IS ELIMINATION OF FORUM SHOPPING BY MEANS OF INTERNATIONAL UNIFORM LAW AN 'IMPOSSIBLE MISSION'?

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I INTRODUCTION

This paper will analyse the question whether forum shopping can be eliminated entirely or at least partly by means of international uniform law conventions. Furthermore the issue of the nature of forum shopping and the implications of Private International Law will be addressed.

A *Definition of Forum Shopping*

Forum shopping is the tactical activity of a litigant to choose (amongst several available venues) a specific forum in a specific jurisdiction in order to achieve the application of the most favourable procedural and substantive law to a case. As the choice of a specific forum may give the party some control over both, procedural and substantive law, this could offer the opportunity to the plaintiff to influence the applicable law by choosing one specific forum amongst several competent and available venues.

The choice of a specific forum triggers firstly the application of the procedural law of the state where the forum is located and secondly the application of the Private International Law (thus the national set of conflicts laws) of that state.[1] By determining where court proceedings commence, one determines at the same time, which Private International Law rules apply and consequently, which substantive domestic law is applicable.[2]

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1 Franco Ferrari, 'Forum Shopping Despite International Uniform Contract Law Conventions' (2002) 51.3 *International and Comparative Law Quarterly* 689, II.A. and II.B.

2 Nita Ghei and Francesco Parisi, 'Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order' (2004) 25 *Cardozo Law Review* 1367, 1390; Franco Ferrari, 'International Sales Law and Inevitability of Forum Shopping: A Comment on Tribunale Di Rimini, 26 November 2002' (2004) 23 *The Journal of Law and Commerce* 169, 180.

In case of availability of several venues in different states, such a situation offers the opportunity of forum shopping by analyzing in advance the outcome of the case in several available venues and choosing the forum that will result in the most favourable outcome for the plaintiff regarding the procedural law and the substantive domestic law according to the Private International Law of the forum.[3] This does not necessarily lead to the application of the substantive law of the state where the forum is located. It is also possible that the forum, concerned with an action, has to apply foreign law. That is the case when the Private International Law of the forum leads to applicability of foreign substantive law.

The availability of several venues instead of exclusively one competent court is one crucial factor to open the gate to forum shopping opportunities. The second necessary factor is that the Private International Law of different available venues leads to different substantive laws. This requires of course that the parties have not skipped the Private International Law by choice of a specific substantive law and that the Private International Law of the forum is not skipped by international uniform law, governing exclusively the relevant legal issues.

B *Why is Forum Shopping 'Evil' – If at all ?*

The phenomenon of forum shopping is a topic that has attracted harsh criticism as well from judges as from practising lawyers and from scholars. It is argued, that the opportunity of one party (in principle the plaintiff) to 'manipulate' the outcome of a case by choosing a specific forum instead of another would create the problem of moral hazard and incentives for abuse. Furthermore it is felt, that the opportunity of forum shopping

1. creates legal uncertainty (particularly for the defendant);
2. increases litigation costs by adding an issue that needs to be litigated;
3. leads to overload of work for particular fora and
4. undermines the authority of substantive state law by promoting a negative popular perception about the equity of the legal systems.[4]

A primary area of law, which attracted harsh criticism regarding abuse of forum shopping opportunities, is tort law. In the field of tort law, plaintiffs feel particularly attracted to litigate in the US for recovery of personal injuries. Lord Denning therefore stated: '… as a moth is drawn to the light, so is a litigant drawn to the US … .'[5]

A striking example of forum shopping in a personal injury case is the litigation regarding a plane crash near Paris of a DC-10, owned by a Turkish airline as a products liability suit in a Federal Court in Los Angeles against McDonnell

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3 Ferrari, above n 1.
4 Ghei and Parisi, above n 2, 1378 ff; Ferrari, above n 1, V.
5 See *Smith Kline & French Laboratories Ltd v Bloch* [1983] 2 All ER 72, 74.

