

## **FORUM SHOPPING: UNACCEPTABLE PRACTICE?**

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### **Abstract in original language:**

Tento příspěvek se zabývá jevem "forum shopping" v mezinárodních sporech, kdy strany využívají možnosti zvolit si mezi pravomocí soudů různých států. Nejprve je definován pojem forum shopping. Poté jsou popsány různé druhy fora shopping. Následně jsou představena a zhodnocena pozitiva a negativa jevu forum shopping. Dále jsou rozebírány možnosti a nutnost omezení fora shopping. V závěru je potvrzena stanovená hypotéza.

### **Key words in original language:**

Forum shopping; výběr fóra; žalující; žalovaný; právní jistota; unifikace; kritéria pro určování pravomoci.

### **Abstract:**

This contribution deals with legal international forum shopping. Firstly, the term forum shopping is defined. Then, various forms of forum shopping are introduced. Afterwards, positives and negatives of forum shopping are presented and evaluated. Subsequently, the possibilities of reduction of forum shopping and its necessity are discussed. Finally, the stated hypothesis is confirmed.

### **Key words:**

Forum shopping; choice of venue; plaintiff; defendant; legal certainty; unification; basis of jurisdiction.

## **1. INTRODUCTION**

„Forum shopping is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favorably presented: this should be a matter neither for surprise nor for indignation.“ (Lord Simon of Glaisdale<sup>1</sup>)

“Forum shopping is a plaintiff by-passing his natural forum and bringing his action in some alien forum which would give him relief or benefits which would not be available to him in his natural forum.” (Lord Pearson<sup>2</sup>)

At the moment of lodging a claim, the claimant's aim is, of course, to achieve the best possible result of the dispute. Thus, he must consider carefully, in which venue to file an action (provided the litigants did not prorogate the venue in their contract).

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<sup>1</sup> In Lowenfeld, A. F. Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation. American Journal of International Law, 1997, p. 314.

<sup>2</sup> In Fawcett, J. J. Forum Shopping – Some Questions Answered. Northern Ireland Legal Quarterly, 1984, No. 2, p. 141.

This phenomenon of choosing between two and more possible venues is called forum shopping. The phrase forum shopping has been generally known for about thirty years<sup>3</sup> as a result of an increased number of transnational disputes connected with emergence of global economy.<sup>4</sup>

In legal practice, forum shopping is on one hand regularly used by litigants and on the other hand, widely disapproved by judges. The same disparity rules over legal literature. Forum shopping is seen as a natural act of seeking the most advantageous venue in which to try a case.<sup>5</sup> At the same moment, it is also criticized because, in some opinions, forum shoppers unfairly exploit jurisdictional or venue rules to affect the result of a dispute.<sup>6</sup>

Therefore, the focus of this paper is to confirm or refuse the following hypothesis: "Forum shopping is an unavoidable procedural tactic of litigants that is based on the possibility to choose between jurisdictions of courts of various states. Forum shopping cannot be completely eliminated."

At the beginning, I will introduce the phenomenon forum shopping which is only rarely discussed in Czech legal literature.<sup>7</sup> In the second part of this contribution, I will concentrate on the consequences of forum shopping. After that, I will prove possible means of dealing with forum shopping and their efficiency.

In this article, I am going to deal with legal international forum shopping. On the contrary, I do not concern misusing procedural practices of litigants.

## **2. TERM „FORUM SHOPPING“**

Before starting to deal with the phenomenon forum shopping, it is necessary to define the term because it is understood very differently.

Basically, it can be differentiated between

- 1) Legal forum-shopping,
- 2) Misusing forum-shopping.

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<sup>3</sup> The practice as such is definitely older. It was firstly mentioned in a judicial opinion in 1952 but the term was known years before. Juenger, F. S. *Forum Shopping, Domestic and International*. Tulane Law Review, 1988 – 1989, p. 553.

<sup>4</sup> Bell, A. S. *Forum Shopping and Venue in Transnational Litigation*. Oxford: Oxford University Press, 2003, p. 14 - 15.

