existence of valid arbitrary agreement and state immunity.

[2] Theory of *forum non conveniens* had been adopted, granted, not with fully identical method of application, in the following countries: Great Britain (until 2005, when the European Court of Justice, in *Owusu*, gave its final opinion on this issue), the US, Canada (including Québec), Israel, Australia, New Zealand. Furthermore, it has been adopted also in countries whose legal systems developed under the influence of English law, such as Hong Kong, Brunei, Singapore and Gibraltar. See: Fawcett, *Declining Jurisdiction in Private International Law*, 1995. pg. 10.; North and Fawcett, *Cheshire and North's Private International Law,* 1992. pg. 222.

question of the principle's applications became very much in focus. The English courts had a very different approach to this problem, which led to a variety of decisions and legal insecurity in this field. A final judgment on the possibilities of application of the *forum non conveniens* doctrine was given by the European Court of Justice in 2005, and it was that this doctrine is incompatible with the Brussels Convention, and that it cannot continue to be implemented.

This paper reconstructs the chronology of events and decisions which were significant in determining the essence of the doctrine of *forum non conveniens* and in setting the path of its development in England. Thus, it first elaborates on the concept and structure of this doctrine, followed by the steps in its formulation and development through marked decisions of English courts, and exposes a final conclusion, through construal of substance, spirit and the objective of the Brussels Convention, by both the English courts and relating doctrine, and the European Court of Justice, that this theory has lost its significance and treatment that it used to have.

1. Concept and Structure of *Forum non Conveniens* Doctrine

Although it bears a Latin name, there is no evidence that the doctrine *forum non conveniens* originates from Roman law.[3] Its roots are in the Scottish law, i.e. decision of Scottish courts at the beginning of the 17th century, even though the expression "*forum non conveniens*" has been in use since the second half of the 19th century.[4]

The doctrine of *forum non conveniens* implies a discretionary power of the court to refuse to hear a proceeding over which it would otherwise have jurisdiction should it judge that it itself is a "seriously inconvenient" forum and that parties' interests , as well as public ones, would be best served if the claimant was to be direct to another, much more "convenient" (more "appropriate") forum, which must also be in jurisdiction for the given proceeding.[5] In other words, the basic principle of this doctrine is that a court may refuse jurisdiction on grounds of *forum non conveniens* in case it is assured that there is another court to which the claimant has access and which is also in jurisdiction and more appropriate for hearing the

[3] Pillet, Jurisdiction in Actions Between Foreigners, 18.*Harv.L.Rev.*325 (1905).

[4] The first published case in which the term "*forum non conveniens"* is used is from 1873, with the case being *Longworth v. Hope*, (1865) 3 M. 1049, 1058. cited according to: Karayanni, *Forum non Conveniens in the Modern Age,* New York, 2004. pp. 24.

[5] Weintraub, *Commentary on the Conflict of Laws,* 1986. pp. 4-33.

respective proceeding both from the aspect of interests of all parties, and from the aspect of serving the principles of justice.[6] The court with which the claim is lodged, therefore, stays from hearing the case and running the proceeding in favour of a court of another country, which it deemed is, for private, but also public interests, more suitable for hearing the case. The extent at which the initial legal forum is inconvenient, and the alternative forum is "convenient", "natural" even, is evaluated by the original court at each particular case. The court makes its decision examination and deliberation of all relevant issues of the case that refer to the real and substantial connections between the case and the court which should hear the case, which certainly encompass factors such as: the domicile or the business seat of parties and potential witnesses thereto (in that sense the court evaluates expected personal difficulties, especially material expenses of parties and potential witnesses in the case that proceeding is to be run in a territorially remote court), followed by the location of the evidence, procedural difficulties related to their service to each of the possible courts, local interests of each state for hearing the proceeding, difficulties in acquiring knowledge of and in application of a foreign applicable law, whether the issue is of complex and cumbersome disputes with several persons being respondents, the possibility of recognition and enforcement of the court decision in each of the possible countries that house possible alternative forums, costs of the proceedings, optimal time in which the case may be resolved, and similar. The aforesaid factors are marked as *exempli causa* in the main court divisions, which makes them serve more as guidelines than firm rules. Undoubtedly, all of them are important in objective terms, but they do not have the same importance and weight in each individual case, so therefore the determination of their value and merit in an individual case is left to the discretion of the judge.

The doctrine of *forum non conveniens* is fruit of judicial practice. It had been created within it and developed. Courts had the prerogative to adopt it and develop it in the extent and in the manner that best suited them,[7] although in some countries this doctrine managed to become accepted and guaranteed by law.[8]

In order for the *forum non conveniens* to work, two main presuppositions, or preconditions, need to be met. The first presupposition is that proceeding

[6] North and Fawcet, op.cit., pp. 223.
[7] Fleming, *Civil Procedure,* 2001, pp. 114.
[8] See: § 410.30(a) of the California Code of Civil Procedure; Art. 49 of the England's 1982 Civil Jurisdiction and Judgments Act; Article 3135 of the Code of Civil Procedure of Quebec; Article 429c(2) of the Dutch Code of Civil Procedure.

at hand is one for which there is a concurrent (and contending) international jurisdiction, and the other is that the court that applies the doctrine has discretionary power to do this.

Concurrent international jurisdiction exists in cases when for one and the same proceeding there exists a valid basis for jurisdiction of at least two different courts in two different states due to which a positive conflict of jurisdiction arises, or competition in jurisdiction. This is possible because the bases, or conditions, for jurisdiction of a court are facts that reflect the relations between the proceeding and the court that is supposed to hear it, and these relations may be numerous and various in view of the fact that they relate not only to the parties, but to the issue of dispute as well.[9] Concurrent jurisdiction as a condition for the application of the doctrine of *forum non conveniens* implies invariable existence of two facts: a) that the given proceeding is covered by international jurisdiction of the initial forum (court of the country before which a claim is lodged), and b) that indeed exists a convenient, alternative forum with likewise jurisdiction (competent court for the issue in another state). The requirement of jurisdiction of the initial forum is both logical and natural. Should this forum not be in jurisdiction to hear the given proceeding, it will refuse it on grounds of lack of jurisdiction and in that case the issue is not application of the *forum non conveniens* doctrine, because the basic presupposition is not met, which is existence of jurisdiction of the initial forum. By the same token, if there is exclusive jurisdiction of the initial court for the given proceeding, application of this doctrine is not possible because, as a sole court with jurisdiction, this court must hear the proceeding and deliberate upon it. This is a consequence of the principle *judex tenetur impetiri judicium suum,* i.e. the court's obligation to adjudicate on a matter for which it does hold jurisdiction. Therefore, in order for the initial court to refuse jurisdiction in a concrete case and by that not adjudicate at all, it must be certain that there is another court with jurisdiction before which the claimant may exercise protection of his/her/its rights.[10] Existence of the

[9] Bases of jurisdiction of courts in comparative procedure law may be: domicile, residence or nationality of claimant or respondent; business seat, place of incorporation or place of business interests of a legal person; location of property or an object of a natural or legal person; presence (for personal service) on the territory of the court; location where the delict was committed (*Forum Delicti*); location of conclusion or exercise of a contract (*Forum Contractus*); location of a thing found (*Forum rei sitae*); jurisdiction agreement between parties (*prorogatio fori*); forced jurisdiction (*Forum Necessitatis*). More in: Stanivuković, *Međunarodna nadležnost sudova u pravu SAD, Evropske Unije i EFTA (International Jurisdiction of Courts in US, EU and EFTA Law,* 1995, pg.47.

