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Forum non Convenience as a Basis for Determining of Jurisdiction

Abstract: The institution of *forum non conveniens* as a base for determining jurisdiction in special situations is a doctrine of the Anglo-Saxon legal system. This doctrine allows the court to assess whether it is better to continue the proceedings or if it is more efficient to leave the jurisdiction for the given case to the court of another country. The court will make the said decision, only if it determines that it is "more appropriate" to conduct the proceedings before another court. This doctrine is not known in the continental legal system. However, given the fact that a legal relationship with a foreign element consists of several facts, the question can be raised as to whether it is more or less "connected" to the judiciary of a domestic or foreign country. The paper defines the concurrent jurisdiction of the courts, which is the basis for the application of the doctrine of *forum non conveniens*, and this institute is analyzed in relation to *lis pendens*, as well as the deviation clause. In the work, the authors pays attention to the application of the Brussels Convention on Jurisdiction and the Recognition and Enforcement of Court Decisions in Civil and Commercial Matters, as well as the Brussels and Brussels Ia Regulations, which replaced the aforementioned Convention and abolished the application of *forum non conveniens* in Great Britain until its exit from the EU. Finally, the authors analyzes the possibility of applying the doctrine of *forum non conveniens* in the continental legal system, and therefore its place in the legislative system of the Republic of Serbia.

Key words: jurisdiction, *forum non conveniens*, Anglo-Saxon legal system, *lis pendens*, deviation clause.

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1. INTRODUCTION

The disputes with a foreign element are dealt by the internal (domestic) courts of a country. Given that there is no international court or other body that would resolve disputes related to civil law relations with a foreign element, it is necessary to define the jurisdiction of the courts in the said disputes. Of course, in order to achieve this, it is necessary to determine when the court of a country will have jurisdiction. The jurisdiction of the courts, by the way, is defined by internal procedural rules. However, jurisdiction in disputes with a foreign element is not determined for each court, especially within one country, but is determined at the level of the entire country. If the court of one country is competent in these disputes, it is a matter of its

internal rules, which court it will be.[1] Otherwise, jurisdiction with foreign element can also be called abstract jurisdiction. It refers to the authority of all courts in a country to act in a specific case.[2] However, there are disputes in which only the domestic court of the country with which the dispute or the subject of the dispute has a very strong connection can act. The law of the country that determines the exclusive jurisdiction of its courts decides what this connection is. On the other hand, in other disputes, the jurisdiction of the courts of other countries can be determined, which means that both domestic and foreign courts can act in certain cases. We call such jurisdiction concurrent. But, with concurrent jurisdiction, there is a possibility of *lis pendens*, that is, a conflict of jurisdiction. Then, it should be determined which court first started the proceedings, in order to define jurisdiction.

In the Anglo-Saxon legal system, there is the institute of *forum non conveniens*, which enables the court, in certain situations, to assess whether it is better to continue conducting the proceedings or whether it is more efficient to leave the jurisdiction for a given case to the court of another country. This means that, when applying this institute in a specific case, the court that has a close connection with the case, but also that would be more suitable for conducting that procedure for other reasons concerning both the parties who are participants in the procedure, and, also, the subject of the dispute. Also, the application of the aforementioned institute or doctrine raises with it the question of the application of other institutes of private international law that concern decision-making by the court of another country that has a certain connection with the case. First of all, *forum non conveniens* should be related to the aforementioned institution of *lis pendens*, i.e. conflict of jurisdiction, when two courts simultaneously or within a short time interval initiate proceedings in the same matter and between the same parties. Then, when applying *forum non conveniens*, the question arises of recognizing the decision of a foreign court, the jurisdiction of which is determined by the application of this doctrine, that is, the application of the applicable law in that procedure, considering the fact that jurisdiction is determined by this institute according to criteria that are not always firmly defined. Also, the issue of *forum non convenens* arises in situations where jurisdiction is established by prorogation, that is, by agreement of the parties.

In any case, the institute *forum non conveniens* cannot be applied if there is no question of concurrent jurisdiction. Then, this institute should be put on the same level as *lis pendens*, but also compared to the deviation clause, considering that the rules for determining jurisdiction are also deviated from in *forum non conveniens*. Finally, the authors of the paper will try to answer the question of whether an institute related to Anglo-Saxon law would be possible in our country and other countries that apply different rules on jurisdiction that do not allow the discretion of the court to be decisive when defining which court will act. in a given dispute with a foreign element.

2. FORUM NON CONVENIENCE AS THE INSTITUTE OF THE ANGLO-SAXON LEGAL SYSTEM

The application of foreign law in the countries of the Anglo-Saxon legal system can be limited by a procedural institute called *forum non conveniens*. If the plaintiff addresses the court, e.g. in England with a claim for damage compensation, in order to exercise a

[1] Čolović V. (2012), *Međunarodno privatno pravo*, Panevropski univerzitet Apeiron, Banja Luka, 258.