Douglas and a subcontractor. The choice of this forum was primarily driven by the goal to obtain maximum amounts of financial compensation and to escape from the damage ceiling according to the Warsaw Convention.[6] It is not surprising that especially tort law cases attract the criticism and that scholars focus on such cases when blaming attorneys or solicitors for 'manipulative' litigation as in such cases there is no chance for the defendant to make prior arrangements by fixing the applicable substantive law and the forum in a contract in order to reduce or prevent uncertainties resulting from forum shopping opportunities. Therefore the defendant is much more exposed to the tactical choice of a forum by the plaintiff and to (alleged or actual) 'manipulation' of the outcome of the case in the field of tort law than in any other field of law, such as contract law.

On the other hand, there is some tension between the obligation of an attorney or solicitor to zealously promote his clients' interests and to thoroughly analyze their cases in all respects and the view that forum shopping is 'evil'. To solve this dilemma, it is argued that forum shopping is not 'evil' but simply a part of procedural litigation.[7] This issue could indeed be of practical relevance for an attorney or solicitor to avoid exposure to claims of clients because of alleged deficiencies and shortcomings of the legal advice. The question is related to Rule 3.1. ABA Model Rules of Professional Conduct of 2 August of 1983 (which have so far been adopted by approximately 40 states). The comment on this rule states that '… the advocate has a duty to use legal procedure for the fullest benefit of the clients' case, but also a duty, not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed… .'[8]

So far any practicing attorney or solicitor has to find his way himself when representing clients in international cases as it is an open issue whether analysing and using forum shopping opportunities is part of the legal duties of the attorney or solicitor or not. It is an ongoing discussion whether forum shopping is evil or not. The majority of scholars and practitioners seem to argue against forum shopping for the above outlined reasons.

C *Approaches to Avoid Forum Shopping*

1. The phenomenon of forum shopping is closely related to Private International Law which is designed to solve conflicts of laws which typically arise in cases with an international or even multinational dimension. An ideal set of Private International Laws would result in the application of the same substantive law to identical facts, regardless of the forum that is concerned with the case. Such a set of conflict laws in all states would eliminate forum shopping opportunities and incentives for forum shopping, at least regarding the substantive law by ensuring

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6 See Friedrich K Juenger, 'The Internationalization of Law and Legal Practice: Forum Shopping, Domestic and International' (1989) 63 *Tulane Law Review* 553, 560f.

7 Mary Algero, 'In Defense of Forum Shopping: A Realistic Look' (1999) *Nebraska Law Review* 78, 79, 81f.

8 Ibid 106.

uniform and predictable results.[9] It is of course an illusion to achieve such a legal harmony. There are even states which do without a set of conflict rules at all and which are far from handling legal issues in a predictable, efficient and uniform manner.

But even the existence of an international and identical set of conflict rules could not eliminate the risk of different characterization of a legal issue and subsequently the application of deviating substantive law on the basis of application of different rules of the identical set of Private International Law.[10] Furthermore, forum shopping of procedural law would not be prohibited as it is irreversibly connected to the forum.

2. One approach to prevent (or at least to reduce) forum shopping opportunities is the creation of international substantive uniform law which applies directly to relevant legal issues when the requirements for its applicability are fulfilled. In case of applicability of international uniform law, the (national) Private International Law is skipped as there is no conflict of laws. Consequently, judges from contracting states to a uniform substantive law convention will always have to look first at whether a uniform law convention applies before resorting to their own rules of Private International Law.[11] The national substantive law is simply replaced by the international uniform law as far as the scope of the convention covers the relevant legal issues and as far as the parties have not used the option to derogate partly or entirely from the uniform law, if it is possible to do that.

There are different kinds of international uniform law conventions, mandatory ones and non-mandatory ones. Non-mandatory conventions are the rule, whereas mandatory ones are the exception. An example of a non-mandatory convention is the Convention on Contracts for the International Sale of Goods of 1 January 1980 (CISG) which provides in Art 6 CISG the opportunity to the contracting parties to derogate entirely or partly from the provisions of the convention. An example for a mandatory convention is the Convention on the Contract for the International Carriage of Goods by Road of 19 May 1956 (CMR) which prohibits in Art 41 CMR derogation of any of its provisions.