<sup>5</sup> Forum shopping defense e.g. Algero, M. G. In *Defense of Forum Shopping: A Realistic Look at Selecting a Venue*. Nebraska Law Review, 1999, p. 79 – 112; Juenger, F. S., fn. 3, p. 553 – 574; McGuire, M.-R. *Forum Shopping und Verweisung. Über die Vermeidung missbräuchlicher Prozesspraktiken im Europäischen Zivilprozessrecht*. ZfRV, 2005, No. 3, p. 83 – 93.

<sup>6</sup> Opeskin, B. R. *The Price of Forum Shopping: A Reply to Professor Juenger*. Sydney Law Review, 1994, No. 14, p. 14 – 27.

<sup>7</sup> E.g. Pauknerová, *Evropské mezinárodní právo soukromé*. Praha: C. H. Beck, 2008, p. 341; Rozehnalová, N., Týč, V. *Evropský justiční prostor ve věcech civilních*. Brno: Masarykova univerzita, 2003, p. 29 – 32.

## **2.1 LEGAL FORUM SHOPPING**

Legal „forum shopping“ is defined as an act of seeking the most advantageous venue where a case is to be tried.<sup>8</sup> In other words, the claimant makes legally use of his right to choose between the courts which have jurisdiction to decide a case.

Such possibility of forum shopping is caused by lack of uniformity, e.g. by

the existence of separate, often broadly based and thus concurrent jurisdictions<sup>9</sup> all over the world and

differences in states' choice of law rules and internal laws<sup>10,11</sup>

The second important factor is a frequent presence (not only physical) of defendants – multinational corporations and individuals - within more than one forum, which increases the number of possible jurisdictions.<sup>12</sup>

Accordingly, legal forum shopping is based on procedural rules, i.e. on valid laws. Thus, forum shopping is an expression of the principle of autonomous will which rules in private law.

## **2.2 MISUSING FORUM SHOPPING**

From legal forum shopping, misusing forum shopping must be distinguished. The choice of forum is abusing when a claim is purposely lodged by a court which apparently does not have jurisdiction.

For example, parties to a contract prorogated the jurisdiction of Austrian courts in their agreement but the claimant filed an action at an Italian court. The only reason for it was that proceedings before Italian courts take very long time. The claimant actually wanted to obstruct the proceedings and in Italy he could be sure that he would win not only months but several years until the court decides that it has no jurisdiction.<sup>13</sup>

In other words, the aim of such choice of venue is not to protect one's rights but to blockade the protection of counterparty's rights. Such special cases of forum shopping are called “(Italian) torpedoes”. The main difference between “classical” forum shopping and torpedo is that the goal of the former is to influence the decision of the court while the aim of the latter is

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<sup>8</sup> Algero, M. G., fn. 5, s. 79.

<sup>9</sup> E.g. art. 14 of the French Code Civil (it allows French plaintiffs to sue anybody in France) or sec. 23 of the German Code of Civil Procedure (it allows to sue in Germany anybody who has some assets (no matters of which amount) there). Bell, A. S. fn. 4, p. 9.

<sup>10</sup> This is also true in the member states of the EU. Although legal protection here is taken for equally effective, it is not congenerous. McGuire, M.-R. fn. 5, p. 86 – 87.

<sup>11</sup> Bell, A. S. fn. 4, p. 15.

<sup>12</sup> *Ibid.*, p. 11.

<sup>13</sup> Decision of the European Court of Justice C-116/02 *Erich Gasser GmbH v. MISAT Srl.* from 9. 12. 2003.

that there is no decision at all. 14 Unlike forum shopping, torpedoes are based on factual aspects of the case and the jurisdiction of courts is not decisive for them. It is only a misusing procedural tactic which shall be eliminated.<sup>15</sup>

Similar effect can have a situation when a defendant lodges a counterclaim at a court that does not have a jurisdiction.

