Naděžda Rozehnalová (ed.)

UNIVERSAL, REGIONAL, NATIONAL

Ways of the Development of Private International Law in 21st Century

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List of Abbreviations

Act on Bankruptcy and Restructuring	Act No. 7/2005 Coll., on Bankruptcy and Restructuring (Slovak Republic)
Art.	Article / Articles
Asylum Act	Act No. 100/2005 Coll., Federal Act Concerning the Granting of Asylum (Republic of Austria)
BGB	German Civil Code (Germany)
BIT/BITs	bilateral investment treaty/ bilateral investment treaties
Brussels Convention	Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters
Brussels I Regulation	Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
Brussels I bis Regulation	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
Brussels II Regulation	Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses

Brussels II bis Regulation	Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000
Brussels II Regulation Recast	Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction
CISG	United Nations Convention of 11 April 1980 on contracts for the international sale of goods
CJEU	Court of Justice of the European Union
CNPC	Act No. 161/2015 Coll. of laws the Civil Non-Contentious Procedure Code (Slovak Republic)
COMI	centre of main interests
Czech Civil Code	Act No. 89/2012 Coll., Civil Code (Czech Republic)
Czech PILA	Act No. 91/2012 Coll., on Private International Law (Czech Republic)
EC	European Community
ECJ, alt. Court of Justice	European Court of Justice
EEC	European Economic Community
EGBGB	Introductory Act to the Civil Code (Germany)
EU	European Union

European Enforcement Order Regulation	Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European enforcement order for uncontested claims
European Payment Order Regulation	Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure
Former Czech PILA	Act No. 97/1963 Coll., on Private International and Procedural Law (Czech Republic)
FTAs	free trade agreements'
Giuliano-Lagarde Report	Council Report on the Convention on the law applicable to contractual obligations by Mario Giuliano and Paul Lagarde. In: Official Journal No C 282/1 of 31 October 1980
Hague Convention on Choice of Court Agreements	Hague Convention on Choice of Court Agreements of 30 June 2005
Hague Principles	Principles on Choice of Law in International Commercial Contracts of 19 March 2015
Hamburg Proposal	Hamburg Group for Private International Law. Comments on the European Commission's Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations
Hague Protocol on the law applicable to maintenance obligations	Protocol of 23 November 2007 on the law applicable to maintenance obligations

HCCH	Hague Conference on Private International Law
ICSID	International Centre for Settlement of Investment Disputes
Insolvency Regulation	Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings
Insolvency Regulation Recast	Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings
IPR	Intellectual property rights
ISDS	Investor-State Dispute Settlement
Jenard Report	Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters by Mr P. Jenard. In: Official Journal No C 59/1 of 27 September 1968
Maintenance Regulation	Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations
Matrimonial Property Regulation	Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes
New York Convention	United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards
p. / pp.	page / pages

para.	Paragraph / Paragraphs
PECL	Principles of European Contract Law
Property Consequences of Registered Partnerships Regulation	Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships
Proposal for Rome I	Proposal for a regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)
Rome Convention	Convention of 19 June 1980 on the law applicable to contractual obligations
Rome I Regulation	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations
Rome II Regulation	Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations
Rome III Regulation	Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation
Slovak PILA	Act No. 97/1963 Coll., on Private International Law and Rules of International Procedure (Slovak Republic)

Small Claims Procedure Regulation	Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure
Succession Regulation	Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European certificate of succession
Swiss CPIL	Federal Code No. 291 on Private International Law (Switzerland)
TEC	Treaty establishing the European Community
TEEC	Treaty establishing the European Economic Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
The Hamburg Group	The Hamburg Group for Private International Law
UN Convention	United Nations Convention on the Assignment of Receivables in International Trade
Vol.	Volume
ZPO	Code of Civil Procedure (Germany)

Introduction

Private International Law as a special branch of jurisprudence dealing with questions of private law including some kind of foreign element, which comes into play when private natural persons or legal entities of different states interact with one another. Private International Law serves as an instrument that helps to decide to which of the potentially relevant laws the legal issue is linked the most and helps to apply the law that has the greatest connection to the issue.