3. Regarding contractual obligations (in contrast to obligations resulting from tort law), the parties have themselves the control to insert a choice of law clause into their contract and to appoint the forum that has to be concerned exclusively with an upcoming litigation. Free choice of the applicable law is one of the basic principles of Private International Law. But there are also some restrictions to this principle. For example in the Member States of the European Union, there are restrictions to

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9 Ghei and Parisi, above n 2, 1374.

10 Ibid 1375.

11 Franco Ferrari, 'International Sales Law and Inevitability of Forum Shopping: A Comment on Tribunale Di Rimini, 26 November 2002' (2004) 23 *The Journal of Law and Commerce* 169, 176f.

free choice of law with regard to consumer protection and labour protection.[12] A source of restriction to free choice of law can also be contained in international uniform law. One important example is Art 41 CMR which provides for a mandatory character of the CMR and prohibits a derogation of its provisions.

4. Some scholars like Currie[13] developed an interest analysis approach instead of a rule based approach to solve conflicts of laws. In this standards-based approach, the court undertakes an individualized process of conflicts analysis, thus there is no clear a priori rule that provides for predictable and equal outcomes.[14] The unpredictability and legal uncertainty is the most striking disadvantage of this approach and therefore it is not a perfect means to prevent forum shopping reliably.

II Analysis of Specific International Uniform Law Conventions Regarding Forum Shopping Opportunities

In the following paragraphs, we will take a more accurate look at some specific international uniform law conventions to analyse their contribution to the elimination of forum shopping. Like outlined above, international uniform law conventions bypass Private International Laws by replacing directly the national substantive law as far as they cover the relevant legal issues.

A *CISG*

The UN-Convention on International sales of Goods of 1 January of 1980 was drafted by the United Nations Commission on International Trade Law (UNCITRAL) and entered into force on 1 January of 1988. The CISG is of great practical relevance and has been ratified by 63 states so far. It was drafted in light of common law and civil law concepts and principles, but it is intended to be a self-contained body of law to be interpreted without exclusive resort to common law or civil law.[15] The goal of the CISG is expressed in its preamble as 'the adoption of uniform rules which govern contracts for the international sale of goods that take into account the different social, economic and legal systems, would contribute to the removal of legal barriers in international trade and promote the development of international trade'. An ideal frame for the realisation of this goal would be the universal ratification of the Convention by all States with the result that a common legal code of rules dealing with international sales contracts would be applied to international sales of goods. But even under such ideal circumstances, there would still be gaps and uncovered cases, due to the limited scope of the Convention

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12 See Art 5 and 6, *Convention on the Law Applicable to Contractual Obligations*, opened for signature in Rome on 19 June 1980.

13 See Brainerd Currie, 'Survival of Actions: Adjudication Versus Automation in the Conflict of Laws' (1963) *Selected Essays in the Conflict of Laws* 128, 168.

14 Ghei and Parisi, above n 2, 1375.

15 Gabriel Moens and Peter Gillies, *International Trade and Business: Law, Policy and Ethics* (2000) 2.

according to the Art 1-6 CISG.[16] This recognition has of course also relevance for the question to what extent the CISG has an impact on the elimination of forum shopping opportunities.

1 *Scope of Application*

From the foregoing it can be concluded that forum shopping can only be eliminated by the CISG as far as the scope of its application covers (exclusively) all relevant substantive legal issues of a sales agreement.

(a) First of all, the applicability of the CISG requires a specific 'internationality' of the sales contract. The required 'internationality' is not construed in the sense of common understanding but is technically defined in Art 1 CISG. That requires that the places of business of the contracting parties are located

  (i) in different states *and*
  (ii) that both states where the parties are vested with their place of business are contracting states (Art 1(1) lit a CISG) or
  (iii) that the rules of Private International Law lead to the application of the law of a contracting state (Art 1(1) lit b CISG).