### **2.3 OTHER TYPES OF FORUM SHOPPING**

Besides legal and misusing forum shopping, it can be differentiated between:

1) a) Horizontal forum-shopping – shopping for the best venue from among the courts within the same court system, e.g. for the best state court.

b) Vertical forum-shopping – shopping for federal court instead of state court and vice versa.<sup>16</sup>

2) a) Domestic forum shopping – forum shopping within one (federal) state. Domestic forum shoppers are primarily motivated to gain more favorable substantive law.<sup>17</sup>

b) International forum shopping – forum shopping between two or more states. International forum shoppers try to take advantage of procedural legal advantages.<sup>18</sup>

3) a) Claimant's forum shopping – lodging of a claim by a court according to the claimant's choice.

b) Defendant's = Reverse forum shopping – defendant's effort to change the court, e.g. by lodging a counterclaim at another court or by objection of forum non-conveniens.

It must be added that forum shopping is not equal to choice of venue made by a mutual agreement of parties to a contract (prorogation).

### **3. REASONS FOR FORUM SHOPPING**

Choice of a particular venue can be of vital importance in transnational litigation because it influences many factors that are decisive for the result of a dispute. These factors can be basically divided in two groups:

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<sup>14</sup> To the states with very slow court proceedings count also Belgium, Portugal and France. McGuire, M.-R. fn. 5, p. 86 – 87. For more details about torpedoes see Hartley, T. C. The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws. *International and Comparative Law Quarterly*, 2005, No. 10, p. 815 – 821.

<sup>15</sup> *Ibid.*, p. 93.

<sup>16</sup> Algero, M. G., fn. 5, p. 80.

<sup>17</sup> Dorward, D. J. The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs. *U. Pa. J. Intl'Econ. L.*, 1998, No. 1, p. 151.

<sup>18</sup> *Ibid.*

## Legal

Procedural rules of the venue (e.g. long-lasting procedure, costs of proceedings, discovery, juries etc.),

Choice of law rules of the venue,

Governing substantive law likely to be applied by the courts of the venue (huge amounts of damages<sup>19</sup>, limitation periods, possibility to get divorced<sup>20</sup> etc.),

Claimant's orientation in the law of the venue,

Possibility of recognition and enforcement of the court's decision in foreign states.

## Factual

Convenience of the claimant (familiarity with the venue, claimant's orientation in the state of the venue, the language to be used in a court, contacts with lawyers in the state, political connections, contacts to lawyers etc.),

Location of the witnesses,

Reputation of the judges and/or jurors of the venue (fairness, pro-plaintiff bias),

Political climate and bias.

From these entire factors, the most decisive for claimants are their familiarity with the forum, procedural advantages for plaintiff (or procedural disadvantages for defendant), legal costs, speed and mode of the litigation etc. On the contrary, the divergences of the choice of law rules are not as crucial for plaintiff's decisions as it is sometimes believed<sup>21</sup>. In short, the roots of forum shopping lie in lack of uniformity of a mixture of internal laws, choice of law rules and procedural laws of various legal systems.<sup>22</sup>

## 4. EVALUATION OF FORUM SHOPPING

### 4.1 CLAIMANTS' AND DEFENDANTS' POSITIONS IN FORUM SHOPPING

The critics of forum shopping understand it as a wrongdoing and abuse of plaintiffs to which they are not entitled. The reason is that plaintiffs, being the first to decide actively about the

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<sup>19</sup> A typical case is the USA with jury trials, large damages awards, non-recovery of costs rules, and expansive rules of pre-trial recovery. It is said that „As a moth is drawn to the light, so is a litigant drawn to the United States.“ Juenger, F. S., fn. 3, p. 562.

<sup>20</sup> Schack, H. Internationales Zivilverfahrensrecht. 3. Auflage. München: C. H. Beck, 2002, p. 101.

<sup>21</sup> Bell, A. S. fn. 4, p. 47; Juenger, F. S., fn. 3, p. 572 – 573.

<sup>22</sup> Bell, A. S., fn. 4, p. 24 – 25.

forum, have better chances to determine it. Therefore, in the critics' opinions, plaintiffs gain unfair advantages over defendants.<sup>23</sup>

This statement can be agreed with. Being the first to choose the forum, plaintiff can win a tactical advantage in the procedure. For example, the chosen forum provides remedies for a plaintiff, which he otherwise would not have. A defendant has only the possibility to react on the venue chosen by the plaintiff and to defend himself against it if it is necessary whereas his tools to achieve this goal efficiently are limited by the court selected by the plaintiff.<sup>24</sup> In extreme cases, the trial in an alien forum may make it difficult for the defendant to put up an adequate defense.