At the turn of 21st century, Private International Law gained new impulses which are associated with the communitarization at European level. As a result of the fact that legal regulation of cross-border disputes falls within the first pillar of the EU, international conventions were being replaced by regulations. Moreover, much of the so-called special part of Private International Law is nowadays regulated by the EU legislation and issues related to universal unification efforts arise. What is more, the jurisprudence of the European Court of Justice has developed significantly. The EU's competences play an important role as well as its ties with third countries including possibly and highly likely the United Kingdom. At the same time, the fragmentary unification of Private International Law reaches its limits. For instance, in the fragmentation of the general part of Private International Law – which may cause difficulties in the unification of special parts of Private International Law – or in relation to the procedural aspects of Private International Law.

The topic of the publication – Universal, regional, national – ways of the development of Private International Law in the 21st century constitutes a topic at European and global level. Thus, the topic of the publication has been selected as a core section of 13th annual traditional international conference Days of Law which took place on 21 and 22 November 2019 at the Faculty of Law, Masaryk University in Brno. Furthermore, the topic of the publication was accepted as a project of Specific Research at Faculty of Law, Masaryk University. Consequently, this publication reflects the results that have been achieved through the conference and the project by academics

and Ph.D. candidates. Contributions in this publication deal with both conflict-of-law questions as well as procedural ones.

Regarding the area of conflict-of-law rules, contributions in this publication firstly evaluate the relation between the norms of European Private International Law and international conventions. Their mutual relationship is illustrated by the example of rights in rem. Consequently, the area of succession and its universal, regional and national regulation is examined. Secondly, suitable ways of advanced application of universal norms of Private International Law are described as well as attitudes to the adaptation of both conflict and procedural solutions. Next, the question of unification of conflict-of-law rules dealing with intellectual property law is analyzed. Moreover, the issue of regional unification of the conflict-of-law rules in matters of matrimonial property regimes at EU level is looked into in this publication. The goal of this part of the publication is to analyze the doctrine of overriding mandatory provisions and consider the applicability of the public policy exceptions.

Furthermore, contributions in this publication dealing with conflict-of-law questions assess possible areas of cross-border relationships and conflict norms arising thereof. In addition, contributions also aim to analyze current values of Private International Law – the balance between the flexibility of solutions and the legal certainty in the form of predictability of decision-making process and protection of the values of a particular legal order or the society as such.

Also, contributions in this publication evaluate procedural norms, i.e. the question of international jurisdiction as well as the area of recognition and enforcement of foreign court decisions including the obligation of recognition and enforcement of court decisions published within the EU. The field of procedural norms of Private International Law is examined in view of the principles of state sovereignty and territoriality of law. Regarding the recognition and enforcement of foreign court decisions, the necessity of the recognition phase is further discussed in the publication. Next, contributions in this publication assess the relation between European Private International Law and national laws which constitute a residual regulation and may set certain guidelines arising out of procedural law. Furthermore, the

contributions in this publication evaluate the future of choice of court agreements after Brexit. It is discussed whether the Hague Convention presents a complete and comprehensive solution in terms of choice of court agreements for the United Kingdom provided that the Brussels Ibis Regulation is no longer applicable. Finally, the question of choice of court agreements in succession matters is analyzed.

The meaning and benefits of Private International Law in today's global world are undisputed. As both universal and regional aspects of Private International Law have been developing rapidly in 21st century, the contributions in this publication aim to analyze the current challenges and troublesome questions as well as to outline prospective solutions.

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Predictability and Flexibility in Private International Law: Allies or Enemies?

*Jiří Valdhans**

Abstract

The chapter discusses the relationship between predictability and flexibility as the values currently expected for private international law standards. While predictability has been perceived for a long time, flexibility has been gaining momentum in the US since the 1930s and in Europe in the second half of the last century. At present, however, the demand for flexibility in the standards of private international law is expressed in all modern codifications. Therefore, the chapter also outlines the institutes through which flexible elements intended to enable to take into account individual aspects of a particular case can be incorporated to traditional predictable blind conflict-law-rules methodology.

Keywords

Predictability; Flexibility; Private International Law; Value; Legal Certainty; Stability; Individual Case; Adaptation; Contradiction; American Revolution; European Evolution; Balance; Accumulation of Connecting Factors; Flexible Connecting Factors; Escape Clauses; Status Preference; Validity Preference; Position of Person Preference; Cascade; Cumulation; Double-Actionability.

