# IS IT NECESSARY TO AMEND THE JURISDICTIONAL RULES OF REPUBLIC OF ARMENIA WITH THE TRADITIONAL "FORUM NON CONVENIENS" RULE ?

Legal practitioners from civil law countries, especially those from post-soviet area (hereinafter referred as "Developing civil law systems" or "DCL systems") find the doctrine of "forum non convenience" (hereinafter referred as "FNC") very strange. It is, indeed, very unusual, at least in DCL systems, that the court may have discretionary power to decline to exercise its jurisdiction, when it would be more convenient for the parties if their case would be heard by the other court[1].

However, as a matter of fact, the absorption of different legal institutes from developed legal systems is now a widely accepted practice in DCL systems, no matter how unusual those institutes are for their local legal cultures.

I believe that the FNC could be next candidate for incorporation into a DCL system such as the legal system of the Republic of Armenia (hereinafter referred as "RA"). Thus the necessity of doing so would be considered within this paper.

For that reason we would first have to understand the main objectives of the FNC doctrine. Second we will review the set of current RA jurisdictional rules applicable in context of private international law in order to reveal the possible legal gap. Finally the necessity of injection of the FNC as it is accepted in common law systems (hereinafter referred also as "traditional FNC") rule into RA legislation will be discussed.

In this paper the historical development of FNC as well as diverse aspects regarding the practical application of the doctrine in common law systems (hereinafter referred as "CL systems") will not be considered.

While going through the mentioned issues we will compare the FNC doctrine with the concurring "lis pendens" (hereinafter referred as "LP") doctrine from perspective of objectives of those two institutes. Furthermore evaluations would be made regarding the necessity of traditional FNC rule in RA legislation based on the analyses of specific features of the FNC doctrine.

## 1. WHAT ARE THE OBJECTIVES OF THE "FORUM NON CONVENIENS" ?

### 1.1 The definition of FNC.

Being invented in nineteenth century in Scotland the doctrine of FNC became widely accepted in Common law systems such as England, US, Canada, Australia etc.

From very wide perspective the FNC could be described as a jurisdictional rule which is designed to solve the, so-called, "jurisdictional conflicts".

[1] Gonson, S. D, 'FORUM NON CONVENIENS' (1999) Revue Québécoise de Droit International, no.2, 1 No need for referring to HeinOnline. Only refer to electronic source if there is no hardcopy.

The Legal Information Institute portal of Cornell University Law School contains a laconic and at the same time very comprehensive overview of the FNC doctrine which is described as a discretionary power that allows courts having jurisdiction pursuant to the relevant jurisdiction rules to dismiss a case where another court, or forum, is much better suited to hear the case based on several factors, such as the residence of the parties, the location of evidence and witnesses, public policy, the relative burdens on the court systems, the plaintiff's choice of forum, etc.[2]

### 1.2 Objectives of FNC doctrine.

Edward L. Barrett Jr. in his publication "The Doctrine of Forum Non Conveniens" while discussing the importance of identification of objectives of the FNC as guidelines for the courts implementing the doctrine, suggests that the question "whose interests are to be protected ?" is a main test for revealing the objectives of the discussed instrument[3].

With this perspective, in legal literature[4] two main objectives of FNC are suggested.

The first one is public-law objective according to which FNC mostly protects the public interests while resolving the conflict of jurisdiction, it defines the court that should hear the case ordering the other court to stay the proceeding, basically protecting the courts from undesirable "case overload".

The second one is an objective of doing justice to the parties by reserving the right to hear the case to the court which is more related to the case thus more able/inclined to hear the case due to principles of justice (hereinafter referred as "private law objective").

For the further purposes of this paper it is worth mentioning that lawyers from CL systems giving greater weight to private interests than to public interests usually label the second objective as a main one [5]. Whereas, it is well known, that in contrast to common lawyers, continental lawyers prefer the dominance of public law interests along with the certainty and predictability of legal regulations. For that reason the LP doctrine, developed and traditionally accepted in civil law systems, is mainly designed to protect the interests of a public nature solving the problem of conflicting jurisdictions simply preserving the right to hear the case to the court first seized. This doctrine can also be characterized as a more certain and predictable rule.

In this paper both FNC objectives will be considered and further analysis will be made within the context of public-law and the private-law objectives.

## 2. IS THERE A LEGAL GAP IN THE RA JURISDICTIONAL RULES ?

### 2.1. Overview of current jurisdictional rules of RA.

Current RA jurisdictional rules regulating jurisdictional issues within the scope of private international law can be found basically in "Kishinev Convention on legal aid and legal assistance in civil, family and criminal matters of

[2] Legal information institute portal, < https://www.law.cornell.edu/wex/forum_non_conveniens> accessed 7 November 2015'

[3] Edward L. Barrett Jr., "The Doctrine of Forum Non Conveniens" (1947) 35, "California Law review", 420 < http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3543&context=californialawreview> accessed 07 November 2015

[4] Trevor Hartley, *International Commercial Litigation*: (Cambridge University Press. Kindle Edition 2015), 224-225.

[5] Trevor Hartley, *International Commercial Litigation*: (Cambridge University Press. Kindle Edition 2015), 224.

2002"[6] (applicable by/between the member states of the "Commonwealth of Independent States"), in "Bilateral treaties of legal aid and legal assistance in civil, family and criminal matters" signed between Republic of Armenia and Republic of Lithuania or Republic of Armenia and Republic of Romania etc., as well as in national legislation and mostly in "Civil procedural code of Republic of Armenia".