But this does not mean that the defendant will be only disadvantaged. For example, if the plaintiff chooses a venue with efficient procedural rules and/or lower costs of litigation, both parties can benefit from it.<sup>25</sup> Moreover, if the defendant is permitted to defend himself from forum shopping, the plaintiff's forum shopping converts in defendant's forum shopping. This is the case when defendants lodge a counterclaim or an objection of forum non-conveniens.

In addition, if jurisdictional rules of various states allow forum shopping, plaintiffs can be hardly blamed for choosing the venue where they can receive the most favorable judgment. Only a deliberate choice of a forum, which is inconvenient and oppressive for the defendant, can be suppressed.<sup>26</sup>

## **4.2 LEGAL UNCERTAINTY**

A typical reason underlying the policy against forum shopping is the uncertainty about venue and consequently, uncertainty about applicable substantive law which it causes. I share the opinion that choice of law rules and consequent material laws can be the important motives for plaintiff's decision. This again is disadvantageous for defendants who cannot influence the choice of law by choice of forum. On the other hand, the diversity of legal solutions and the litigants' opportunity to choose a suitable legal climate can be taken for very positive and desirable for the parties to a dispute.<sup>27</sup>

These attitudes differ according to the legal culture, the former being typical for continental Europe while the latter for the Common law states.

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<sup>23</sup> Dorward, D. J., fn. 17, p. 151 – 152.

<sup>24</sup> This topic is more dealt with in chapter 5.

<sup>25</sup> *Ibid.*, p. 152.

<sup>26</sup> Fawcett, J. J., fn. 2, p. 144

<sup>27</sup> Rozehnalová, fn. 7, p. 29.

### **4.3 UNNECESSARY COSTS**

It is also objected to forum shopping that it is a waste of time, money and resources.<sup>28</sup> If parties to a dispute can choose a venue, there is always space for litigating the jurisdiction of a court by other courts. Thus, the costs are bigger and additional proceedings oppress the parties and overload the courts. Conversely, it can be argued, that the costs, time and resources lost while litigating of venue are nothing unusual. Choice of jurisdiction is a procedural issue. Litigating venue is like litigating any other procedural issue, e.g. evidentiary issues, which the parties must count with.<sup>29</sup>

Then, forum shopping is often rejected with a “public interest argument”. Many foreign actions brought before courts of a particular state (such as the USA) in connection with the necessity to familiarize themselves with foreign substantive laws and to apply it constitute serious burdens for the courts. Consequently, the local actions can be delayed.<sup>30</sup>

This might be true. But on the other hand, the choice of a particular forum means its popularity. It shows that it is a centre for international trade and that foreign businessmen confide in its courts. Accordingly, the litigants bring not only disputes before the courts but also trade to the country. A typical example of such a popular venue is London.<sup>31</sup>

## **5. DEALING WITH FORUM SHOPPING**

As I showed in the previous chapter, forum shopping can really have some negative consequences, especially for defendants. Hence, I will now concentrate on potential mitigation of this problem. There are several possibilities how to deal with forum shopping the keyword being unification. They can be divided into two groups:

Jurisdictional rules

Bases of jurisdictions stated in legal rules and/or judicial decisions,

Tools for contravening the jurisdiction (to be used ex offio or on defendants discretion),

Unification of choice of law rules/substantive laws.

Basically, dealing with jurisdiction depends on the legal culture the particular state belongs to. While the civil law countries maintain the legal predictability and certainty mirrored in the clear written (not only) jurisdictional rules and the tools to oppose them, the common law states live from their (for continental lawyers) sometimes vague judicial decision tradition. This, of course, influences their approaches to forum shopping.

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<sup>28</sup> Algero, M. G., fn. 5, p. 111.

<sup>29</sup> *Ibid.*, p. 111.