1 Predictability and flexibility – values of private international law?

What is understood under predictability and flexibility in private international law? How do these notions manifest themselves and what values do they represent in the conflict-of-law approach to determining the applicable law? What is their mutual relationship? Is it suitable or more suitable to accentuate

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any of these values or should they apply in parallel? And is parallel application of these values actually possible? These are only a few of numerous questions that might be faced by the legislature when creating legal norms, by a judge when hearing a dispute with an international element or an academician when deliberating over the conflict-of-law approach to determining the applicable law.

Predictability is a value that is quite typically associated with legal norms. It represents the possibility for a legal entity to devise ideas about its future conduct, while taking into account the objective legal conditions under which such conduct will (or should) take place.[1] However, it cannot be stated that the very existence of a legal norm ensures sufficient predictability – the frequency and manner of changes to the legislation also play an important role in this regard. Predictability can also be perceived as transparency of the law and legal norms in view of their application.[2] Predictability is therefore a necessary prerequisite of legal certainty, i.e. a situation where similar situations are decided in the same way, and where the law is thus not applied arbitrarily. Both values are interconnected especially in the sphere of application, where a person who relies on the valid (applicable) law should not be disappointed in his/her expectations.[3] The principle of legal certainty and predictability means *de facto* that the law inclines towards stability, and anyone who relies on it should not be caught off guard by some surprising and unexpected turn of events.

The requirement that a legal norm ensure legal certainty and predictability is inherent to the law in general. Therefore, this requirement cannot be denied even to private international law and its conflict-of-law component. Both these notions are commonly used in professional publications dedicated to private international law. No further explanation is needed in this regard.[4] It is clear that the academia considers these values so automatic that it does not consider it necessary to substantiate why conflict-of-law rules should

1 Judgment of the Constitutional Court of 12 December 2013, Case III. ÚS 3221/11.
2 Wolff, L-C. Flexible Choice-of-Law Rules: Panacea or Oxymoron? *Journal of Private International Law*. 2014, Vol. 10, No. 3, pp. 431–459.
3 Judgment of the Constitutional Court of 12 December 2013, Case III. ÚS 3221/11.
4 See for example Pfeiffer, M. Legal Certainty and Predictability in International Succession Law. *Journal of Private International Law*. 2016, Vol. 12, No. 3, pp. 566–586.

ensure predictable solutions and legal certainty for parties to private-law relationships with an international element.[5] These notions are also commonly used in the recitals of European Union regulations on private international law, which like to denote legal certainty as their general objective[6] or basic element.[7] They are also referred to in explanatory memoranda of new general civil codices[8] and codes of private international law.[9]

Flexibility is perceived as an ability to adapt to the circumstances of the given case. It is therefore often understood as a precondition for ensuring justice in an individual case, although *Wolff* already considers this statement a *cliché*.[10] However, it remains a fact that this interconnection of flexibility and individual justice can be found in the works of many authors.[11] The requirement for flexibility in decision-making is based on the idea that a judge should be interested in finding a fair solution to the legal question presented to him/her. A judge cannot decide without regard to individual justice only

5 See Rozehnalová, N. *Instituty českého mezinárodního práva soukromého.* Praha: Wolters Kluwer ČR, 2016, p. 26; Pauknerová, M. Prostor pro uvážení v českém mezinárodním právu. *Právník*. 2016, Vol. 155, No. 1, p. 14; Symeonides, C. S. Rome II and Tort Conflicts: A Missed Opportunity. *The American Journal of Comparative Law*. 2008, Vol. 56, No. 1, p. 179.

6 Recital 16 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I Regulation").

7 Recital 14 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II Regulation").

8 The Explanatory report to the Act No. 89/2012 Coll., Civil Code (Czech Republic) speaks on legal certainty as the unwritten principle (p. 26), or, as the case may be, of the overall objective pursued by both private and public law (p. 30). See The Explanatory report to the Act No. 89/2012 Coll., Civil Code (Czech Republic), p. 26, 30 [online; cit. 7. 1. 2020]. Available in Czech language at: http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-NOZ-konsolidovana-verze.pdf

9 The Explanatory report to the Act No. 91/2012 Coll., on Private International law (Czech Republic) [online]. p. 43 [cit. 7. 1. 2020]. Available in Czech language at: http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-k-ZMPS.pdf

10 Wolff, L-C. Flexible Choice-of-Law Rules: Panacea or Oxymoron? *Journal of Private International Law*. 2014, Vol. 10, No. 3, p. 441.

