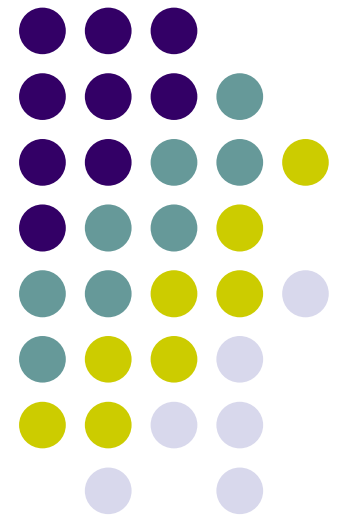
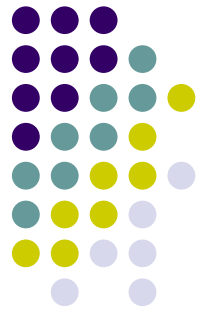


Forum non conveniens and forum shopping

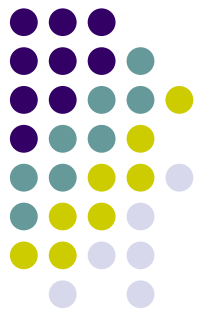
Zdeněk Nový
3rd Session



The aims of the presentation



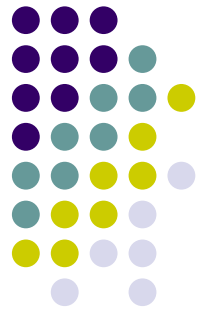
- Focus on forum on conveniens with special regard to Brussels I Regulation
- View on forum shopping



Forum non conveniens

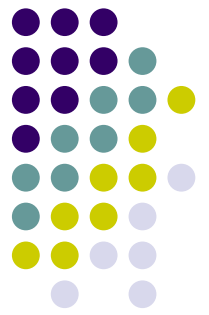
- Conveniens – lat.
- In English – convenience
- Convenience= *‘the quality of being suitable or useful for a particular purpose, especially by making something easier or saving you time’* (Longman Dictionary of Contemporary English, 2006, sub voce ‘convenience’)
- F.n.c. should solve a problem of suitable forum for a dispute

Forum non convenience - definition



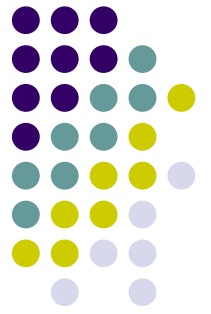
- Schlosser's Report (para 76):
 - 'Exceptionally, the courts may refuse to hear or decide a case, if they believe it would be **better** for the case to be **heard** before a court having equivalent jurisdiction in another State (or another judicial area) because this would increase the likelihood of an **efficient** and **impartial hearing** of the particular case' (emphasis added).
 - Key element: DISCRETION OF THE COURT

Historical roots of non conveniens



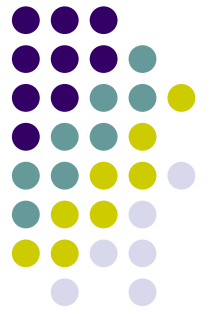
- Comes from Scottish-law concept forum non competens
- Borrowed by English law (as well as American and Australian Law)
- McShannon v. Rockware Glass Ltd.[1978] A.C. 795: Lord Diplock rejected existence of non convenience doctrine in Common Law

Forum non conveniens in England



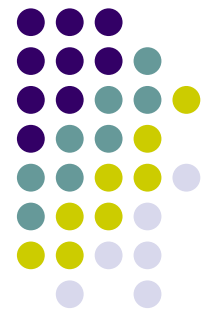
- The Atlantic Star [1974]A.C. 436:
- ‘[...]mere balance of convenience is not sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court.’
- McShannon v. Rockware Glass Ltd.[1978] A.C. 795: Lord Diplock rejected existence of non convenience doctrine in Common Law