<sup>30</sup> Fawcett, J. J., fn. 2, p. 145.

<sup>31</sup> *Ibid.*, p. 146.

## **5.1 JURISDICTIONAL RULES**

### **5.1.1 BASES OF JURISDICTION**

For forum shopping are decisive the bases of jurisdiction allowed by various states. To avoid forum shopping, it is necessary to define bases of jurisdiction which require a substantial connection with the forum.<sup>32</sup> This does not mean that only exclusive jurisdictions must be approved but that the concurrent jurisdictions must be reduced.<sup>33</sup>

#### *a) European Union*

An example of such efficient rules are the regulations Brussels I<sup>34</sup> and Brussels II<sup>35</sup> - although they allow more than one jurisdiction for various situations<sup>36</sup> (i.e. they do not completely eliminate forum shopping within the member states of the European Union, hereinafter “EU”) they ensure that disputes are sufficiently linked with the forum state.<sup>37</sup> Combined with the Rome Convention on law applicable to the contracts (hereinafter “Rome Convention”, see next chapter) providing similar choice of law rules in all member states, the incentives to forum shop are strongly reduced in the whole EU.

Conversely, e.g. two bases for jurisdiction, which are not sufficiently linked with a particular venue like the American minimum contact jurisdiction, open room for litigants to forum shop.

Another example of unified jurisdictional rules that also allow to choose from more than one jurisdiction is the article 31 of the Geneva Convention on the Contract for the International Carriage of Goods by Road (hereinafter “CMR”). A litigant can choose among several alternative fora according to the ordinary residence of the defendant, the defendant’s principal place of business, the branch or agency through which the contracts of carriage are made or the place of take-over or delivery of the goods.

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<sup>32</sup> Fawcett, J. J., fn. 2, p. 146.

<sup>33</sup> Schack, H., fn. 19, p. 102 - 103.

<sup>34</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; similar rules are contained in the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>35</sup> Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

<sup>36</sup> For example, in matters relating to a contract, plaintiff can choose between the general jurisdiction stipulated according to the domicile of the defendant (article 2) and the alternative jurisdiction stipulated according to the place of performance of the obligation (article 5.1).

<sup>37</sup> Similar attempts to widely unify the rules for determining of the jurisdiction of the courts were made on the world level with the proposal of the Hague Agreement on Jurisdiction and Civil Judgments. One of the reasons for its failure were the provisions concerning refusal of jurisdiction (the “American” approach) and avoiding of parallel jurisdictions (the “European” Approach) discussed in the next chapter.



However, the situation is different than under the Brussels regulation that is prevailed by CMR which is as a specific legal regulation. These venues are not always situated in the member states of the EU and hence, it cannot be counted with the same choice of law rules as under the Rome Convention. Therefore, CMR is an example of uniform international jurisdictional rules that not only admit forum shopping but that can even promote it.<sup>38</sup> Notwithstanding, the chances to forum shop are definitely narrower than in the states approving exorbitant jurisdictions.

#### *b) Federal Law of the United States of America*

A different example offer the USA where the base of jurisdiction is created especially by the judgment of the Supreme Court of the USA *International Shoe v. Washington*<sup>39</sup>. This case shifted from the strictly territorial jurisdiction of courts to personal jurisdiction, based either on the so called minimum contact of the defendant with the venue<sup>40</sup> or on the tag/transient jurisdiction.<sup>41</sup>

This means that the dispute must not have a sufficient link to the venue and it can be still brought before an American court. For that reason, American courts are overloaded with foreign claims that were lodged only to gain benefits from the favorable American laws and they will have to cope with it unless they change their laws.