11 Explicit reference is made by Rozehnalová, see Rozehnalová, N. *Instituty českého mezinárodního práva soukromého.* Praha: Wolters Kluwer ČR, 2016, p. 27. As well as Pfeiffer, see Pfeiffer, M. Legal Certainty and Predictability in International Succession Law. *Journal of Private International Law*. 2016, Vol. 12, No. 3, p. 567. It can be deduced in Symeonides, C. S. Codification and Flexibility in Private International Law. In: Brown, K. K., Snyder, V. D. (eds.). *General Reports of the XVIIIth Congress of the International Academy of Comparative Law*. Dordrecht: Springer. 2011, p. 14 or in Pauknerová, M. Prostor pro uvážení v českém mezinárodním právu. *Právník*. 2016, Vol. 155, No. 1, p. 14.

because he/she is required to rule on a relationship with an international element,[12] i.e. the idea of individual justice cannot be abandoned due to the presence of an international element.

However, throughout the historical development of private international law, the position of flexibility was not as strong as that of predictability. Considerations regarding flexibility did not appear until the 1930s in the United States and until after WWII in Europe. Moreover, the actual perception of the significance of flexibility represents a struggle between the civil-law approach, i.e. the traditional continental manner of determining the applicable law, and American concepts. Indeed, there is no single prevalent doctrine in the United States; to the contrary, several different concepts have been introduced by various authors. By stating that the perception of predictability and flexibility represents a struggle between civil-law (continental) and American private international law, I do not mean minor disagreements among several academicians regarding marginal aspects of conflict-of-law rules, but rather a battle regarding the very concept of private international law settings in terms of determining the law applicable to a private-law matter involving an international element.

2 Extreme positions of predictability and flexibility

If the relationship between predictability and flexibility can be perceived through the prism of a collision between European and American approaches, how can these positions be characterised? The European approach is considered traditional and is associated with *Friedrich Carl von Savigny*. The development of conflict-of-law rules can naturally be traced further to the past, but *Savigny's* approach, which differed from the concepts prevalent to that date, later dominated continental Europe and is currently considered the basis for conflict-of-law considerations in civil law.

12 Symeonides, C. S. Material Justice and Conflicts Justice in Choice of Law. In: Borchers, P., Zekoll, J. (eds.). *International Conflict of Laws For the Third Millennium: Essays in Honor of Friedrich K. Juenger*. Leiden/Boston: Brill, Nijhoff, Transnational Publishers. 2001, p. 128.

Savigny approached various legislations as mutually equal – his concept was based on formal equality and thus also interchangeability of legal systems.[13] He therefore rejected the priority of *legis fori* vis-à-vis foreign laws[14] because this would not allow for an equal approach towards the state's own citizens and to foreigners. At the same time, he followed from the idea that the laws of each jurisdiction as well as each legal relationship were localised in space – he denoted this as the "local seat" of the legal relationship. His allocation technique adopted a neutral stance towards the contents of the laws[15] and did not perceive any hierarchical relationships among them. *Rozehnalová* refers fittingly to a horizontal conflict in this regard.[16] *Savigny's* theory has its geographical basis (is jurisdiction-oriented). It assumes that if a legal question is correctly localised in space and is thus connected to the territory of a certain state, the law used in this territory can be applied to the given question. The European concept is based on the premise that the law of an appropriate state is (automatically) an appropriate law, where this appropriateness (of both the state and the law) is approached in geographic terms.[17] And this is without regard to the contents of the law. *Pauknerová* denotes this as emotional neutrality of the conflict-of-law method.[18] The connection of a certain legal question to a certain state territory is governed by conflict-of-law rules. A legal norm is what is oriented towards ensuring conflict-of-law justice. Conflict-of-law justice is not identical with material justice, as its objective is (merely) a geographically fair, predictable connection of a certain legal question to the territory of a certain state and thus also its law. A conflict-of-law rule chooses, among laws of sovereign states, the law which is generated by the state to which the legal question is connected, where this connection is perceived purely

13 Schäfer, K. A-S. *Application of Mandatory Rules in the Private International Law of Contracts.* Frankfurt am Main: Peter Lang, 2010, p. 23.