[10] It would appear, at least judging by one published decision, that this requirement is not absolute. In

appropriate alternative forum must be proved by fulfilment of several requirements. First and foremost, a possible alternative forum must have jurisdiction to hear the proceeding in question. Further on, in relation to the initial forum, the alternative forum needs to be more appropriate (convenient) for hearing the proceeding, both from the point of view of interests of the parties (primarily the respondent), and from the point of view of interests of the court and the state in which it operates. Finally, an alternative forum must be a court of a foreign country and must be available to all parties. Should protection of claimant's rights encounter significant legal and technical obstacles, the application of this doctrine would not be justified.[11]

Forum non conveniens rests on a discretionary power of the court. This is the second presupposition or precondition for the application of this doctrine and a characteristic that makes it unique. The court uses its discretionary power by balancing out the interests of the claimant, respondent and the forum itself.[12] For this purpose, as it has been said, it examines and assesses relevant factors that tie it to the subject matter of the proceeding, evaluates them and issues a decision on whether jurisdiction in the case should be kept or refused in favour of a court of another country that is more convenient for hearing the proceeding. Naturally, since there are no firm rules as to what factor should be given what level of power, it is upon the judge and his/her judgment to determine the concrete importance of each individual factor in each individual case.

At the time when this doctrine entered into usage, its underlying idea (L: *ratio)* was based on the principle of prohibition of *abuse of process*. This is a traditional approach that this doctrine took and it meant that a court may not refuse to hear a proceeding for which it holds jurisdiction unless the court is assured that this would create an injustice by inducing harassment to the respondent or would present an abuse of process in another

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the case *Islamic Republic of Iran v. Pahlavi* of 1985, an American court dismissed an action based on an objection that *forum non conveniens*, even though it had been expressly ascertained that an alternative court, in this case an Iranian one, was not appropriate because it lacked the necessary neutrality for its decisions to be recognised and enforced in the US. In the rationale, it was underlined, beside other issues, that the Islamic Republic has itself to blame for such repute of its courts. Quoted from: Stanivuković, *International Jurisdiction ...* pp. 151.

[11] Reus, *Judical Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany,* Loyola of Los Angeles International and Comparative Law Journal, Vol.16. N.2. 1994. pp. 458-459.

[12] Del Duca and Zaphiriou, *United States of America* in: Fawcett, *Declining Jurisdiction in Private International Law,* 1995. p. 402.

fashion.[13] However, in later times, when due to development of transportation and communication technology the number of proceedings with foreign element increased and when more and more foreigners appeared as claimants, the courts began to abandon the abuse of power viewpoint and started to focus the issue on a very simple question "is the court chosen by the claimant inappropriate for hearing the proceeding because there are no relevant contacts between the court and the subject matter of the proceeding".[14] This meant that the courts felt necessary to direct claimants to whichever court with which the parties, together with the very subject matter of the proceeding, had much closer ties, due to which such court would much more convenient for hearing the proceeding and deciding the subject matter of the case. This was a new approach marked in legal doctrine and judicial practice as the principle of *most suitable* or *most convenient forum*. The reasons that stood behind this "twist" in the application of *forum non conveniens* principle were various. It was stressed that the court that directs a proceeding to another, more appropriate forum, did not necessarily considering itself superior to a foreign court, which signalled acceptance of the principle of internationalism and transnational courtesy in the realm of court jurisdiction.[15] On the other hand, the approach of *most convenient forum* was viewed as a breakwater against *forum shopping,* which was considered undesirable at many courts, especially those in the US.[16] By the same token, it was also viewed as a defence against case overload that the courts are generally exposed to. The standpoint indeed was that lodging of claims to an inappropriate court was an expression of a kind of "imposition" of jurisdiction on the court and also an unjustified burden to court resources, especially in cases when the event that gave rise to the dispute occurred outside the boundaries of its jurisdiction. With time, *the most suitable forum* approach prevailed in most countries (with the exception of Australia), but simultaneously posed the main target for criticism that this doctrine received.

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[13] *St. Pierre v. South American Stores (Gath & Chaves Ltd.)* (1936) 1 K.B. 382, 398 (C.A.) qeated according to: Robertson, *Forum non conveniens in America and England: "A Rather fantastic Fiction"* Law Quarterly Review, 103(1987) p. 399.

[14] *Gahr. Devel. V. Nedlloyd Lijnen, B.V. 723* F. 2d 1190, 1192 (5th Cir. 1984) from Robertson, *op.cit*. p. 405.

[15] Pryles, *The Struggle for Internationalism in Transnational Litigation,* 61 (1987) Australian Law Journal, pp. 434, 435.

[16] See: Juenger, *Forum Shopping, Domestic and International,* 63 (1989) Tulane Law Review, p.564.

2. Development of the *forum non conveniens* doctrine in England

The doctrine of *forum non conveniens* secured its implementation in English law not sooner than XX century. Until then, the discretionary power of the court that related to the issue of jurisdiction existed only within the doctrine of *forum conveniens* (when the court decided whether it itself was a suitable forum of hearing a concrete proceeding, and, depending on the answer to the question, whether it would establish jurisdiction for itself), and referred to proceeding when respondents were persons outside England and Wales. This is a traditional English rule that was set by the *common law* Civil Procedure Act that dates back to 1852 and gave English courts a discretionary power to establish jurisdiction over absent respondents by *summons*, regardless of whether they were from England or overseas.[17] This basis for jurisdiction is today regulated by *Rules of Supreme Court* (*Order* 11, *Rule* 1(1). In essence, this rule gives an English court the right to expand jurisdiction over persons and events outside English territory (exorbitant jurisdiction),[18] which, undoubtedly, sets a case of excessive jurisdiction seeing that neither parties nor the subject matter of the proceeding need be related to England. On its contingent jurisdiction the court decides upon request of the claimant who aims to prove that the concrete court is an appropriate or convenient forum to deliberate on the given case. The aim of the claimant's request is to have the court establish its jurisdiction, i.e. to hear and deliberate on the claimant's claim. Unlike this doctrine, the result of implementation of *forum non conveniens* doctrine is the exact opposite: the court refuses jurisdiction to hear a given proceeding, for which it is otherwise validly in jurisdiction should it deem that a court in another country is more convenient and appropriate to hear the proceeding. Obviously, the court in this case does not seize jurisdiction, as in the previously stated case, but rather relinquishes jurisdiction it already possesses in favour of another, more convenient forum.