[2] Stanivuković M., Živković M. (2004), *Međunarodno privatno pravo, opšti deo*, Beograd, 183.

right not otherwise recognized in foreign law, and he could have exercised his right before a court in a foreign country, such a claim will be rejected. Namely, the plaintiff must not abuse the opportunity to exercise his right and improve his position in relation to the defendant, by choosing a second competent court in order to exercise rights that the primary competent court believes cannot be exercised.[3] Otherwise, there are two basic criteria for regulating international jurisdiction. The first one refers to the Anglo-Saxon countries, where the legislator determines the principles and guidelines, and the courts decide on each specific case for the establishment of international jurisdiction, that is, jurisdiction with an element of foreignness. Then it is about the doctrine of *forum non conveniens*.[4] Another way to regulate international jurisdiction refers to its regulation through internal rules.[5] So, if there is a basis for establishing jurisdiction, the court must initiate the procedure, that is, continue it, if this question is raised during the procedure. However, in Anglo-Saxon countries, this rule can be deviated from, as we have said, by referring to *forum non conveniens*, that is, by stating that, although there is jurisdiction of the court acting in a given case, some other jurisdiction represents a much more suitable solution for the applicant of the claim or other request. Otherwise, according to the general rules of the countries of the continental legal system, if the legislator has prescribed the basis of a certain type of jurisdiction, the courts cannot review the adequacy and economy of such a solution, especially if objections were taken into account that the refusal of jurisdiction would be contrary to the right to a fair trial and the right to access the court, which is guaranteed by Article 6 of the European Convention on Fundamental Human Rights and Freedoms.[6] But on the other hand, the plaintiffs have to take into account that their lawsuit will be dismissed, even though all the conditions for establishing the jurisdiction of a particular court in the USA or in the United Kingdom have been met.[7]

The institute of *forum non conveniens* originates originally from Scottish law from the 19th century. It was later accepted in almost all countries of the common law system. But England accepted *forum non conveniens* in the 1970s. Jurisprudence has concluded in this sense that there are no differences between Scottish and English law. That is why older decisions of Scottish courts are often cited in explanations of judgments of English courts. When applying this doctrine, the basic question that arises relates to the fact when the court should accept the defendant's request to dismiss the lawsuit. Jurisprudence gave an answer to this question, through the reasoning of the Scottish judge Keener in the *Sim v. Robinous* from 1892. Namely, in the explanation of the verdict, it is emphasized that the request to dismiss the lawsuit should be accepted, if the court considers that there is another competent court, which would be more suitable for conducting the proceedings,

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3 Pak M. (1991), *Međunarodno privatno pravo*, Beograd, 429.

4 Čolović V. (2012), 258.

5 Fisher H.D. (2002), *The German Legal System&Legal Language*, Routledge Cavendish, London, Sydney, 290.

6 Law on Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Zakon o ratifikaciji Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda)..., *Sl. list SCG - Međunarodni ugovor*i, br. 9/2003, 5/2005 i 7/2005 - ispr. i *Sl. glasnik RS - Međunarodni ugovori*, br. 12/2010 i 10/2015.

7 Topić Šimunović A. (2022), „Međunarodna nadležnost - pojam, značaj i vrste", *Revija za pravo i ekonomiju,* god. 23, br.2, Pravni fakultet Univerziteta „Džemal Bijedić" u Mostaru, 140.

considering the interests of all parties in the proceedings.[8]

The basic principle is that *forum non conveniens* will apply only if the court is satisfied that there is another forum available to the parties and competent, which is appropriate in the particular case. Appropriate means that the procedure will be conducted in a manner that is more suitable for the interests of all parties and the goals of justice.[9]

Determining whether there is a basis for applying *forum non conveniens* consists of two stages. In the first phase of the first instance, it is determined whether there is another forum available, and in the second phase, whether it is clearly more appropriate. In the second stage, the interests of the parties are first evaluated and it is determined how much importance should be attached to them, and then the "quality of justice" that can be obtained in that system is compared with the situation before the English courts. Each aspect is evaluated according to the circumstances existing at the time of submission of the application.[10]

2.1. The role of the defendant in the application of forum non conveniens

The defendant may file a motion to dismiss the lawsuit, if he considers that the English court is not suitable for conducting the proceedings. This means that the burden of proving that fact lies on him.[11] In cases where the jurisdiction of the court is determined according to the place where the real estate is located, then the place of regular residence or residence of the defendant, the place where the contract was concluded, the jurisdiction of the English court does not come ipso iure. The prosecutor must obtain permission to conduct the proceedings. He would have to prove that by conducting the proceedings in another country, and not in England, he would be put in a disadvantageous position, considering the increased costs, the way of presenting evidence, etc.[12] The application of the doctrine of *forum non conveiens,* in fact, is a way of defending of the defendant against the jurisdiction of a court.[13]