This means in practice that the applicability does not necessarily require that goods cross a border, on one hand and that the fact that goods cross a border is not sufficient to trigger the applicability of the CISG on the other hand. The CISG solely focuses on the place of business of the contracting parties as the crucial factor. The concept of 'place of business' is dealt with in Art 10 CISG.

(b) An accurate analysis of the scope of application of the convention according to Art 1-6 CISG reveals that there are several carve-outs from its application. The CISG does not cover:

  (i) Sales of goods, bought for personal household use (Art 2 lit a CISG);
  (ii) Sales by auction (Art 2 lit b CISG);
  (iii) Sales on execution or otherwise by authority of law (Art 2 lit c CISG);
  (iv) Sales of stocks, shares, investment securities, negotiable instruments or money (Art 2 lit d CISG);
  (v) Sales of ships, vessels, hovercrafts or aircrafts (Art 2 lit e CISG);
  (vi) Sale of electricity (Art 2 lit f CISG);
  (vii) Sales of immovable properties;[17]
  (viii) Issues of validity of the sales contract (Art 4 lit a CISG);
  (ix) Issues regarding the transfer of property of the goods (Art 4 lit a CISG);

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16 Moens and Gillies, above 15, 2f.

17 Ibid 7: The Convention does not define goods, but it is consistent with defining them as a common lawyer would define them, as movable tangibles and thus excluding immovable properties.

(x) Issues regarding the liability of the seller for death or personal injury, caused by the sold goods.[18]

From the aforementioned list of carve-outs it becomes obvious that the CISG is not an exhaustive codification of sales contract law and therefore cannot apply to all contractual issues.[19]

Regarding these carve-outs from the scope of the CISG, the Private International Law of the forum comes into play again to determine the applicable substantive law, unless the issue is covered exclusively by other international substantive uniform law. This is e.g. the case for the carve-out under (x) which is covered by The Hague Convention on Product Liability of 2 October 1973 which has of course its own gaps of coverage. In the case of exclusive applicability of other substantive international uniform law, the carve-out from the scope of the CISG does not lead to a gap in the 'fence against forum shopping' as far as the scope of the other international convention reaches. Beyond that scope, again Private International Law of the forum comes into play.

(c) Furthermore, the parties of the sales contract have the opportunity to derogate entirely or partly from the provisions of the CISG according to Art 6 CISG. Such derogation from the CISG does not necessarily have to take place in written form, unless the specific provision of Art 12 CISG applies.

2 *Impact on Forum Shopping*

Like pointed out above, the CISG replaces the national substantive law merely to the extent of its scope and consequently prevents forum shopping opportunities at least so far. This is at any rate true for substantive law.

Regarding procedural law the situation is different. The CISG does not contain procedural rules but purely substantive law. Consequently international conventions regarding procedural law and the procedural law of the forum complement the CISG. The close relationship of international (such as the EU-Regulation 44/01) or domestic procedural law and the CISG interestingly even promotes forum shopping under specific circumstances by opening the gate to additional venues.[20]

The CISG contains a provision that leads to an additional venue for the seller to collect the purchase price at his place of business instead of the place of business of the buyer. On the basis of Art 57 CISG in conjunction with Art 5(1) EU-Regulation 44/01 (former Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters of 27 September 1968) the seller of

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18 This carve-out is due to the fact that issues of product liability are dealt with by *The Hague Convention on Product Liability* of 2 October 1973 as far as the scope of this convention reaches.

19 Moens and Gillies, above n 15, 8.

20 Ferrari, above n 1, 689 IA

the goods can also file an action to collect the purchase price from the buyer at the place of the seller and not exclusively at the place of the buyer at a forum in the European Union.