All until 1906, English courts rejected jurisdiction, using their discretionary powers, only in cases when objection of *Lis pendis* was raised, i.e. objection that the litigation on the same subject matter between the same parties already takes place before another court. An English court refused jurisdiction on grounds of *forum non conveniens* theory for the first time in *Logan v. Bank of Scotland.* [19] It based its decision on incommodious

[17] Cheshire & North's, *Private International Law,* 12.ed. 1992. p.190.
[18] *Ibid*. 221.
[19] *Logan v. Bank of Scotland*, (1906) 1 K.B. 141, 149-153. The issue of contention was between Scottish parties, where the court deemed that it would be better to have a Scottish court hear it. In

motivations of the claimant and the abuse of procedural powers. Nevertheless, in this decision the court did not invoke the *forum non conveniens* doctrine, as it would not, for many years to come, accept that refusal of jurisdiction is indeed based on this doctrine.[20]

Thirty years after this case, English courts were again in a situation to deliberate on an objection based on *forum non conveniens.* In the 1936 case *St. Pierre v. South American Stores (Gath &Chaves) Ltd.*[21], the Appellate Court, upon deliberation on the issue of refusal of jurisdiction, examined all relevant facts of the case and concluded that (an alternative) Chilean court is much more appropriate. It made its conclusion from the facts of the case, which stood that the contract in question was made in Spanish, that it was governed by Chilean law, that the events that led to the tort occurred in Chile, that all parties to the proceeding have substantive connection to Chile and that pertinent witnesses and certified court experts are also located in Chile. However, the court concluded that all these factors only determine the issue of to what extent the English court is *convenient* to hear the case, but not that they are proof of harassment of the respondent or abuse of powers.[22] The court further decided that the balance of these factors, or relevant merits is not foundation enough to relieve the claimant of the advantage of a proceeding before an English court, and that a claimant's right of access to court cannot be rejected easily. According to the Appellate Court, in order for the stay of jurisdiction to be justified, two conditions must be met: a) the respondent must prove to the court that the hearing of the case before that court would inflict injustice to the respondent because that would present a harassment to him/her/it or that it would constitute abuse of powers in another manner; and b) that refusal of jurisdiction must not inflict injustice to the claimant. In either case the burden of proof lies on the respondent.[23] By such, obviously rigid stance, the respondent was imposed with a very difficult task in an attempt to succeed with the *forum non conveniens* objection. In this case, according to the court's assessment, the respondent failed in the task because he failed to convince the court that there was harassment or disturbance to the respondent, and therefore the court did not refuse jurisdiction.

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its decision, the court invoked Scottish law, two decisions of American courts and took the position that a hearing in Scotland would not inflict any injustice on the claimant, whereas on the other hand, a proceeding in England would put the respondent to unnecessary harassment, which substantiates in an abuse of procedural powers.

[20] Dicey and Morris on *Conflict of Laws,* 12. ed. 1993. p. 398.

[21] *St. Pierre v. S. Am. Stores (Gath & Chaves) Ltd*., (1936) 1 K.B. 382, 398 (Eng. C.A. 1953).

[22] *Id*. 397-98

[23] *Ibid*.

The fact that two mentioned decisions were passed in the span of 30 years speak that the doctrine of *forum non conveniens* had very limited use. English courts rarely refused jurisdiction to themselves, and not only that they did not use the original name of this doctrine, they were also extremely rigid in its use. This rigidity relates to both the reasons for the refusal of jurisdiction (only if respondent is harassed), and to the burden of proof.[24] Inexistence of will of English courts to relinquish jurisdiction is a consequence of the fact that England, and especially London, was a prominent centre of commerce and that English judiciary traditionally enjoyed high respect and held great significance in the international business communities. For these reasons, perhaps a non-too-confident, even arrogant stance of an English court arose, expressed in the judgement in *The Atlantic Star* and read "No one who comes to these courts asking for justice should come in vain... This right is not limited to the English alone. It relates to any friendly foreigners. They may seek help of our courts should they desire to do so. You may call this "*forum shopping*" if you please, but if the forum is England, it is a good place to shop in, both for the quality of goods and the speed of service" [25]

A considerable shift in the development of *forum non conveniens* had not been made until the 1970s. By deciding in *The Atlantic Star*[26] in 1974, the supreme court, i.e. the *House of Lords* radically changed things because it overturned decisions of two lower courts (first instance and appellate court) by taking a standpoint that a claim regarding a dispute that had arisen when two Dutch ships collided in Belgian territorial waters should be stayed in favour of a Belgian court. Both lower courts had not stayed the claim with a rationale that in concrete case there had been no abuse of powers.[27] Because it had a completely opposite opinion, the Supreme Court redefined the concept of harassment and disturbance or abuse of powers, with an aim to create possibility for refusal of claims in a larger number of cases. Practically, that meant that these notions should be interpreted more liberally and flexibly. Lord Reid criticised the opinion of the Appellate Court as being too "parochial and chauvinist".[28] This meant that from then on a claim could be refused even when the claimant did not act with ill-intent, because the court, when examining the issue, should take into

[24] See more in: Cheshire, op. cit. pg. 221; Dicay & Morris, *op. cit*. p. 398-99.
[25] *The Atlantic Star,* (1973) Q.B. 382.
[26] *The Atlantic Star,* (1974) A.C. 436.
[27] *The Atlantic Star,* (1973) Q.B. 381-82, 384-85, 387-88.
[28] See: Robertson, *op. cit*. p. 411.

consideration not only the advantages on the claimant's side, but also the disadvantages on the respondent's side.[29]

The process of liberalisation was continued in *MacShannon v. Rockware Glass Ltd.*, in which Lord Diplock took the following position: "In order for the stay of a claim to be justified, two conditions must be met, one positive and one negative: a) the defendant must satisfy the court that there is another court to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience and expense, and b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English Court".[30] In the said case, an English court received a claim for damages suffered at work. The claimant was a Scotsman who lived and worked in Scotland. The respondents were English companies. All witnesses, medical staff and others lived in Scotland. The claimant lodged the claim in the country where the respondent has its business seat so the English court validly took jurisdiction. The respondents requested stay of jurisdiction leaving the claimant a contingency to lodge a claim before a Scottish court. The court, when considering the issue, took the position that a convenient or "natural" court for hearing this case is a court in Scotland, in view of the fact that all significant factors pointed in that direction. Since, according to court's opinion, there was no justification for the claimant to have the case heard in England, the motion was dismissed. The term "natural" forum became oft-used in juridical practice, and Lord Keith, who presided in the case, pointed out that it refers to a country with which the claim has the most real and substantial connection.[31] The language used by the court clearly indicates the approach of "most convenient" forum, and the very fact that the objection of *forum non conveniens* was accepted is by itself proof that the limited approach of the "abuse of powers" was abandoned because it would be literally unbelievable to claim that a respondent was harassed if someone sued him in his own country.[32]