Forum non conveniens depends of the power of the court's discretion. The court analyzes and balances the interests of the plaintiff, the defendant, as well as the forum itself. This means that the judge himself determines the specific importance of each mentioned element, in order to be able to make an appropriate decision.[14]

3. CONCURRENT JURISDICTION AND FORUM NON CONVENIENCE

Only in the case of concurrent jurisdiction, the question of the existence of the *forum*

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8 Marin J. (1997), „Opće razgraničenje odgovornosti brodovlasnika i doktrina forum non conveniens", *Poredbeno pomorsko pravo*, vol.39 no.153-154, Jadranski zavod HAZU, Zagreb, 41.

9 Kršljanin N. (2008), „Forum non conveniens", *Anali Pravnog fakulteta u Beogradu* god. LVI, br. 1, 249.

10 Kršljanin N. (2008), 250.

11 Ćorić D. (1991), „Forum (non) conveniens i englesko pravo", *Uporedno pomorsko pravo*, vol. 33, no.129-130, Jadranski zavod HAZU, Zagreb, 161.

12 *Ibidem.*

13 Marin J. (1997), 41.

14 Petrović M. (2007), „Forum non conveniens in english judicial practice and European Union Law" , *Revija za evropsko pravo,* vol. 9, br. 2-3, Udruženje za evropsko pravo - Centar za pravo Evropske unije, Kragujevac, 26.

non conveniens institute can be raised, which allows choosing between different forums the one that is the most suitable, i.e. whose procedural and collision rules are the most appropriate for the solution or case.[15] This is logical, given that each of the parties wants success in the procedure, so the said institute represents a kind of incentive for them. However, in order for the parties to be able to achieve the above, it is necessary to have as many elective bases of jurisdiction as possible, i.e. defining the widest possible criteria of general jurisdiction.[16]

Concurrent jurisdiction of domestic courts does not exclude the possibility of establishing the jurisdiction of a foreign court in the same matter.[17] This means that a party can initiate proceedings, in a specific case, either before a domestic or a foreign court. This does not constitute an obstacle to the recognition and enforcement of a foreign decision, if the party has decided on the jurisdiction of a foreign court. Concurrent jurisdiction of the domestic court is foreseen in matters, which are not so interesting for the state, in relation to cases, where exclusive jurisdiction is foreseen.[18] We will mention only some cases, i.e. disputes, in which there is competing or selective jurisdiction, which is defined by the Act on the Resolution of Conflicts of Laws with the Regulations of Other Countries (further: ARCL).[19] First, jurisdiction with foreign element of the domestic court exists, if there are special binding points: a) in disputes arising from non-contractual liability for damage and when the damage occurred in the territory of the domestic country; b) in disputes about property claims, when the property of the defendant or the subject of the claim is located in the home country; c) in disputes related to the defendant's obligations, which arose during his stay in his home country; d) in disputes related to the right of disposal and right of lien on an aircraft, sea vessel or inland navigation vessel; e) in disputes related to interference with possession of movable property, that is, if the interference occurred on the territory of the home country; f) in disputes related to interference with possession of an aircraft, sea vessel or inland navigation vessel.[20]

In addition to the above, the domestic court will be competent to declare a missing person - a foreign citizen as deceased, if the person died on the territory of the home country. So, apart from the criterion of citizenship, which determines exclusive jurisdiction, jurisdiction in this matter is also determined by the place of occurrence. Likewise, the domestic court can be competent in disputes related to immovable property. Namely, if the immovable property of a domestic citizen is located abroad, the domestic court will have jurisdiction if the foreign court, i.e. the court of the place where the immovable property is located, is not competent. The same is with the case with the movable property of a domestic citizen in probate proceedings. If these things are located abroad, and according to the law of that country, its court is not competent, our court will be competent. If the inheritance of a foreign citizen is in question, which consists of movable property, and these property are located on the domestic territory, then the domestic court will have

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15 Topić Šimunović A. (2022), 138.

16 Topić Šimunović A. (2022), 140.

17 Fisher H.D. (2002), 290.

18 Vuković Đ. (1987), *Međunarodno građansko procesno pravo*, Zagreb, 18.

19 Zakon o rešavanju sukoba zakona sa propisima drugih zemalja Republike Srbije (Act on the Resolution of Conflicts of Laws with the Regulations of Other Countries) , *Sl.list SFRJ* br. 43/82 i 72/82- ispr., *Sl.list SRJ* br.46/96 i *Sl.glasnik RS* br. 46/2006 – dr.zakona.