14 Kegel, G. Fundamental Approaches. In: Kurt, L. (ed.). *International Encyclopedia of Comparative Law.* Vol. 3. Tübingen: J. C. Mohr, 1986, pp. 6–7.

15 Schäfer, K. A-S. *Application of Mandatory Rules in the Private International Law of Contracts.* Frankfurt am Main: Peter Lang, 2010, p. 23.

16 Rozehnalová, N. *Instituty českého mezinárodního práva soukromého.* Praha: Wolters Kluwer ČR, 2016, p. 166.

17 Symeonides, C. S. Exception Clauses in American Conflicts Law. *The American Journal of Comparative Law.* 1994, Vol. 42, No. 2, p. 815.

18 Ibid.

territorially in terms of its suitability – justice. The resulting solution is not *a priori* better for one or the other party to a specific dispute. This solution connects, based on a certain criterion (connecting factor), a legal question to a certain law, according to which the contents of the given legal question will be regulated in the sense of the rights and obligations of the parties involved. The conflict-of-law solution does not favour either of the parties involved in terms of substantive law – the connecting factor used is chosen and formulated in such a way that it is neutral in its result. It does not prefer any specific party to a specific legal relationship in view of the contents of the specific legal regulation. As an example, we can mention connecting factors in conflict-of-law rules such as: the law applicable to the seller's place of residence, in the case of a purchase contract; or the law applicable to the person performing a certain act, as regards the capacity to engage in legal conduct; or the law applicable to the place of unlawful conduct, in the case of constructive obligations.

However, according to *Symeonides*, such an approach results in the fact that private international law does not (and does not even want to, cannot) try and achieve the good and justice in an individual case.[19] In another work of his, he makes the same considerations as he explains the difference between conflict-of-law justice and material justice,[20] where private international law and the solution it provides are not about a good or a bad result.[21] *Kučera* also considered the conflict-of-law approach, in its traditional *Savigny's* concept, to be a manner of maintaining legal certainty. *Kučera's* concept is a pure example of the European approach. In his understanding, the conflict-of-law method does not discriminate among various laws and considers them equal. Conflict-of-law rules are employed to make a choice between the relevant laws, as they aim at determining fairly the applicable

19 Symeonides, C. S. Material Justice and Conflicts Justice in Choice of Law. In: Borchers, P., Zekoll, J. (eds.). *International Conflict of Laws For the Third Millennium: Essays in Honor of Friedrich K. Juenger*. Leiden/Boston: Brill, Nijhoff, Transnational Publishers. 2001, pp. 126–127.

20 Similarly, Kegel distinguishes between justice in substantive law, that is material justice, and justice in private international law, that is conflicts justice. See Kegel, G. Fundamental Approaches. In: Kurt, L. (ed.). *International Encyclopedia of Comparative Law*. Vol. 3. Tübingen: J. C. Mohr, 1986, p. 15.

21 Symeonides, C. S. Result-Selectivism in Private International Law. *Roman Private International Law & Comparative Private Law Review*. 2008, p. 2.

law based this conflict-of-law approach, since they cannot cover various perceptions of substantive justice in individual jurisdictions. *Kučera* also does not ask the question of whether or not conflict-of-law rules should show interest in substantive justice. He curtly states that this is not possible in view of the nature of the matter. Therefore, conflict-of-law rules are not interested in the contents of the applicable law.[22]

On the other hand, American approaches perceive those aspects which are considered positive by the continental doctrine of private international law as negative. While *Symeonides* acknowledges the need for predictability in the European concept, he goes on to criticise it by noting that this need renders any such system rigid. He claims, and documents this by a reference to American case-law, that no democratic system can mechanise the methods of decision-making because, should it do so, the application sphere (judges) will begin ignoring this system.[23] Only such norms are then applied which enable to avoid the rigid rules, whereby the entire system becomes unstable and solutions unpredictable.[24] By this mechanical nature, he means the aforesaid automatic connection between an appropriate state and an appropriate law.