In both cases English courts refused to accept the *forum non conveniens* theory as part of the English law. In subsequent decisions it was nonetheless acknowledged that formulation of the principles on grounds on which the English court acted was not far from the practice based on the

[29] Dicay and Morris, *op. cit*. p. 399.
[30] *MacShannon,* (1978) A.C. 812.
[31] Cheshire & North, *op. cit*. p. 224. In practice, this expression was used as a synonym to terms such as "convenient" or "appropriate".
[32] See: Robertson, *op. cit*. p. 412.

doctrine of *forum non conveniens*.[33] The final recognition of an English court that its discretion is based on *forum non conveniens* doctrine ensued in 1984, in *The Abidin Daver*.[34] In this decision Lord Diplock declared that "judicial chauvinism has been replaced by judicial comity to an extent which I think the time is now right to acknowledge frankly that the test applicable to stays is indistinguishable from the Scottish legal doctrine of *forum non conveniens*".[35] He advocated a much more flexible approach to the problem of stay of jurisdiction, considering that his view was that a discretion of the court in each individual case means valuation and measuring of all relevant factors on each side, therefore, both those that speak in favour of dismissal of a claim, as those that merit against it.[36]

Modern application of the doctrine of *forum non conveniens* was framed in 1987, in *Spiliada Maritime Corp. v. Cansulex Ltd.*[37] The facts of the case were as follows: the claimant was from Liberia, the owner of the ship *Spiliada,* which sailed under Liberian flag; the respondents were sulphur exporters from British Columbia; the claimant brought a claim before an English court in 1984 for compensation of damages that his ship endured due to corrosion that was incurred due to loading of cargo of wet sulphur in British Columbia in 1980. The respondent raised two requests in the proceedings. One related to the rescission of the court's decision on acceptance of jurisdiction over a foreign respondent, which the English court issued by applying Order XI of Rules of the Supreme Court.[38] The respondent unsuccessfully contested jurisdiction of the English court because it declared itself *forum conveniens*, i.e. an appropriate forum for hearing this proceeding, and then accepted jurisdiction.[39] The other objection that the respondent raised was the objection of *forum non conveniens.*[40]

By discussing the issue of jurisdiction for the said case, the court expressed a view that Lord Diplock's formulation gives too much importance to "legitimate personal or juridical advantages" to the claimant for the proceeding with the case in England, so it set a basic principle of test that

[33] See: (1978) A.C. 795, pg. 812 (Lord Diplock), 822 (Lord Fraser), as well as *Hesperides Hotels Ltd. v. Aegean Turkish Holidays Ltd.* (1979) A.C. 508. at 537 (Lord Wilberforce) and 544 (Lord Fraser). Cited from: Dicay & North, *op. cit*. p. 399.
[34] (1984) A.C. 398.
[35] *Ibid*. 411.
[36] Cheshire, op. cit. pg. 223.
[37] *Spiliada Mar. Corp. v. Cansulex Ltd.,* 1 A.C. 460 (H.L.1987).
[38] *Ibid*. 467.
[39] *Ibid*. 460-61.
[40] *Ibid*. 467.

would determine whether a court would reject jurisdiction upon objection of *forum non conveniens,* only in the case that the court is assured that there is an alternative forum that possesses jurisdiction and that is appropriate to hear the case, i.e. at which the proceedings would be more suitable in terms of interests of all parties and ends of justice.[41] In accordance with this basic principle, Lord Goff set six points for the application of the modern doctrine of *forum non conveniens* in England and Scotland:

The court will stay jurisdiction only if it is proved that there is another amenable court, with jurisdiction and convenient to hear the case;

The burden of proof lies on the respondent who is to satisfy the court to stay jurisdiction.

The respondent is to provide, not only that an English court is not natural and suitable forum for hearing the given case, but also that there exists another available court that is clearly and distinctly more appropriate than the English court;

In determining the appropriate forum, with which the case has a real and substantial connection, the court must examine numerous factors, such as availability of witnesses, the law applicable to the given dispute, the location (state) of domicile of the parties or the state in which they have their business seats (in case of legal persons);

Should there be no other alternative forum that is "clearly more appropriate for hearing the given subject matter", the court will not stay its jurisdiction;

Should the court assess that there is another "court that is *prima facie* much more appropriate to hear the given case", it will dismiss the claim, unless the claimant proves that there are circumstances that require the claim not to be dismissed for ends of justice.[42]

In consideration of these clauses, we dedicate our attention to some of the issues that we feel require further explanations. Foremost, regarding the burden of proof, from this case we can clearly deduce that it is divided between the parties. Namely, the respondent first needs to prove that there is a amenable forum in another country that is much more convenient for hearing the given proceeding than it is the English court. Should he not succeed in this, the court will not stay jurisdiction, i.e. it will proceeding with hearing the case. On the contrary, should the respondent succeed in

[41] *Ibid*. 476.
[42] See: Beaumont, *Great Britain,* in: Fawcett, *op. cit*. p. 210-11.; Brand, *op. cit*. pp. 471-72.

this, then the burden of proof transfers onto the claimant, who is then to prove to the English court that interests of justice demand that the proceedings be held in England.

The issue of burden of proof points to two things. Firstly, that the very procedure of decision-making on *forum non conveniens* objection the court carries out in two phases or on two levels. In phase one, the respondent proves that there is an alternative, more appropriate forum, and in phase two, the claimant needs to justify reasons for his lodging of claim before an English court. Secondly, with setting of such state of affairs, Lord Goff clearly separated deliberations regarding "appropriateness of the forum", from deliberations regarding the question of "justice". Examinations on whether there is a forum in another country that is clearly and **distinctly** more appropriate than an English forum are nothing more than a search for a court in a country with which the given case has real and substantial connection.[43] To this aim the court examines related factors that comprise not only those that refer to appropriateness and costs (such as availability of witnesses), but also other factors, such as law applicable for the given case, or location of domicile or business seat of parties. At any rate, this is a discrete power of the court, whereas the results of *Spiliada* give rise to the fact that the court did not offer clear-cut guidelines as to how to evaluate all of these factors. By the same token, Lord Goff does not in this case define and by that determine more closely what should be understood to be "justice" in application of this doctrine, but rather uses the view of Lord Diplock to this end, expressed in *Abidin Daver*:[44] "It may not be excluded that there still are countries before which courts there is risk that a foreign claimant, for special types of motions, may not exercise the principle of justice, whether for ideological or political reasons, or for inexperience or inefficacy of the judiciary, or for lack of available legal instruments". As a matter of course, rarely will a court say in its rationale that a foreign court does not meet the basic criteria of natural justice,[45] but when exercising its discrete powers, it will, in each individual case, certainly kept account and