20 Čolović V. (2012), 267-268.

jurisdiction, except in the case, if in the country of the decedent-foreign citizen, the court of that country is not competent.[21]

When deciding on the application of *forum non conveniens*, the court examines all relevant issues related to the case and which concern the real and essential connections between the case itself and the court that should make a decision on that case. That's why we mentioned the cases when competitive jurisdiction can be established, i.e. what are the situations according to the ARCL. But the court should examine, when determining the grounds for *forum non conveniens*, the following elements: residence or seat of the parties, as well as potential witnesses, location of evidence, local interests of each of the states in which the proceedings may be conducted or which has any connection with the procedure, difficulties in applying foreign applicable law, the number of participants in the procedure, the possibility of recognition and enforcement of the decision in each of the possible countries related to the case, the costs of the procedure, the period in which the decision can be made, etc.[22] All these elements must be closely related to the other country, which will be the basis for application of *forum non conveniens*.

We must say that England (not counting Scotland that we mentioned), in addition to the USA, is one of the countries that was among the first to accept the application of the *forum non conveniens* institute, which was later developed through judicial practice. However, the problem of applying this doctrine arose when Great Britain acceded to the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters from 1968.[23], (which later took its form as Regulation Brussels I, i.e. Regulation Brussels Ia). Namely, the goal of this Convention was to unify and balance the civil procedural rules of different EU member states in order to strengthen the judicial protection of persons residing in the EU.[24]

4. FORUM NON CONVENIENCE AND THE PROVISIONS OF THE BRUSSELS REGULATION I (IA)

In the EU, the matter of jurisdiction was regulated, first of all, by the aforementioned Brussels Convention. First of all, this Convention provided for general jurisdiction, that is, it defined that proceedings can be initiated against persons residing in the contracting state before the court of that state. Likewise, the aforementioned jurisdiction was also based in the case when those persons are not citizens of that country, but have a residence in it.[25] This Convention also regulated special jurisdiction, when it is based outside the residence of the defendant. Then it is a matter of concurrent jurisdiction. We will mention some cases: a) contract disputes - place of execution of the contract; b) maintenance - residence or place of residence of the recipient of maintenance; c) damage from delict - place of harmful action; d) disputes related to representative offices, representative offices, branches - the place of their headquarters; etc.[26] More than three decades later, the Council and the European Parliament passed Regulation no. 44/2001 (Regulation Brus-

[21] Čolović V. (2012), 268-269.
[22] Petrović M. (2007), 24.
[23] Published in *Official Journal* L 299, 31.12.1972., and the refined text in *Official Journal* C 027 26.01.1998.
[24] Petrović M. (2007), 22.
[25] Varadi T., Bordaš B., Knežević G. (2001), *Međunarodno privatno pravo*, Novi Sad, 503.
[26] Varadi T., Bordaš B., Knežević G. (2001), 504-505.

sels I).[27] Regulation 44/2001 completely replaced the Brussels Convention.[28] According to Regulation 44/2001, the courts of the Member State in which the defendant is domiciled have general jurisdiction.[29] Determining the place of residence is carried out according to the rules of the internal law of the country of the court, which initiates the procedure, on the basis of general jurisdiction, that is, according to the *lex fori*.[30] Regulation 44/2001 provides for the possibility of initiating proceedings against persons residing in one of the member countries before the courts of other member countries, if there is a reason to establish special jurisdiction under the provisions of Regulation 44/2001. For defendants residing in the territory of another country, jurisdiction will not be determined according to the rules of this Regulation, but according to the national rules of the member states. Exceptions are situations in which the conditions for the exclusive jurisdiction of a member state are met in accordance with Article 22 of Regulation 44/2001, when the residence of the defendant is not important, even if it is located in the territory of a third country or the existence of a prorogation agreement in favor of the court of a member state. Precisely because of the mentioned problem, the Commission deleted the disputed condition in Article 4, paragraph 1 of Regulation 1215/2012 (Brussels Ia Regulation),[31] which provided for the possibility of applying the rules on special jurisdiction to defendants who do not have a residence on the territory of EU countries.

As we said, Great Britain has implemented the provisions of the Brussels Convention. Namely, the Act on Jurisdiction and Court Decisions in Civil Matters from 1982, which came into force in 1987, included the provisions of the Brussels Convention, with the doctrine of *forum non conveniens* retained in the case of proceedings related to Scottish court cases, so that within the framework of the same rules, they do not apply the Brussels Convention, which is also defined by Article 49 of the aforementioned Act.[32]

We will also say that the Brussels Convention did not contain rules on the interaction between the subjects of EU countries and countries that are outside the EU. This problem has been partially resolved by the EU approving the application of the Hague Convention on Choice of Court Agreements[33], in such a way that it is foreseen that a court within the EU that initiated proceedings after a non-EU court can, in the interest of the administration of justice, that is, with discretion, refuse jurisdiction in favor of a non-EU court.

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[27] Cuncil Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *Off.Journal EC* L 12, 16/01/2001, p. 1–23.