### **5.1.2 INITIATIVE OF DEFENDANTS - DISCRETIONARY POWER OF COURTS**

When considering defendants' possibilities to oppose the venue chosen by a plaintiff, it must be again distinguished whether the dispute takes place in countries with common law or civil law tradition. However, under both systems, it is possible to bring an action for negative declaratory relief in a state that convenes the prospective defendant before the prospective plaintiff commences its action in another state. In this way, a potential defendant can have his rights and liabilities as to the potential plaintiff declared by the court.<sup>42</sup>

#### *a) European Union*

Concerning the refusing of the venue by defendants, in the EU operates the so called Brussels system established on *lis pendens* ("the first in time rule"): the jurisdiction has the first seized court if proceedings in the second state involve the same claim between the same parties pending already at the first court. In such a case, the second court must defer the action to the

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<sup>38</sup>Ferrari, F. Forum Shopping Despite International Uniform Contract Law Conventions. *International and Comparative Law Quarterly*, 2002, p. 692 – 694.

<sup>39</sup> *International Shoe v. Washington*, 326 U.S. 310 (1945).

<sup>40</sup> E.g. sale of goods to an American who sold the goods further to consumers living in the USA who were injured by it.

<sup>41</sup> E.g. If the defendant is on a fortnight holiday in the USA. Philip, A. *The Global Hague Judgments Convention: some comments*. In *Intercontinental cooperation through private international law: essays in memory of Peter E. Nygh*. Einhorn, T., Siehr, K. The Hague: T. M. C. Asser Press, 2004, s. 301.

<sup>42</sup> Algero, M. G., fn. 5, s. 102 – 103.

first court to eliminate parallel proceedings.<sup>43</sup> There is no room for discretion of courts under the European regulations.

This system might on one hand raise the race to a court; however, I find it still better because it rules out seriously inconvenient fora. Beyond that, the standard of civil proceedings in the EU is generally taken for comparable so the litigants are not forced to forum shop as much as in other cases.

For those reasons, the other defendants' tools to fight against forum shopping usual in common law countries are taken unnecessary and not allowed in the EU. In summary, forum shopping is still available to the first plaintiff but not to its adversary.

b) *Federal Law of the United States of America*

*In states where jurisdictions of courts are widely defined, the discretionary power to refuse jurisdiction of courts can be an effective means of reducing forum shopping. The proceedings can be counterattacked through following tools:*

*Doctrine forum non-conveniens,*

*Anti-suit injunction.*

*Both doctrines can be granted under the fulfillment of two conditions: the defendant must raise the objection of forum non-conveniens or claim an antisuit injunction and the court must decide to grant them. The court's decision is subject to a great degree of interpretation and discretionary power of the tribunal.<sup>44</sup>*

*While the doctrine forum non-conveniens allows courts to decline their jurisdiction to decide a case if – according to judge's opinion – a more suitable alternative forum exists, antisuit injunctions have a reverse goal: they protect courts' jurisdictions by issuing an order that prevents an opposing party from commencing or continuing a proceeding in another jurisdiction. Both solutions are derived from the broadening concept of personal jurisdiction to moderate the expansion of jurisdiction.<sup>45</sup> Forum non-conveniens is defined and delineated in the U.S. Supreme Court case law; it has no statutory or constitutional foundation. Anti-suit injunctions were developed by case law as well.<sup>46</sup>*

*Thus, the defendants in Common law states have more chances to impugn the jurisdiction chosen by plaintiffs. However, they can never be sure that courts really accept their*

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<sup>43</sup> For more details see e.g. Bohúnová, P. Odmítnutí pravomoci soudů ve věcech občanských a obchodních: americké a kontinentální řešení. Časopis pro právní vědu a praxi, 2008, No. 4, p. 378 – 385.

<sup>44</sup> Nelson, N. Forum non-conveniens, comity, antitrust injunctions and parallel proceedings. In: Proceedings of the annual meeting. 1996, p. 62 - 67.

<sup>45</sup> The test of application of the doctrine is stated in the judgment 330 U.S. 501 (1947) Gulf Oil Corp v. Gilbert.

<sup>46</sup> One of the earliest cases was Unterwesser Reederei 428 F.2d 888 (5th Cir. 1970). In Nelson, N. Forum non-conveniens, comity, antitrust injunctions and parallel proceedings. In: Proceedings of the annual meeting. 1996, s. 65.

*objections. This is not in conformity with legal predictability required by critics of forum shopping. On the other hand, if the courts are friendly to defendants, they support the reverse forum shopping. In short, the tools that shall help to fight against forum shopping can actually encourage it.*

Being a continental lawyer I prefer the Brussels systems with its certain degree of legal certainty (though without defendant's chances to contravene the chosen forum) to the complicated and sometimes unclear common law systems.