[43] Slučaj *Spiliada, op. cit*. 477-78.
[44] Id., 478. Više: Beaumont, *op. cit*. p. 211.
[45] Thus, in *The 'Al Battani* (1993) 2 Lloyd's Rep. 219, judge Sheen decided that the court in Egypt was more appropriate for hearing the case than an English court, but did not stay jurisdiction invoking the principle of ends of justice. He felt that the financial burden of running of proceedings in Egypt would have been so difficult that the ends of justice require the claim not be dismissed. In consequences, he stressed that proceedings in Egypt would be procrastinated for five years, and that for that time only court's, and no other costs could have been reimbursed, and that the interest starts to run from the day of validity of the decision of the appellate court. He also pointed out high costs of translation of contracts and other documents from English into Arabic.

examine all merits that are supposed to convince it that the claimant will exercise an equitable legal protection before a concrete foreign court.[46] A fact that English law enables larger compensation, or higher interest rate than the law of a foreign court, is not, according to Lord Goff's point of view, sufficient reason to keep jurisdiction in England, by invoking to the ends of justice, and rejecting the motion for *forum non conveniens*.[47] On the other hand, the fact that a claimant may not exercise justice before a foreign court, for example because the courts in the given country are not independent, or because statute of limitations in that country took effect and with it the inability of taking action before the alternative forum, surely will be of importance in determining the "ends of justice".[48]

The principle of most appropriate forum requires an analysis of an obviously large number of factors that do not all have the same significance in all disputes, making the establishment or stay of jurisdiction mainly a discretionary power of the judge. This power must be said is quite wide, therefore making his/her decision hardly ever overturned in second-instance examinations.[49] So as to achieve a level of uniformity in the appraisal of factors and by that provide a higher certainty in application of the *forum non conveniens* doctrine, cases that ensued after *Spiliada* provided for a further, clearer analysis. Based on it, all significant clauses in an analysis and testing of "forum appropriateness" could be summed up in the following fashion:

Applicable law is a significant factor when the parties themselves had designated it by mutual consent. If the parties made no agreement on applicable law, and if potential courts would apply different legal rules, the applicable law to which Scottish or English norms on conflict of laws would not be considered a significant factor in determining the appropriate forum;

The fact that the proceedings are run before another court (a case of *lis pendis)* is a noteworthy factor if the proceedings reached a phase in which it bears on the dispute between the parties;

Availability of witnesses is a significant factor, unless the proceedings are prevailingly tied to a issue at law, because in such a case there is no need for hearing witnesses. However, this will be a major factor if the issue of contention is a factual state of affairs and when a good portion of evidence,

[46] See: Cheshire & North, *op. cit*. p. 226-27.
[47] See: Beaumont, *op. cit*. p. 211.
[48] Cheshire & North, *op. cit*. p. 227.
[49] Robertson, *op. cit*. p. 413.

among which hearing of witnesses too, needs to be expounded in a foreign language;

Residence or business seat of parties is also important;

If a claim can be extended onto other respondents before a court in one country, and if third persons also may appear there, but this is not possible before an alternative forum, then this is also a significant factor that bears to the favour of the original court;

If proceedings are opened before one court, but not before the alternative court, and if counsellors are able to move for and realise necessary expertises at the court in which proceedings are running, then this is a significant factor in favour of that court;

Differences between one and the other (alternative) forum in terms of costs, compensation of damage and procrastination of proceedings are of no or little value in determination of adequacy of a court;

Should, by merits of the case, the respondent not be capable to protect his rights before the first, but neither before the second (alternative) court, the significant factor speaks in favour of the first forum, where the aim is to eschew wasting of time;

The legal jurisdiction in which injury occurred or a tort was done is *prima facie* most appropriate forum for hearing the case that arose from the claim.[50]

When it seemed that all the questions relating application of the *forum non conveniens* doctrine, in 1978, the UK acceded to the Brussels Convention on Jurisdiction and Recognition and Enforcement of Decisions in Civil and Merchant Matters, so the question of application of this theory was re-raised. In consequence, this Convention, as a primary piece of legislation of the EU, does not regulate the principle of *forum non conveniens,* so the issue was whether this traditional common law rule can still be applied. The UK passed the Civil Jurisdiction and Judgments Act in 1982 which implemented the Convention, and in Article 49 stipulated that "Nothing in this Act shall prevent any court in the U.K. from staying, sisting, striking out or dismissing any proceedings before it on the ground of *forum non conveniens* or otherwise, where to do so is not inconsistent with the 1968 [Brussels] Convention". However, this Act does not determine when a *forum non conveniens* objection is inconsistent with the Convention, so does not provide much help in resolving this issue. The courts were found with

[50] More about each of the clauses in: Beaumont, *op. cit*. pp. 212-221.

a big problem. The doctrine was trying to justify application of its own national rule, and the final decision on the issue was brought by the European Court of Justice and it will be discussed in the following portion of this paper that relates to the Brussels Convention and the Council Regulation (EC) *No 44/2001*.

3. *Forum Non Conveniens* and Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

The doctrine of *forum non conveniens* did not come across the same reception in all states. In England, the consideration is that the development of this doctrine is a significant improvement of procedural rules in view of the fact that it constitutes a sophisticated instrument that provides for international harmony in court deliberations and for an adequate distribution of resources.[51] Conversely, in national legal systems of civil law countries in which statutory procedural rules clearly and strictly stipulated jurisdiction of courts without leaving room or need for discrete powers of courts, this doctrine was not accepted and consequently is not applied.[52]

What is important to our further considerations is the issue of what relation the EU procedural law has toward the doctrine of *forum non conveniens*,

[51] Kennett, *Forum Non Conveniens in Europe,* Cambridge Law Journal, 54(3) (1995), p. 553.