[28] Except when it comes to Denmark.

[29] Grabinski K. (2007), „The Brussels I Regulation (Council Regulation 44/2001) in Patent Infringement Litigation", *IP Enforcement Week*, Münich, 3.

[30] Stanivuković (2002), „Regulativa saveta o nadležnosti i priznanju i izvršenju sudskih odluka u građanskim i trgovinskim stvarima (2001/44/EC)", *Evropsko zakonodavstvo* br. 1/02, 10.

[31] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), *Off.Journal EC* L 351, 20/12/2012, p. 1–32.

[32] Beaumont P. (2018), „*Forum non conveniens and the EU rules on Conflicts of Jurisdiction: A Possible Global Solution*", *Revue critique de droit international privé* 2018/3 (N° 3), p. 447-457, https://www.cairn.info/revue-critique-de-droit-international-prive-2018-3-page-447.htm, access: 1.6.2024.

[33] The Hague Convention of 30 June 2005 on Choice of Court Agreements, https://www.hcch.net/en/instruments/conventions/full-text/?cid=98.

However, the above will be accepted only in situations, when it is possible to insist on the acceptance of the general norm related to *lis pendens*, where the court that first initiated the procedure resolves the same.[34] So, the main problem is reducing the influence of *forum non conveniens* in relation to giving importance to the institution of *lis pendens*.

After Brexit, on January 1, 2021, the transition period of Great Britain's exit from the EU, i.e. from the customs union and the single market, ended. This means that Regulation 1215/2012 no longer has force in the UK either. On the other hand, the Hague Convention on Choice of Court Agreements remains in force, which applies only to agreements and exclusive choice of court. Thus, the scope of *forum non conveniens* is expanded.[35]

Here we will also mention the provision of Article 31 of Regulation 1215/2012 (Brussels Ia Regulation), which gives priority to the application of the rules related to *lis pendens* in relation to *forum non conveniens*. Namely, if more than one court has exclusive jurisdiction in one proceeding, then every court except the court that started the proceeding will declare itself incompetent in favor of that court. Then, if jurisdiction is established by prorogation, then any court of another member state will suspend the proceedings until the court, which initiated proceedings based on the agreement on jurisdiction, is declared incompetent based on the provisions of that agreement. Then, if the court designated by the treaty has established jurisdiction in accordance with its provisions, then any court of another member state will be declared without jurisdiction in favor of that court.[36] Practically, it can be seen from this provision that legally regulated jurisdiction, as well as jurisdiction determined by the agreement of the parties, has priority over the opportunistic attitude towards the determination of jurisdiction in accordance with lower or greater chances of success in the dispute.

We must also say that the cases of *Gasser* and *Owusu*[37] showed that there are limitations in the application of the *forum non conveniens* institute, which are primarily imposed by the Brussels I Regulation. This limitation clearly shows the rejection of this institute before the courts of EU member states, regardless of whether in the legal systems of those countries, this institute has its place or not. This fact also applies to cases where the jurisdiction of the court under this institute also concerns other countries outside the EU. The relationship between *forum non conveniens* institute and *lis pendens* is clearly established, which has primacy in relation to the said Anglo-Saxon institute.[38]

In the end, we will say that the preliminary opinion of the European Court of Justice from March 1, 2005 was crucial, according to which the application of the doctrine of *forum non conveniens* is contrary to the regime established by Regulation Brussels I and Brussels Ia. The European Court of Justice limited itself to cases where the defendant re-

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[34] Beaumont P. (2018).

[35] Farrington F. (2022), "*A return to the doctrine of forum non conveniens after Brexit and the implications for corporate accountability*", *Journal of Private Intrenational law*, vol.18, issue 3, p.399-423; https://www.tandfonline.com/doi/full/10.1080/17441048.2022.2151092?scroll=top&needAccess=true, access: 1.6.2024.

[36] Art. 31, p. 1,2, 3 Regulation 1215/2012.

[37] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62002CJ0281, access: 10.6.2024.

[38] Brand R.A. (2013), „Challenges to Forum Non Conveniens", 45 *New York University Journal of International Law and Politics*,1015.

sides in the territory of the contracting state.[39]

5. FORUM NON CONVENIENCE AND LIS PENDENS

According to the rules of the Anglo-Saxon legal system, the court should not stop the proceedings if it becomes known that the same is already being conducted in another country, although it should take care to prevent two or more judgments in the same matter and between the same parties. So, if the proceedings before the foreign court were started a few days before the proceedings before the English court were started, it is unlikely that this factor will be taken into account. If the proceedings before the foreign court are already at an advanced stage and a verdict can be expected soon, it will be considered that the foreign forum is more appropriate, that is, the foreign court can retain jurisdiction. The same applies to prorogation agreements.[40]