Art 57 CISG determines in case of absence of an agreement between the parties, that the place of performance of the obligation is the relevant place to pay the purchase price. In conjunction with Art 5(1) EU-Regulation 44/01 this leads to the consequence that the buyer can also be sued at the place of performance, thus also in the place of business of the seller. This additional venue would not be available according to several domestic procedural laws in the European Union (such as e.g. in France, Germany and Greece).[21]

Such a constellation is thus an example that international uniform substantive law could even extend forum shopping opportunities, at least with regard to procedural law by offering additional venues.

But the buyer has of course the possibility to negotiate this point and derogate from Art 57 CISG on the basis of Art 6 CISG to preserve the venue at his place of business for the collection of the purchase price. It is at any rate recommendable for him to do that as it is a big disadvantage to litigate in a foreign forum with several uncertainties regarding the procedural law of the forum and the probably closer relation of the opponent to that court. Not to mention the travelling expenses or the expenses to hire a lawyer at the place of a foreign forum. Attorneys' fees are not in all jurisdictions reimbursed by the opponent, even in case of a complete victory of one party. For example the Germany civil procedural law does provide for an obligation of the defeated party to reimburse the expenses of the winning party but this seems to be more the exception than the rule on the tapestry of procedural laws. This point could create an incentive for the plaintiff to litigate in a German court.

B *CMR*

In the following paragraph, we will take a more accurate look at the Convention on the Contract for the International Carriage of Goods by Road of 19 May 1956 (CMR) which is also of great practical relevance.

For the application of the CMR, it is not sufficient that the contract is international in the sense that the contracting parties are based in different states. Furthermore, the CMR requires a link between a contracting state and the place of handing over of the goods or that of delivery. That means that both of these places have to be located in different states and that at least one of these places is located in a contracting state to the CMR in order for it to apply.[22]

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21 Ferrari, above n 1, 689 IA.

22 See Art 1 CMR; *Muenchener Kommentar zum HGB*, K Schmidt (Basedow) Vol 7a, Art 1 CMR, Comment No 30.

The CMR is an interesting contrast in comparison to the CISG concerning the optional character of its provisions. Whereas Art 6 CISG provides for the discretion of the contracting parties to derogate entirely or partly from its provisions, Art 41 CMR declares the CMR to be mandatory for the contracting parties. As soon as the requirements for the application of the CMR are fulfilled, the contractual relation of the parties is governed by the CMR and the parties have no possibility to derogate from its provisions. This eliminates forum shopping opportunities which are a consequence of the discretion of the parties to restrict the scope of application of a convention.

On the other hand, Art 31 CMR provides several alternative fora and is therefore a widely open gate for forum shopping opportunities with regard to the procedural law of a forum.[23]

According to Art 31 CMR an action may be brought in:

1. The place of residence of the defendant;
2. The principal place of business of the defendant;
3. The place of the branch or agency through which the contract of carriage was made;
4. The place of take-over or delivery of the goods;
5. Any place, the parties agreed upon to be an additional venue.

In this context it has to be clarified that the venue, which the parties agreed upon, may not be exclusive but is an additional venue amongst the available ones, listed under (i) up to (iv).[24] Forum shopping with regard to procedural law could be in particular attractive in those jurisdictions in which statutes of limitation are part of the procedural law and not of the substantive law. Furthermore, procedural rules with regard to allowed categories of evidence could be a reason to choose one specific forum instead of another. In some jurisdictions for example, facts and evidence obtained from undercover investigations such as telephone tapping by private persons instead of authorities, could be used to deliver evidence whereas they may not be permitted in other jurisdictions.

III Analysis of Elimination of Forum Shopping by International Uniform Law

Taking all the foregoing into account, one could arrive at the conclusion that the elimination of forum shopping by means of international uniform law is an impossible mission. Under the assumption, that the goal of international uniform law is to achieve the complete elimination of forum shopping, this conclusion would be true. But this assumption itself is artificial and unrealistic. The following paragraphs will take a more accurate look at specific gaps in the 'fence against

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23 Ferrari, above n 1, 689 IB.