[52] The negative standpoint toward *forum non conveniens* doctrine has been eased, at least partially, in some of these countries. In extraordinary, special and limited cases it is possible to apply the so-called 'substitute' of *forum non conveniens,* which cannot be equated to the real application of this doctrine, but has commonalities with it because the end results between them are similar. By applying these substitutes, courts in civil law countries may stay jurisdiction in a given case if the interest of a party is to have the case heard before a court of another country or if the court wishes to prevent abuse of procedural powers, or if cheaper proceedings are possible before another court, or if given proceedings have insufficient connections with the state of domicile of the court, etc. However, the basic difference in the stay of jurisdiction between the common law and the civil law systems is in the fact that in the former case the jurisdiction is stayed on grounds of discrete power of the court, and in the latter the issue is not of the discrete power of the court, but of the application of clearly defined legal rule. Thus, for example, according to provision of par. 47(2) of the Act on Non-Contentious Proceedings of the Federal Republic of Germany of (FGG) of 1898, as amended in 1986, and then in 1997, when both German and courts of another country are amenable for organising custody and when custody is established on the territory of FR of Germany, the German court before which the proceedings relating the custody was opened may transfer the case to the state whose courts are also in jurisdiction, on condition that the interests of protégés be preserved, that the guardians agree to that and that the foreign country accept such transfer.

being the supranational law of the Union's member states. In other words, the question is whether this doctrine, as a pronouncedly national institute of English and other common law systems within the European Union, is recognised as a Communautaire rule in determination of international jurisdiction of courts or not. If the answer is negative, the question remains whether courts of the common law countries still can apply the doctrine, at least in cases in which courts with competitive jurisdiction are courts in non-EU countries. The primary source of law that regulates and arranges the issue of international jurisdiction of courts in European Union member countries is the Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 22 December 2000 (hereinafter: the Regulation).[53] The Regulation basically contains an almost identical text with the text of the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters that was adopted on 29 July 1968, and came into force in the then six members of the EEC on 1 February 1973, as well as the Lugano Convention, passed on the same subject matter on 16 September 1988 for member countries of the EFTA. [54] The end of these documents is the same, and it was set when Brussels Convention was being adopted, and that is the unification and harmonisation of civil procedure codes of EU member states in the designated group of legal matters,[55] so as to strengthen legal protection of persons situated in the EU. With an aim of uniform interpretation and application of the Brussels Convention, as well as the Lugano Convention, a separate Protocol on Interpretation was issued,[56] according to which the authority for interpretation of provisions of the Convention was expressly conferred onto the European Court of Justice.[57]

[53] Council Regulation (EC) No. 44/2000, OJ L 12 of 16.01. 2001.

[54] Brussels Convention, OJ C 189 of 28 July 1990. First innovations the Brussels Convention endured in 1978 when new members acceded to the EEC (Denmark, Great Britain and Ireland), and referred to certain provisions that relate to jurisdiction, considering that the acceding countries belonged to common law systems, whereas all subsequent amendments boiled down essentially to the expansion of the number of countries in which the Convention takes force; the Lugano Convention, OJ C 15 of 15 January 1997.

[55] See: Kropholler, *Europaeisches Zivilprozessrecht,* Heidelberg, 1987. p. 21; The Convention arranges for only three groups of procedural relations that have international significance, which are the areas of: jurisdiction; multiple litispendence; and international recognition and enforcement of judgments; See more in: Vodinelić, Knežević, *Građansko procesno pravo Evropske Unije,* Beograd, 1988. p. 18.

[56] Protocol was passed on 3 June 1971 on grounds of Art. 177 of Rome Treaty and Art. 150 of EUROATOM.

[57] Art. 1(1) of Protocol. The European Court of Justice is the Supreme Court of the EU, the "guardian" of Treaties that are primary European law from possible infractions and the only authoritative interpreter of provisions of the EC Treaty and of other legal acts of the Community.

The basic general rule on international jurisdiction in terms of the Regulation was established in Art. 2 and it reads: "According to this Regulation, persons who have domicile in one treaty country, regardless of their citizenship, may be sued before courts of that treaty country. Persons who are not citizens of the country in which they have domicile are subject to jurisdiction that applies for the citizens of that country."

What is unambiguous from the quoted basic rules is acceptance of the traditional rule of *actor sequitur forum rei*, *id est*, that in territorial sense, jurisdiction is determined according to the domicile of the respondent. Business seat of a legal person is equated with a residence of a natural person and the term used is uniform – domicile. The Regulation does not define the notion of domicile, but rather leaves to member states to determined in accordance with their national what is to be considered "domicile".[58] Deviation from domicile as a point of reference is still possible, but only in cases that are expressly designated by the Regulation. This means that a person may lodge a claim to a court of a member state in which the respondent *does not* have domicile in one of the following cases: a) special territorial competences (Arts. 5 through 7); b) special international jurisdictions in matters relating to insurance (Arts. 8 through 14); c) special international jurisdictions for consumer contracts (Arts. 15 through 17); d) special international jurisdictions for individual contracts of employment (čl. 18-21); e) exclusive jurisdictions (Art. 22); and e)

In interpretation of European law, the European Court of Justice uses a combination of the known methods of interpretation, and especially the teleological method leaning more on the purpose of norms of treaties and other legal acts of the EC than on grammatical interpretation of its provisions. The procedure of preliminary interpretation by the EC is initiated by a competent court of a member state by its request – second instance courts may do it if before a court of a member state there arises a question of interpretation and validity of norms of European law. The obligation to initiate these proceedings lies with the highest courts of member states (supreme courts), namely those courts against whose judgments there are no legal remedies. The decision of the European Court of Justice is considered binding for the parties in the proceedings, i.e. to the national court that instigated the proceedings, as well as to those courts that will pass judgments in those proceedings with regards to legal remedies of parties in related proceedings.

[58] According to Article 59 of the Regulation, the court will apply the legal norms of its home country to determine whether the party has domicile in the member state whose courts are seized in the proceedings. If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State. For the purposes of the Regulation, Art. 11(1) of the revised text of 2002 envisages that a person is domiciled in the state in which he/she has usual residence. Regarding seats of legal persons, Art. 60 of the Regulation determines that a company or other legal person or association of natural or legal persons is domiciled in a place of their statutory seat or central administration or principal place of business. In order to determine whether domicile of a trust is in the member state whose courts are seized of the matter, the court will apply its own rules of private international law (Art. 60, paragraph 3 of the Regulation).

prorogation of international jurisdiction (Art 23 and 24). Outside these cases, proceedings may be brought only to a court of the country in which the defendant is domiciled.[59] Regarding application of national laws of member states, the Regulation explicitly and directly stipulates what concrete legal norms of a national law of a member state a court may not apply with an aim to establish jurisdiction over a defendant that does not have domicile on its territory.[60]

Seeing that a basic rule for determining international jurisdiction of courts in European Union member states is firmly based on the domicile of the defendant, the question arises regarding the effect of the rule on forum non conveniens. In other words, the question is whether for example an English or an Irish court, before which proceedings were brought and whose territory the defendant is domiciled, may stay jurisdiction because it deems that another court, in a non-member-state, is more appropriate to settle the case due to its substantial connections with the dispute. Namely, the question is whether the *forum non conveniens* doctrine is compatible with the Regulation or not.