Each procedure produces certain consequences that are embodied in making a decision. In this regard, two or more proceedings cannot be conducted in the same matter, given that, in that case, different decisions can be made, which would have negative consequences, both for the parties and for the execution of those decisions. In order to be able to talk about *lis pendens*, i.e. the situation where the court of the home country terminates the proceedings at the request of a party, if there is an ongoing dispute before a foreign court in the same legal matter between the same parties, the following conditions must be met: 1) If, first, a proceeding was initiated before a foreign court, based on the respective dispute. The time of initiation of proceedings before a foreign court shall be assessed according to the law of the country of that court, and the time of initiation of proceedings before a domestic court shall be assessed according to domestic law; 2) If it is a dispute, for the trial of which there is no exclusive jurisdiction of the court of the home country. So, if there is one of the cases, which leads to the establishment of the exclusive jurisdiction of our court, then there will be no *lis pendens*. Exclusive jurisdiction is therefore determined by our law; 3) If there is reciprocity. Reciprocity is assumed, until the contrary is proven, that is, until, in case of doubt about the existence of reciprocity, a request for notification of the existence of this procedural presumption is submitted. These are general rules. By the way, here we are interested in material reciprocity, which refers to the recognition and execution of foreign decisions, that is, it concerns the effect of a foreign decision in the home country.[41]

We must say that the most important element of *lis pendens* is the identity of the subject and the parties in one request. The question arises whether we can say that the identity of the basis of that request is an essential element.[42] The answer to that question depends on how one understands the structure of the claim. In theory, there are two approaches: substantive and procedural. According to the substantive legal understanding, identity depends not only on the factual basis of the claim and the content of the legal consequences that the plaintiff requests the court to issue with the claim, but also on the substantive legal basis of the claim. The European Court of Justice in legal case C-406/92, judgment of December 6, 1994, expressly determines that the basis of the claim is understood to be the facts and the legal rule relating to the claim, whereby the institution of *lis*

[39] Petrović M. (2007), 43.
[40] Kršljanin N. (2008), 251-252.
[41] Art. 80 ARCL.
[42] Vuković Đ. (1987), 100.

pendens is viewed through the lens of substantive law. On the other hand, the procedural law approach starts from the structure of the claim. When one claim differs from the other according to the factual basis and the content of the legal consequences, it is a two-part claim. However, if the initial criterion of distinction is only the content of the legal consequence, it is a one-member request. In Serbian doctrine and jurisprudence, the opinion on the two-part claim prevails because it consists of facts and the legal consequences that the plaintiff derives from them, with the note that the plaintiff is not obliged to state the legal basis of his claim in the lawsuit, and if he has determined it, the court is not bound by it.[43] Therefore, the identity of the request is changed if either of those two elements is changed. In Serbian law, the position that the legal basis stated in the lawsuit is not significant for the court can be fully defended only when it is a condemnation lawsuit. It should be emphasized that our judicial practice has changed with regard to the identity of the claim. First of all, the Supreme Court of Serbia in one of its decisions accepted the substantive legal point of view and confirmed that the existence of a final court decision between the same parties, in the same legal matter, i.e. in a matter that has the same factual and legal basis, produces a legal effect that makes it impossible to proceed that in another litigation can decide about that.[44] After that, the same court, applying a procedural approach, concludes that when there is an identity of claims in a lawsuit that has been legally concluded and a lawsuit that is ongoing, between the same parties, then the objection of the adjudicated matter is founded, regardless of the fact that the plaintiff in the new lawsuit has changed legal basis of own claim.[45] It is important to emphasize that in order to assess the identity of the litigation, in addition to the identity of the claim, it is necessary to clarify the subjective identity. It exists not only when both parties are the same person, but also when a co-litigant who does not have the status of a unique co-litigant appears alongside one party in a new lawsuit.[46]

In any case, if there is a *lis pendens*, the domestic court will terminate the proceedings, which it will decide by issuing a decision. The suspension of the domestic proceedings will last until the end of the proceedings before the foreign court. If a decision is made in the proceedings before a foreign court, which has effects in the home country, then the proceedings will be suspended in the home country. If no decision is made in the proceedings before the foreign court, i.e. if the effects of the decisions made in the proceedings cannot be recognized in the home country or the foreign court rejected the lawsuit or the plaintiff withdrew the lawsuit, then the proceedings before the domestic court will con-

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[43] Art. 192, p. 4. Zakona o parničnom postupku (Law on Litigation Procedure), *Sl. glasnik RS*, broj 72/2011, 49/2013- odluka US, 74/2013- odluka US, 55/2014, 87/2018, 18/2020, 10/2023- dr. zakon.

[44] Bilten sudske prakse privrednih sudova (Bulletin of judicial practice of commercial courts), no. 2/2001, 101. See the decision of the Supreme Court of Serbia, Prev. 81/2000.