24 Ibid.

forum shopping' to show, that international uniform law contributes to the goal of restricting forum shopping but that it is not able to eliminate it completely under realistic assumptions.

A *Problem of Limited Scope of International Conventions*

From the foregoing we can draw already the conclusion that international uniform law is a useful tool to restrict forum shopping as far as its scope covers all upcoming legal issues of a specific case. Beyond that scope, the national Private International Law of the forum applies to lead to the applicable substantive law.

The mere fact of being 'international' (with few exceptions) is not sufficient to make an international uniform contract law convention applicable to a contractual agreement. In principle the international uniform conventions require an additional link to a contracting state and contain specific carve-outs from the scope of its application. For example pursuant to Art 5 CISG, the liability for personal injury does not fall under the scope of the CISG. Furthermore, it goes without saying that the CISG does not deal with matters that are not expressly listed, such as set-off, assignment of receivables, agency, limitation period etc.[25]

Consequently all these gaps in the scope are gates which could create forum shopping opportunities in conjunction with the Private International Law of the forum.

B *Problem of Optional Nature of International Uniform Law*

A further 'gap in the fence' against forum shopping is a consequence of the optional nature of most of the international uniform law conventions such as eg, the CISG according to Art 6 CISG. Any derogation of the rules of the CISG, made by the parties according to Art 6 CISG, triggers the application of the Private International Law of the forum, unless the parties make a specific choice of law to fill the gaps, created by derogation of the CISG. Especially in cases where one party is in a much stronger position and is more sophisticated in the field of drafting international sales agreements, this contains the risk of intentional creation of a forum shopping opportunity by one party to the detriment of the other.

The preceding conventions to the CISG, namely the 1964 Hague Uniform Laws (accepted by the Hague Conference in 1964), did not contain such a broad discretion of the contracting parties to derogate from the uniform law in international sales agreements. This was one of the main reasons that the 1964 Hague Uniform Laws were ratified only by a few states and that the ratifying states made several reservations in order to restrict the far going scope of that convention. This result is to a great part due to the reluctance of the contracting states, to create mandatory uniform rules without any discretion of the contracting parties to adjust

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25 Ferrari, above n 1, 689 IIC and IIIA.

their contractual agreement to their specific needs. For this reason, the 1964 Hague Uniform Laws have been replaced by the CISG in 1980 in order to increase the level of acceptance.[26] The CISG was much more successful and has been ratified meanwhile by 63 states.

One important exception to the rule of optional character of international uniform law is the Convention on the Contract for the International Carriage of Goods by Road of 19 May 1956 (CMR). According to Art 41 CMR, its rules are mandatory for the contracting parties without any opportunity to derogate entirely or partly of its provisions. A mandatory character is of course a better means to avoid gaps in the fence against forum shopping. But like pointed out, states are in principle reluctant to agree upon a mandatory uniform set of rules without any flexibility.

C *Discrepancies in Interpretation of Substantive Uniform Law*

Every convention which does not constitute an exhaustive source of rules of its subject, but regulates certain issues of it while excluding others and which does not want to identify itself exclusively with any specific legal system, because it wants to apply in several, can easily create problems concerning the precise meaning of its provisions.[27]

Even in the case of coverage of all upcoming legal issues of a specific case by substantive international uniform law, there still remains room for forum shopping due to deviating interpretations of the convention by judges of several available venues.[28]

International uniform law is in principle applied by a national court which has to apply the provisions in the frame of domestic procedural law. It is a common pattern that domestic judges tend to construe (also) provisions of international conventions in the light of substantive domestic law. But this is not the proper approach to construe terms contained in international conventions such as Art 7(1) CISG clarifies: 'In the interpretation of the CISG, regard is to be had to its international character and to the need to promote uniformity in its application.'

That is a clear signal to the domestic judges to take the international character of substantive international law into account when interpreting its provisions. Nevertheless, there has been and still is a divergence of opinions regarding the proper approach to interpreting international conventions. In Australia eg, it has been argued that international conventions are not self-executing and are included within the domestic law and consequently should be construed according to

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26 See Moens and Gillies, above n 15, 1.