The possible incompatibility of the forum non conveniens doctrine with the Brussels Convention is pointed out by the English 1982 Civil Jurisdiction and Judgments Act (Art. 49.) Yet, since it does not determine when it should regarded that there is incompatibility, the evaluation of English courts had been very different, which resulted passing of different decisions. According to one standpoint, imperativeness of the rule presented in Art. 2 of the Brussels Convention had to be followed, which meant that a court of a contracting state had to accept jurisdiction, even in a case when a court of a non-contracting state was much more appropriate to settle the dispute.61 According to another opinion, the forum non conveniens doctrine could have been applied because it was not regarded as being incompatible with the Convention. Thus, in Re Harrods (Buenos Aires) Ltd (1992) Ch. 72 the Appellate Court took position that English courts may invoke forum non conveniens doctrine and stay jurisdiction that ensues from Art. 2 of the Brussels Convention (on grounds of domicile

[59] See more in: Vodinelić, Knežević, *op. cit*. p. 98 et seq.

[60] With regards to the national law of the United Kingdom, the Regulation, in Annex I, expressly forbids rules that enable jurisdiction to be founded on the following: a) the document instituting the proceedings having been served on the defendant during his temporary presence in the United Kingdom; or b) the presence within the United Kingdom of property belonging to the defendant; or c) the seizure by the plaintiff of property situated in the United Kingdom.
Case *S and W Berisford plc v New Hampshire Insurance Co* (1990) 2 QB 631. cited from: Kennedy, Cahil, Power, *European Law*, 2006. p. 229.

of the defendant in the United Kingdom) in case there is a more appropriate court in a non-contracting state and in case jurisdiction of contracting state outside the United Kingdom is in no way connected to the dispute.62 This court concluded that Brussels Convention does not prevent an English court to stay jurisdiction after an objection grounded in forum non conveniens when the sole alternative forum is in a non-contracting state, so it stay jurisdiction concluding that a court in Argentine is more appropriate for hearing the case. Several arguments exist on which the court based its opinion. Foremost, in terms of Art. 220 of the Treaty on EEC, which represents a basis for the Brussels Convention, the rules on jurisdiction contained in it are to be applied only between contracting states. Aside from that, in a case that rule of Art. 2 of the Convention is imperative to the relations between courts of member and non-contracting states, then an English court – that would have jurisdiction in line with the rule – could not stay the proceedings due to a prorogation agreement, lis pendis or mutually linked claims, in case the alternative court does not have a seat in a contracting state. The rules contained in Art. 17, 21 and 22 of the Convention, which, inspired by these reasons, set mechanism for the distribution of jurisdiction, are to be applied only in relations between the courts of contracting states. According to the view of the Appellate Court, such results would be opposite to the intentions of the authors of the Convention, from it ensues that rule of Art. 2 of the Convention may not imperative in a case when conflict of jurisdiction includes courts of a member and non-contracting states. Finally, application of forum non conveniens doctrine in relations between an English court and a court of a non-contracting state would not be contrary to a free flow of judicial decisions in the EU, because if an English court was to stay its jurisdiction, there would be no judgment on the issue of the case that could be recognised and enforced in another contracting state. The Supreme Court that heard an appeal in this dispute did address a request for a preliminary interpretation to the European Court of Justice, but the request was cancelled because the parties reached settlement and so the European Court of Justice did not decide on the issue.

A decision on whether a court of a contracting state may stay jurisdiction by invoking *forum non conveniens,* the European Court of Justice finally made on 1 March 2005, when upon request of the English Appellate Court, and regarding *Owusu v Jackson,*[63] it gave a preliminary interpretation of

[62] Opinion of Advocate General Lėger on the Case C-281/02, of 14 December 2004, Journal of Judgments, 2005, I- 1383, item 38.

[63] Case C-281/02, *Owusu v. Jackson (t/a Villa Holidays Bal Inn Villas),* ECR, 2005, I-1383

Article 2 of the Convention and finally decide on the issue. The Court the position that the Brussels Convention does not allow a court of a contracting state to stay jurisdiction, which is based on Art. 2 of the Convention, with a justification that a court of a non-contracting state is a more appropriate forum for settling the dispute, even in cases when jurisdiction of a court of another contracting state is not an issue or when the dispute itself is not in any relation with any contracting state. In this manner the court clearly expressed an opinion that the English *forum non conveniens* doctrine is not in accordance with the Brussels Convention if the defendant is domiciled in the United Kingdom. The facts that a more natural or appropriate court may exist in a non-contracting state, or that the dispute itself is not connected to any contracting state by any circumstance, and therefore jurisdiction of any other court of a contracting state is not brought under question, are still of no relevance for the allowance of application of *forum non conveniens* mechanism.

Before we consider the rationale of this decision, we would like to point out the merits of the given case and the questions that were directed to the European Court. Mr. Owusu, a British national, domiciled in the United Kingdom, suffered severe bodily injuries in an accident that he had while sea-diving during his holiday in Jamaica in 1997. In 2000, he filed a claim against Mr. Jackson, a person who was also domiciled in the United Kingdom and who rented Owusu a villa for the duration of the holiday. The grounds of the statement of claim was breach of contract because the safety of the swimming zone was not secured. Aside from this, he sued for damages several companies from Jamaica that ran maintenance of the beach because they had not warned swimmers of the dangers that might cause accidents. The claimant and the defendant are therefore domiciled in the United Kingdom, but on all other relevant merits, the dispute was related to Jamaica. The accident occurred there, the villa was located in Jamaica, five of six defendants were companies domiciled on the island. Pursuant to these facts, the defendants presented before the English court that the natural forum for settling the case was a court in Jamaica, and concordantly raised an *forum non conveniens* objection.[64]

In this case, one of the defendants (Jackson) was domiciled in England, which opened up the issue of application of Art. 2 of the Brussels Convention, i.e. a question whether application of the Convention rejects the possibility of application of *forum non conveniens*. The court of first instance concluded that it is not entitled to stay jurisdiction over Jackson.

[64] CPR 3.1(2)(f).

The court found support for such a decision in *UGIS v Group Josi,*[65] at which the European Court of Justice gave an opinion that the Brussels Convention should be applied on the defendant that is domiciled in a contracting state regardless of the domicile of the claimant. The court did not accept the *forum non conveniens* objection not even in the case of defendants from Jamaica (even though this had been principally possible), with a reasoning that there had been risk of duplicity of efforts and the contingency for different judgments to be passed in case the proceedings were to be run also before the court in Jamaica.[66]

In appeal proceedings the Appellant Court reasoned that the Court of Justice never brought a decision on the key issue - whether it was possible for the court that is amenable on grounds of domicile of the defendant, i.e. on grounds of Art. 2 of the Convention, may stay jurisdiction in favour of courts of non-contracting states, and it may, then in what situations.[67] Subsequently, the Appellate Court addressed the European Court of Justice with the following questions: 1) whether it is contrary to the regimen of the Brussels Convention for the court that is in jurisdiction in line with Art. 2 of the Convention, refuse to carry out proceedings, using its discretion power that it has according to its national law, i.e. stay jurisdiction in favour of countries in which the Convention is not applicable (non-contracting states), and if there are any differences in cases when the dispute has nothing to do with other contracting states; and 2) if it is contrary, whether it is contrary to the Convention in all cases or only in limited situations.