[45] Judgment of the Supreme Court of Serbia, Rev 1031/2006, 7. 2. 2007, *Paragraflex* (judicial practice).

[46] Poznić B., Rakić Vodinelić V. (2015), *Građansko procesno pravo*, sedamnaesto izmenjeno i dopunjeno izdanje, Beograd, 313-316. When in both disputes there is the identity of the litigants, the claim and the factual basis, the said claim is already being litigated, regardless of the fact that in one of the litigations there is also another person on the defendant's side, i.e. the second defendant who is not a party to both proceedings (judgment of the Higher Commercial Court, Pž. 1906/2006(2), 11. 5. 2007, *Paragraf lex* (judicial practice).

tinue. *Lis pendens* as a procedural issue is defined by the *lex fori*.[47]

6. FORUM NON CONVENIENCE AND DEVIATION CLAUSE

As we said before, the doctrine of *forum non conveniens* must be analyzed in relation to the deviation clause. Namely, the basic task of the deviation clause is to eliminate a deficiency related to the application of law that is not closely related to the civil law relationship. Instead of the regular conflict norm, a conflict norm is substituted that is better adapted to the given situation and applies the law of the state with which the particular relationship is the closest. However, it is necessary for the law to authorize a judge who should resolve a specific civil law relationship with a foreign element in the specified manner.[48] We must say that the legislation of many countries, including the Republic of Serbia, does not define a deviation clause. However, the two most important differences between the doctrine of *forum non conveniens* and the deviation clause would be the following: 1) With *forum non conveniens* it is about determining the jurisdiction of the court, and with the deviation clause it is about the application of the applicable law; and 2) In the case of forum non conveniens, the suitability of the court that will lead the proceedings is proved, and in the case of the deviation clause, the connection of the legal relationship with the applicable law is proved. However, the most important similarity between these two institutes refers to the facts that make up the civil law relationship for which, according to those facts, the appropriate applicable law and the subject of the dispute should be determined, where the jurisdiction of another court can also be determined, but according to the facts that make up that subject . In both cases, the application of another law, that is, the determination of the jurisdiction of another court, is determined by the court that decides on one or the other.[49]

7. POSSIBILITY OF APPLYING FORUM NON CONVENIENCE OUTSIDE THE ANGLO-SAXON LEGAL SYSTEM

The question arises whether the doctrine of *forum non conveniens* could be applied in legal systems outside the common law countries, i.e. whether it would be justified to deviate from the defined rules on determining jurisdiction, when the case is more "related" to a different country than that one whose court is defined as competent, either in the provisions of the legal act, or in the agreement of the parties to the proceedings. When we mentioned the deviation clause before, we just wanted to draw a parallel between the determination of the right of inheritance and the definition of liability. Namely, if it is advisable to apply the applicable law that is more suitable for a legal relationship, why would it not be possible to determine the jurisdiction of the court that would conduct the procedure in a more efficient way and make a decision in relation to the court that according to the provisions of the law is competent for the given dispute. Of course, it is certain that the interests of the parties would have to be taken into account, as well as the effect of the decision made by the court that would be competent according to the aforementioned

[47] Čolović V. (2012), 276-277.

[48] Čolović V. (2019), „Klauzula odstupanja u međunarodnom privatnom pravu", *Strani pravni život* br. 3/19, 27; Kitić D. (2016), *Međunarodno privatno pravo*, Pravni fakultet Univerziteta Union Beograd, 116.

[49] Here we must note that when determining the applicable law, another body can decide, not only the court.

doctrine, in another country. In any case, when applying forum non conveniens, the public interest of all countries that have a connection with the case must be taken into account, which means that the institute of judicial courtesy (comity) must also be taken into account here. Namely, the analysis of whether this doctrine should be applied or not implies the determination of that interest related to the foreign forum that should make a decision on the case. In this sense, care should be taken in the application of the institution of comity towards a foreign country.[50]