27 Franco Ferrari, 'Uniform Interpretation of the 1980 Uniform Sales Law' (1994) 183 *The Georgia Journal of International and Comparative Law* 183, 198.

28 Ferrari, above n 11, 178f.

domestic techniques and with the help of the domestic body of law.[29] The problem is created by Art 7 CISG itself as it does not provide a uniform set of interpretation techniques but rather the declaration of the political goal of uniform application of the CISG.[30]

An additional problem is that the application of the CISG by domestic courts can not be corrected by an international court in order to promote uniform application. The UNCITRAL rejected the idea of creating an international tribunal to make rulings on such cases in order to achieve uniform application of the convention. Instead of transferring the judicial power of binding interpretation of the CISG to such an international court, UNCITRAL decided to collect domestic court decisions on the CISG and to make them accessible to domestic judges of contracting states and any interested person.[31] The underlying idea of this approach was that judges of domestic courts should use this international collection of case law in order to achieve uniform interpretation of the CISG.[32]

This approach is from my point of view not the best practise solution. However, requiring interpreters to consider foreign case law, creates practical difficulties for three main reasons:

1. Foreign case law is not easily available;
2. Even when it is easily accessible it is often written in a foreign language;
3. Application of foreign case law could create methodological and systematical problems.[33]

The approach of UNCITRAL is methodologically and systematically problematic as there are crucial differences between common law jurisdictions and civil law jurisdictions with regard to the nature and binding effect of case law. The concept of 'Stare Decisis Doctrine' is a key element in common law jurisdictions whereas it is absent in almost all civil law jurisdictions. Some single scholars from common law jurisdictions suggest the introduction of a 'Supranational Stare Decisis Doctrine' as solution for the outlined problem without pointing out specifically, how such a concept should work properly.[34] Such an approach would not solve any

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29 Bruno Zeller, 'The UN Convention on Contracts For the International Sale of Goods (CISG) – A Leap Forward Towards Unified International Sales Law' (2000) *Pace International Law Review* 79, 82.

30 Ferrari, above n 27, 200.

31 Report of UNCITRAL on the Work of its 21st Session, 1988, 98; Ferrari, above n 27, 205f.

32 Zeller, above n 29, 85f.

33 Franco Ferrari, 'Symposium – Ten Years of The United Nations Sales Convention: CISG Case Law: A New Challenge for Interpreters?' (1998) *The Journal of Law and Commerce* 245, 258f.

34 See Larry Di Matteo, 'The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings' (1997) *Yale Journal of International Law* 111, 133.

problem but create new ones of systematical and methodological nature.[35] As a prerequisite for implementing successfully a 'Supranational Stare Decisis' it would be necessary to erect an internationally accepted and exhaustive hierarchy of courts of all contracting states. This approach is apparently useless for solving practical issues. Last but not least, the question has to be raised, how to integrate decisions of courts of arbitration?[36] The scholars who are in favour of introducing a 'Supranational Stare Decicis Doctrine' are not able to deliver a convincing response to these questions and issues.

From my point of view, the best approach would be to stick to the principle of application of the CISG by domestic courts but to transfer nonetheless the ultimate judicial competence to decide upcoming legal issues concerning the interpretation of the CISG to an international court to promote uniform application of international conventions on one hand and to prevent overwhelming and excessive workload for an exclusively competent international court on the other hand. There is a good example of such a properly working solution in the institutional framework of the European Union.

When a domestic court of a Member State of the European Union is concerned with the interpretation of European Community Law in a case and the judge arrives at the conclusion that the language of the European Community Law is ambiguous or, that the application of it leads to an unacceptable result, he is obliged to transfer the specific interpretative issue to the European Court of Justice to get a final and binding decision on the correct interpretation of provisions of European Community Law.[37]

Such an approach has three crucial advantages:

1. It provides for uniform application of the European Community Law;
2. It creates a reliable and easily accessible source of information for other judges concerning the proper interpretation of European Community Law;
3. It avoids systematical and methodological problems regarding the application of uniform law in both, common law jurisdiction and civil law jurisdictions.