Forum non conveniens in England II



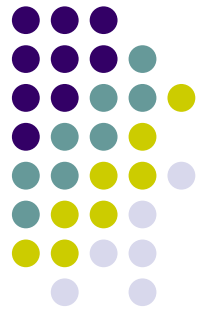
- The Abidin Daver [1984]A.C. 398:
acceptance of forum non convenience in English law by House of Lords
- Lubbe v. Cape[2000] 1 WLR 154 (HL):
 - Compatibility of forum non conveniens with fair trial (e.g. availability of legal aid)

The Spiliada case [1987]A.C. 460



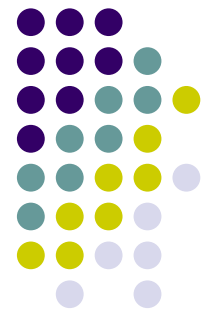
- The concept of ‘natural forum’
- Question concerning stay of proceedings
- Conditions for forum non conveniens:
 - some other available forum
 - in which the case may be tried more suitably
 - **for the interests of all parties**
 - **for the ends of justice**

Key words



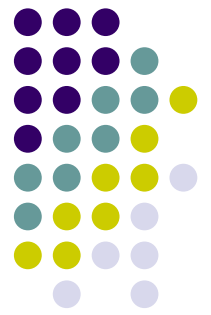
- Natural forum
- Discretion
- Interest of all parties
- The ends of justice
- Suitable forum

Forum non conveniens and civil law systems



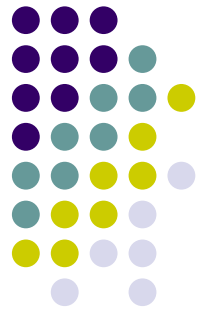
- Judicial discretion (thus f.n.c.) is not much welcomed by civilians
- Why?
 - Different judicial tradition from common law
 - Less confidence to the courts (cf art. 5 Code Civil)
 - Codified law
 - Written constitutions – adopted before huge rise of international litigation contain provisions on fair trial
 - Force of habit

For God's sake what the civilians do without forum non conveniens?



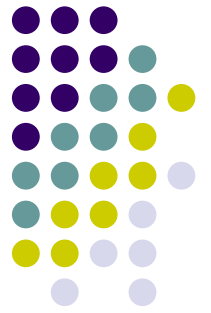
- How does civil law systems deal with problem of inappropriate forum?
- The national procedural rules usually contain provisions on abuse of procedural rights and penalties for oppressive or vexatious claims
- Thus there is a possibility to dismiss such a claim
- But still continental law does give only little discretion to judges in order to maintain legal certainty

Brussels I Regulation



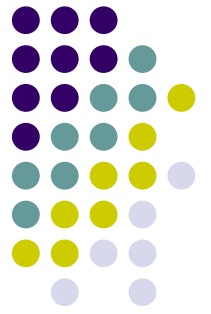
- Brussels Convention was framed by civilians
- Regulation established a link between civil law and common law
- Is there any place for f.n.c. in the system and the spirit of the Regulation?

Forum non conveniens forbidden



- Regulation stands on rigid system of competence criteria which should be foreseeable
- Uniformity and harmony – the aim of the Regulation
- What's the reaction of the UK?

The English courts and Brussels I Regulation



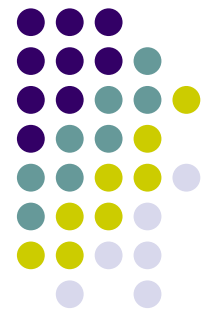
- Re Harrods (Buenos Aires) Ltd.[1992] Ch 72 (CA)
- It is possible to decline a jurisdiction of English court in favour of a more appropriate forum in **non-member state**
- The same is true for the following case law

Owusu



- There is no possibility to decline jurisdiction on the ground that the third-state forum is more appropriate

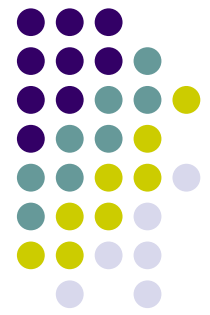
View on f.n.c beyond the frontiers of Brussels I Regulation