The European Court of Justice gave its preliminary opinion, as we have said, in a form of decision (which is standard procedure) on 1 March 2005, according to which the application of English doctrine of *forum non conveniens* is contrary to the regimen of the Brussels Convention in cases when the defendant is domiciled on the territory of a state that participates in the Convention. In a copious rationale of interpretation, the Court firstly emphasised that the formulation of Art. 2 of the Convention there are no indicators that say that the dispute needs to be connected only to member states for it to be effective, and that the only necessary factor for the application of the Convention is that the dispute needs to possess a foreign element.[68] The Court expounded three key reasons for its decision. First, that the provision of Article 2 of the Convention is by its nature an imperative one and that for this reason the only exceptions from its

[65] Case C-412/98, ECR, 2000, I-5925.
[66]See: Harris, *Stays of proceedings and the Brussels Convention,* 54 ICLQ (2005)., p. 933.
[67] See (2002) IL Pr 45. Više: Harris, *op. cit*. p. 934.
[68] Clause 24 and 25 of the said Decision of the European Court of Justice

application are the ones that are expressly envisaged in the Convention itself.[69] Considering that the authors of the Convention had not envisaged *forum non conveniens* as an exception, even though this issue had been discussed when Denmark, Ireland and the United Kingdom acceded to the Convention, the Court concluded that there is no room for the application of this doctrine.

As a second argument for its view, the Court cited the fact that the application of the *forum non conveniens* doctrine would undermine legal certainty and security provided for by Convention rules on civil jurisdiction. It especially stressed that the principle of legal certainty is one of the basic goals of the Brussels Convention and that it is "the essence" of this Convention.[70] According to the Court's assessment, this is confirmed by the Preamble of the Brussels Convention because it clearly expresses an intent, with an aim to strengthen legal protection of persons that are inhabitants of the EU, to have in force common rules on jurisdiction that are to guarantee certainty in relation to distribution of jurisdiction between various courts before which proceedings may be run. For these reasons, the court deems that the principle of legal certainty certainly requires the rules on civil jurisdiction that deviate from Art. 2 of the Convention be interpreted in such a manner that would enable a well-informed defendant to reasonably predict before what courts, outside the state of his domicile, he/she/it may be sued.[71] If courts were to be allowed to apply *forum non conveniens,* the basic goals for which the Convention was created could not be viable because this doctrine authorises courts to reach decisions on its jurisdiction by balancing a large number of variegated factors. This surely would not lead to a uniform application of Convention rules on jurisdiction, which was the intended idea in the first place.

Finally, the Court acknowledged that the doctrine of *forum non conveniens* is recognised in a limited number of states and that a license for its application would undermine uniformity in the application of the Convention, which is another one of its goals.[72] The question whether application of *forum non conveniens* doctrine should be rejected in all situations remains unanswered by the court.

This decision of the European Court of Justice was met with various comments, before all critical ones, especially from the British Government

[69] *Ibid*. clause 37.
[70] *Ibid*. clause 38 and 41.
[71] *Ibid*. clause 40 and 42.
[72] *Ibid*, paragraph 43.

and proponents of the *forum non conveniens* doctrine. Foremost, the Court's opinion that Art. 2 does not allow any deviation, except in a limited number of cases that are expressly determined in the Convention, the commentary was that it is true that *forum non conveniens* is not envisaged by the Convention, but it is also not excluded by it.[73] The Convention simply remains silent about the issue because it does not contain a single provision on this question. Regarding the Court's standpoint that application of *forum non conveniens* leads to excessive legal uncertainty, the commentary was "uncertainty for whom?" They emphasise that the Court only mentions defendants and their need to defend at home, in an environment they know best, and in that respect they answer that *forum non conveniens* is a procedural instrument which the courts in common law countries offer to defendants who are misfortunate with their choice of court with which the claimant lodged a claim. On the other hand, commentaries are that it is simply wrong to think that defendants have full legal certainty if the dispute is being settled in their domicile country. Also mentioned was that the principle of legal certainty must protect not only the defendant, but the claimant too.[74] Among the criticisms of the decision of the Court were those that emphasised that the Court did not give any persuasive justification for the exclusion of application of *forum non conveniens* in cases when the alternative forum is a court of a state that is not member of the Convention.

Regardless of the criticism, the answer of the European Court is not an opinion, but a preliminary decision on the method of interpretation of the Brussels Convention as a legal act of the EU. This decision takes effect *inter partes* and is considered binding for the parties to the proceeding, i.e. the national court which started the procedure, as well as to the national courts that would issue decisions in relation to legal remedies in that proceedings. What is more, it also binds other national courts as well in cases when they meet the same problem, because the purpose of issuance of decisions on preliminary interpretation is to ensure equal interpretation and uniform application of the EC legislation on the entire territory of the Union.

It remains as a conclusion that the doctrine of *forum non conveniens,* as a national procedural rule, may not be implemented in proceedings carried out by courts of member states of the European Union with international jurisdiction. In this territory, the referred doctrine only remains as a issue of possible academic contention, which clearly indicates that in practice of

[73] McEleavy, *Forum non Conveniens and the Brussels Convention,* 54 ICLQ (2005), p. 974.; Harris, op. cit. pg. 937.
[74] McEleavy, *op. cit*., p. 977.

English courts it lost treatment and significance that it used to have. Nevertheless, it still exists and is applied in common law countries outside the Union.

Summary

The doctrine of *forum non conveniens* is a common law doctrine that allows a court to decline existing jurisdiction if the court is satisfied that there is some other available forum, having competent jurisdiction, which is appropriate forum for the trial on the claim, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice. In English law, this doctrine has developed constantly and significantly.

Having in mind that Brussels Convention entered into force in the United Kingdom 1987, the issue of possible incompatibility of the *forum non conveniens* doctrine with the Convention appeared. This question has given rise to very divergent assessments on the part of English courts, in particular where the doctrine falls to be applied in relations between a Contracting State and a non-Contracting State. The answer to this question was given by the European Court of Justice gave in *Owusu*. Conclusion was that Brussels Convention precludes a court of a Contracting State (English court) from exercising a discretionary power to stay its jurisdiction on grounds of the *forum non conveniens* doctrine.