The above mentioned instruments contain well known rules granting jurisdiction to the forum of domicile of the respondent, to the forum of the place of contractual performance, to the forum chosen by parties according to the choice of forum agreement signed between them etc. .

However for the purposes of this paper we will concentrate on the regulation resolving the so-called "conflict of jurisdictions". This regulation (with slight modifications) can be found in "Kishinev Convention" as well as in "RA Civil procedural code"[7]. Because of the similarity of the regulations and because of the fact that the wording of the convention (as international treaty) in any case will prevail over the wording found in the code (national law), within this paper we will refer to the wording found in "Kishinev Convention" which states that "where proceedings involving the same cause of action and between the same parties are brought in the courts of two contracting states, the court that seised last shall of its own motion decline its proceedings"[8].

### 2.2. Identification of the Legal gap

As we can see the regulation stipulated in "Kishinev Convention" is a strict and simple rule of the LP doctrine the role of which is to solve the issue which court should have jurisdiction in case of concurring procedures. As it has already been mentioned above, the LP rule (especially in case of convention's wording) covers only one of the FNC objectives that is the protection of the public interests (first objective discussed in section 1.2.).

It is obvious that the RA jurisdictional rule regulating the conflict of jurisdictions, leaves the interests of private parties (second objective discussed in section 1.2.) completely uncovered.

Indeed, we cannot find a single element in discussed regulation which will express some concern to interest of private parties. The reasons of the convention's drafters strict position in relation to the discussed rule also may be found in the communist/socialist past of the member states of the "Commonwealth of Independent States" where total dominance of public interests over the private interests could not be disputed.

However, I believe that private interests cannot be disregarded in modern legal systems. Thus the current legislative trends should be oriented towards balanced protection of not only public but also private interest.

Summarizing all above mentioned it can concluded that there is a gap in RA jurisdictional legislation as far as there is no rule (or even element of the rule) that would protect the interests of private parties when deciding the jurisdictional conflicts.

## 3. IS TRADITIONAL FNC NECESSARY TO FILL THE GAP ?

Discussing the necessity of the FNC rule as a tool to fill the gap in RA legislation described in previous section, we should keep in mind that the

[6] Sometimes this treaty is also referred as "Minsk and Kishinev Conventions on legal aid and legal assistance in civil, family and criminal matters of 1993 and 2002", because the Kishinev Convention is recast of Minsk Convention some articles of which are still in effective.

[7] "Civil procedural code of Republic of Armenia" article 246 [1].

[8] "Kishinev Convention on legal aid and legal assistance in civil, family and criminal matters of 2002", article 24 [1].

doctrine, although having many advantages[9], is not free from criticism.

For example, Hartley discussing the disadvantages of the doctrine mentioned a large measure of subjectivity involved, which, according to author, means that the two courts may reach different conclusions even if they apply the same criteria. Along with subjectivity Hartley also mentions unpredictability and uncertainty as other negative aspects of doctrine[10].

Indeed the subjectivity, unpredictability and uncertainty are problematic issues for such a developing legal system as Armenia where the risk of judicial partiality is still too high.

Furthermore, as it is discussed in the very beginning of this paper, the FNC doctrine by his nature is quiet unusual for the DSL systems. Thus the "injunction" of this doctrine (rule), as it is, into Armenian legal system may cause some kind of "system revolution" which is a controversial and not always desirable side effect of legal innovations.

For the purposes of this paper it should be noted, there could be an alternative solution, such as amendment of the current jurisdictional rules with the regulations that would enable the courts, even if being seised first, upon some exact factors, probably in limited scopes, to decline jurisdiction in favor of courts seised second if the court seised first finds that the other court is manifestly more connected/related to the case.

In other words in order to cover the legal gap discussed in previous sections, it is also possible to amend the LP rule with an element that to some extent will provide justice to the parties of judicial process instead of substituting it with the FNC rule (as it is accepted in CL systems). Without any doubts this alternative solution should be researched further before actual incorporation.

It could be argued that the suggested solution is some modification of FNC, because it resembles the common law doctrine, as far as to some extent, it addresses the interests of parties of litigation. Although it is definitely not the same traditional institute as accepted in common law system, just because of the fact that in case of proposed solution there should be two concurring proceedings initiated, only then the court would be allowed to exercise its discretion, whereas in case of traditional FNC it is not important whether there is a process initiated or not against other court.

Thus, taking into account all the above mentioned considerations incorporation of traditional FNC rule, as it is accepted in CL systems, into the RA legislation is suggested to be unnecessary.

## CONCLUSION

There is no doubt that a legal gap exists in jurisdictional regulations of the Republic of Armenia as far as current rules cover only one of the two objectives of the FNC doctrine which is the protection of public interests, whereas the second objective of the doctrine - providing justice to parties, remains completely unaddressed.

However, basically due to existence of alternative solution (discussed above) and taking into account the controversial and unusual nature of the FNC doctrine which is often characterized as subjective and unpredictable institute, it is concluded (suggested) that in order to fill the mentioned gap there is no necessity to inject the traditional FNC rule into RA jurisdictional legislation.

[9] In practice the FNC could be very useful for restricting "forum shopping", "Italian torpedo cases" etc.

[10] Trevor Hartley, "International Commercial Litigation", (Cambridge University Press. Kindle Edition 2015), 224-225.