- ALI/UNIDROIT Transnational Principles of Civil Procedure (art. 2.5):
- *‘Jurisdiction may be declined or the proceeding suspended when the court is manifestly inappropriate relative to another more appropriate court that could exercise jurisdiction.’*

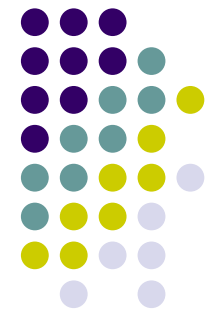
(http://www.unidroit.org/english/principles/civil_procedure/ali-unidroitprinciples-e.pdf)

Preliminary Draft Convention on Jurisdiction ... in Civil and Commercial matters



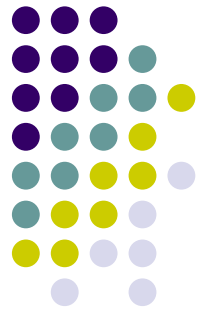
- *Article 22 Exceptional circumstances for declining jurisdiction*
- 1. In exceptional circumstances...the court may, on application by a party, suspend its proceedings if in that case **it is clearly inappropriate** for that court to exercise jurisdiction and **if a court of another State has jurisdiction and is clearly more appropriate** to resolve the dispute.

Preliminary Draft Convention on Jurisdiction ... in Civil and Commercial matters II



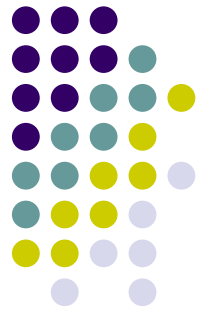
- 2. The court shall take into account, **in particular:**
- any inconvenience to the parties in view of their **habitual residence;**
- the **nature and location of the evidence**, including documents and witnesses, and the procedures for obtaining such evidence;
- applicable **limitation or prescription periods;**
- the possibility of **obtaining recognition** and enforcement of any decision on the merits.

Forum shopping



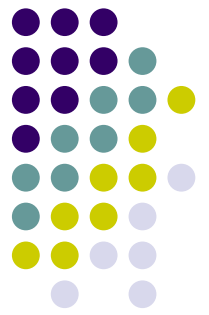
- Misuse of the connecting factors determining jurisdiction or applicable law
- Shopping for forum:
 - Conflict of laws' forum shopping
 - Procedural forum shopping
- The venue in transnational litigation is of importance(applicable law, judicial environment, treatment of foreign law as law or fact, costs of legal advice etc.)

Forum shopping – good or evil?



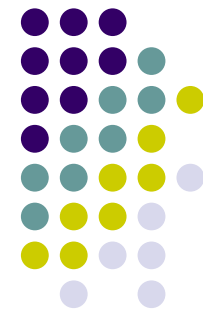
- Abusive and non-abusive forum shopping
- Plaintiff v defendant (is their position equal?)
- Defendants could be sued practically everywhere

Argument in favour of forum shopping and against it



- Favourable arguments:
- Advantage for tort victims or weaker parties
- Arguments against forum shopping:
 - ‘Italian torpedo’
 - Shifting the ‘COMI’ under Insolvency Regulation
 - Abuse of alternative jurisdiction rules in Brussels I

Forum shopping in European Private International law



- Mentioned expressly only by Insolvency Regulation in its Preamble:
 - *‘It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).’*

Forum shopping in European Private International law II



- Only 1 ECJ's judgment mentions forum shopping (ECJ C-539/03 Roche Nederland and others)
- Advocates General often deal with forum shopping in their Opinions (e.g. cases Freeport /art. 6(1) Brussels I reg., Eurofood /art. 3 Insolvency reg./)

Forum shopping in European Private International law III



- We can even find an attempt to define forum shopping in Opinion of 16 March 1999 in Case C-440/97 *GIE Group Concord and others* [1999] ECR I-6307, in particular p. I-6309, footnote 10 made by GA Colomer:
- *'[c]hoosing a forum according to the advantages which may arise from the substantive (and even procedural) law applied there'* (original version in French, this translation taken from GA Mengozzi Opinion in Freeport case)