The field of uniform interpretation and uniform application of international law could furthermore be streamlined by transferring not only the final and binding competence of an interpretative issue with regard to simply one international convention to such an international court but furthermore also the competence of final and binding interpretation of other international uniform conventions. That would definitely streamline the procedures and foster uniform application not only of the CISG but also of other conventions and their relation to each other.

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35 This is in line with: Franco Ferrari, 'Symposium – Ten Years of The United Nations Sales Convention: CISG Case Law: A New Challenge for Interpreters?' (1998) *The Journal of Law and Commerce* 245, 258f; Ferrari, above n 11, 173.

36 Ferrari, above n 35, 257f.

37 See Art 234 *European Community Treaty* (ECT)

Last but not least, it would probably be less expensive and create less workload for all interpreters of law, to extend the number of judges of an internationally respected and accepted court (such as the Permanent International Court of Justice) than to collect all cases and translate them and to create abstracts from them by the staff of UNCITRAL in order to make them accessible to interested persons.

IV CONCLUSION

This article demonstrated that the phenomenon of forum shopping is restricted but not completely eliminated by international uniform law and that it is hardly possible to eliminate it completely by means of international uniform law under realistic assumptions. The analysis of the CISG with its optional character pursuant to Art 6 CISG and of the CMR with its mandatory character pursuant to Art 41 CMR clarified that there are indeed different approaches with an impact on forum shopping opportunities. It has been pointed out that mandatory uniform law is in principle more efficient to eliminate forum shopping opportunities as it avoids gaps in the scope of uniform law, created by a derogation of the contractual parties from the convention. When the parties do not fill the gaps with clear and exhaustive provisions, Private International Law again comes into play.

On the other hand, it has been demonstrated that too strict and inflexible international uniform law conventions could make states reluctant to ratify them as they would block the possibility of the contractual parties to adjust the convention to their specific needs. A good example for such kind of tension was the low level of acceptance of The Hague Uniform Laws 1964, like pointed out above.

The discussion about the detrimental effect of forum shopping has been summarized. From my point of view, it is important to be aware of the fact that forum shopping opportunities create as side-effect 'competition' amongst the available fora and jurisdictions. That could foster the endeavours of the states to streamline and improve their Private International Law and their procedural law. It is an important recognition that this side-effect of forum shopping contains the chance of provoking positive impacts of the phenomenon of forum shopping.

It is also important to distinguish between forum shopping in the field of tort law and forum shopping in the field of contract law. Like pointed out above, the most outrageous cases are based in the field of tort law, due to the fact that the defendant is much more exposed to forum shopping in this field of law as he has no opportunity to make contractual arrangements in advance. A choice of law clause would create ex ante certainty and eliminate ex post strategic forum shopping opportunities.[38] These tort law cases contributed predominantly to the bad reputation of forum shopping. But strictly speaking it is not the phenomenon of a forum shopping opportunity alone that creates the criticized results in the field of

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38 Ghei and Parisi, above n 2, 1387.

tort law but the conjunction of a jurisdiction with partly inconsistent and surprising results and the forum shopping opportunity.

A forum shopping opportunity can vice versa also open a gate to bypass the application of laws that would produce inconsistent or even outrageous results. It is therefore still an open issue, whether forum shopping opportunities are really detrimental or whether they have even positive effects and are more helpful than detrimental. From my point of view there are good arguments for the view that forum shopping opportunities themselves are not 'evil' but an important indicator for tension between legal systems. This indicator could promote the perception and awareness of deficiencies of a legal system and a set of rules. Consequently forum shopping opportunities could enable and motivate the states of the involved legal systems, to streamline their Private International Law and to foster international legal harmony.