We said that the ARCL does not regulate the deviation clause, nor the possibility of deviation from the rules of regulated jurisdiction in certain disputes. However, we will refer to two provisions of the Draft Act on Private International Law (further: Draft APIL),[51] which should be taken into account in the event that the question of establishing jurisdiction arises in one of the countries of the Anglo-Saxon legal system that accepts the institute of *forum non conveniens*. First of all, the Draft APIL foresees a provision on the establishment, that is, retention of jurisdiction, if the facts or circumstances on which the jurisdiction is based change in the course of the proceedings conducted before a court or other body of the Republic of Serbia.[52] The second provision relates to jurisdiction over related claims. Namely, if the court or other authority is competent to decide on one or more submitted requests, it is also competent to decide on other requests if they are related to the aforementioned requests. The Draft APIL defines that requests are related if there are such close links between them that one procedure is more adequately conducted and one decision is made, in order to avoid making contradictory, i.e. different decisions in separate procedures.[53] Whether the mentioned two provisions of the Draft APIL could be applied depends on the following facts: 1) before which court the proceedings were first initiated; 2) what kind of subject it is; 3) whether the parties in the proceedings are of the same or different citizenship, that is, whether one of the parties has the citizenship of a country belonging to the Anglo-Saxon legal system; 4) whether the application of *forum non conveniens* would suit the parties who have the citizenship of our country; and 5) whether the parties who have the citizenship of our country are connected by other facts with the country in which this institute is accepted. So, in the Draft APIL there are provisions that could be interpreted in favor of basing the jurisdiction of another court, but in precisely defined situations. The very definition of the establishment of jurisdiction speaks of the possibility that a procedure may be carried out by a court of a domestic or a foreign country and thereby question the connection of facts in a legal relationship with another country. As for the second provision relating to related claims, its broad interpretation may lead to the conclusion that one claim is "closer" to the domestic or foreign jurisdiction. Practically, by regulating these two issues, the Draft APIL created the possibility of defining the jurisdiction of the court of another country depending on the facts contained in a legal relationship. However, it is certain that *forum non conveniens* could not be applied in the way it is done in the common law system.

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[50] Solen D. (1994) "Forum Non Conveniens and the International Plaintiff" *Florida Journal of International* Law, vol. 9; Iss. 2, Art. 6, 350.

[51] The final version of the Draft Act on Private International Law https://www.mpravde.gov.rs/obavestenje/6274/konacna, access: 29.5.2024.

[52] Art. 12 Draft APIL.

[53] Art. 15 Draft APIL.

8. CONCLUSION

The fact is that the doctrine of *forum non conveniens* does not yet have its place in the continental legal system, that is, in systems where court jurisdiction is determined by law. The court's discretionary assessment that the case has a closer connection with another country, i.e. that due to a number of circumstances, the applicant should start proceedings in another country where he will have a better chance of success in the proceedings is not accepted in systems where the rules for defining jurisdiction are clearly defined. However, given the different situations that may arise in connection with the initiation of a procedure that contains an foreign element, that is, in connection with the facts that are the content of a particular dispute and that are related to different countries, the question arises about the possible modified application of *forum non conveniens*. Namely, if the parties, either the plaintiff or the defendant, prove that, in the first place, the subject of the dispute itself is more "bound" to another country than the one whose court has jurisdiction, as well as that the court of another country could establish jurisdiction in that dispute, as well as if there would be no obstacles to the recognition and execution of a decision made on the basis of such a determined jurisdiction in another country, then there would be no obstacles to the introduction of this institute in legal systems that do not recognize it in their legislation. However, the aforementioned carries with it the danger that the wide discretion of the court in these situations may lead to abuses, primarily by the parties or one of the parties. But if we consider the existence of the deviation clause[54], which entails the application of a point of binding that deviates from that provided for by law, it is certain that *forum non conveniens*, with certain additions in application, would find its place in the legislation that has not yet regulated this institution.

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[54] Although it is not foreseen in the legislation of the Republic of Serbia.

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Forum non conveniens kao osnov određivanja nadležnosti

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Rezime: Institut *forum non conveniens* kao osnov određivanja nadležnosti u posebnim situacijama je doktrina anglosaksonskog pravnog sistema. Ovom doktrinom se omogućava da sud proceni da li je bolje da on nastavi vođenje postupka ili je efikasnije da nadležnost za dati predmet prepusti sudu druge zemlje. Sud će doneti navedenu odluku, samo ako utvrdi da je „prikladnije" da se pred drugim sudom vodi postupak. U kontinentalnom pravnom sistemu ova doktrina nije poznata. No, obzirom na činjenicu da se jedan pravni odnos sa elementom inostranosti sastoji iz više činjenica, može se postaviti pitanje da li je isti „povezan" više ili manje za pravosuđem domaće ili strane zemlje. U radu se definiše konkurentna nadležnost sudova koja predstavlja osnov za primenu doktrine *forum non conveniens*, a ovaj institut se analizira i u odnosu na litispendenciju, kao i klauzulu odstupanja. Autori u radu posvećuju i pažnju primeni Briselske konvencije o o nadležnosti i priznanju i izvršenju sudskih odluka u građanskim i trgovačkim stvarima, kao i Uredbama Brisel i i Brisel Ia, koje su zamenile navedenu Konvenciju i koje su ukinule primenu *forum non conveniens* u Velikoj Britaniji sve do njenog izlasak iz EU. Najzad, autori analiziraju mogućnost primene doktrine *forum non conveniens* i u kontinentalnom pravnom sistemu, pa samim tim i njeno mesto u zakonodavnom sistemu Republike Srbije.

Ključne reči: nadležnost, *forum non conveniens*, anglosaksonski pravni sistem, litispendencija, klauzula odstupanja.