## **5.2 UNIFICATION OF CONFLICT OF LAW RULES**

There have been several attempts in the field of the unification of conflict of law rules that states a higher degree of legal predictability and legal certainty of the parties that shall suppress forum shopping as one of their main goals.<sup>47</sup> The unification of choice of law rules is definitely very advantageous for the determination of applicable laws.<sup>48</sup> Notwithstanding, in practical terms, this method has had, as yet, only a little effect when dealing with forum shopping as it can never discourage a litigant who seeks procedural advantages.<sup>49</sup>

The unification of choice of law rules is not necessary where the domestic laws of alternative fora are identical. However, this is an Utopian idea. The unification of substantive laws regulating the interstate relations has been only minor. In a limited way, it was achieved with a few international conventions such as the above mentioned Convention CMR or by the United Nations Convention on Contracts for the International Sale of Goods (CISG). This is especially due to the limited sphere of application of the conventions, to their (usually) dispositive nature, possibility of declaring reservations and diverging interpretations of their provisions. There are also often loopholes in texts of the conventions which have to be filled in by the law of the forum. Sometimes, conventions expressly refer to *legis fori*. Moreover, the unification of legal rules for international cases in connection with different jurisdictional rules can even promote forum shopping.<sup>50</sup>

In summary, the unification of choice of law rules and uniform international rules can reduce the possibility for forum shopping but it cannot prevent it. These methods for dealing with forum shopping are only back-up discouragement factors which do not get to the root of the problem that is basically the jurisdictional one.<sup>51</sup>

Conversely, one could say that forum shopping leads to the unification of conflict of law rules so forum shopping is positive because thanks to it, determining of applicable law is easier.

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<sup>47</sup> E.g. Rome Convention on law applicable to the contracts.

<sup>48</sup> Rozehnalová, N. fn. 7, p. 30 – 32.

<sup>49</sup> Fawcett, J. J., fn. 2, p. 150.

<sup>50</sup> Ferrari, F., fn. 38, p. 689 – 707.

<sup>51</sup> Fawcett, J. J., fn. 2, p. 150; Ferrari, F., fn. 39, p. 707.

## **6. CONCLUSION**

In my contribution, I wanted to answer two basic questions – whether forum shopping is only a negative phenomenon and whether it can be eliminated.

The first question is answered in the fourth chapter. Here, I showed that the position of claimant is definitely stronger than the position of defendant. It is also clear that forum shopping can bring legal unpredictability and sometimes additional costs to all parties and courts as well. However, the reality of forum shopping is not only one-colored.

The named negatives can be often counterbalanced by various positives the defendants or forum-shopping-popular countries can profit from. The awareness of the possible negatives of forum shopping also compels the parties to concern about their rights before a dispute arises between them. Therefore, they agree on jurisdiction of courts and on applicable law in their contracts which brings the required legal predictability in their relations. This is a really efficient way how to avoid forum shopping.

Moreover, it must be considered that forum shopping is not a bad will of the claimant. Plaintiffs' initial selection of the venue is a lawful strategic choice. It should not be understood as an unfair and abusive practice as it is founded on the availability of various laws which is neither wrong nor unusual. Thus, it does not necessarily violate ethical rules.

The said unavoidable plurality of world legal systems, culture and other factors also allows the conclusion that forum shopping can never be really eliminated. As long as various laws exist, forum shopping will exist. There are no ways around it, it can be only reduced.

For all these reasons, I share the opinion that forum shopping should be recognized as a legitimate practice and legitimate use of procedure when procedural rules are followed.<sup>52</sup> Therefore, the hypothesis is confirmed.

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<sup>52</sup> Algero, M. G. fn. 5, p. 111.

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*Dávid R., Neckář J., Sehnálek D., (Editors). COFOLA 2009: the Conference Proceedings, 1. edition.  
Brno : Masaryk University, 2009, ISBN 978-80-210-4821-8*

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