The mechanic character of decision-making, giving up on seeking individual justice as a result of blind (regardless of contents) selection among the relevant laws, is the basic argument why several theories arose in the United States in the 1930s which have strictly distinguished themselves from the traditional European conflict-of-law method. In spite of certain differences, some of which will be mentioned in the text below, some identical elements can be identified in this respect. These include limited scope, realism and academic character.[25] They are limited in the sense that while European private international law deals with international conflicts, American law focused more at the time on addressing conflicts among states

22 Kučera, Z., Pauknerová, M., Růžička, K. et al. *Mezinárodní právo soukromé.* Plzeň-Brno: Aleš Čeněk-Doplněk, 2015, p. 23 et seq.

23 Symeonides, C. S. Rome II and Tort Conflicts: A Missed Opportunity. *The American Journal of Comparative Law.* 2008, Vol. 56, No. 1, p. 180.

24 Symeonides, C. S. Exception Clauses in American Conflicts Law. *The American Journal of Comparative Law.* 1994, Vol. 42, No. 2, p. 815.

25 Kegel, G. Fundamental Approaches. In: Kurt, L. (ed.). *International Encyclopedia of Comparative Law.* Vol. 3. Tübingen: J. C. Mohr, 1986, pp. 29–72.

within a single federation.[26] International conflicts were much less frequent and, moreover, the interest in resolving them gradually disappeared in view of the problems associated with the interstate conflicts. This is why constitutional law played a more important role compared to Europe and the differences between the laws of the individual states of the federation were relatively minor. The obsolescence of legislation in certain states could thus be more reflected both in the requirement for application of the law which is better and provides a better (more modern) solution to the given problem, and in the willingness to experiment with the creation of new rules.

Realism[27] is a manifestation of the belief that law should be sought in real life and existing legal relationships, rather than abstractly in professional books. This phenomenon was reflected not only in private international law, but was also typical of the contemporary approach to the law as such.[28] It is characterised by interconnection of law with economics and social sciences and by an attempt to reveal rational reasons for judicial procedures. This results in an inclination towards *ad hoc* solutions to individual cases based on consideration of the interests concerned.

The academic nature merely complements the above. The individual approaches are formulated by theorists active in the academia. As *Kegel* fittingly notes, the approaches were developed in lecture rooms and not in court halls.[29] This is why, in his opinion, these approaches, on the one hand, almost recklessly rely on time-consuming processes of examination and comparison of the relevant laws, and on the other hand, place small emphasis (unlike European approaches) on legal certainty and predictability.

Moreover, all American innovators mostly neglected the general part of private international law with concepts such as qualification and *renvoi*, as they perceived them as instruments of courts to manipulate decision-making. They share a common strong interest in interpretation of substantive norms.

26 Vischer, F. General Course on Private International Law. In: *Recueil des cours 1992*. Vol. 232. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993, p. 49.

27 In more detail see Vischer, F. General Course on Private International Law. In: *Recueil des cours 1992*. Vol. 232. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993, pp. 45–48.

28 Kučera also speaks about "realists", see Kučera, Z., Pauknerová, M., Růžička, K. et al. *Mezinárodní právo soukromé*. Plzeň-Brno: Aleš Čeněk-Doplněk, 2015, p. 86.

29 Kegel, G. Fundamental Approaches. In: Kurt, L. (ed.). *International Encyclopedia of Comparative Law*. Vol. 3. Tübingen: J. C. Mohr, 1986, p. 65.

They believe that, by means of interpretation as such, or in combination with evaluation of further circumstances, it is possible to find an answer to the question of whether the given norm requires its application to certain facts. They sought an answer to the question of the scope of a legal norm through interpretation regardless of whether or not the facts of the case involved an international element. If a "norm" wants to be applied, this is also true in relationships with an international element. They infer from the above that if resolution of relationships with an international element in the sense of a choice of the relevant substantive norms depends on interpretation of those substantive norms, the choice can only be made *ad hoc*, exceptionally in conjunction with a narrowly profiled conflict-of-law rule, but not with a broadly formulated conflict-of-law rule, which covers extensive categories of substantive norms. Rejection of both generally constructed conflict-of-law rules and[30] the general part of private international law influences the entire character of the process of determining the applicable law. From this, they infer, in combination with *ad hoc* interpretation, that the result cannot be predicted in advance due to the absence of general mechanisms. It is only possible to set the boundaries for the process of seeking the applicable law – it is not feasible to use an exact map, but only to provide certain guidance that is to be followed.

Individual approaches were formulated by *Currie, Ehrenzweig, Cavers, Leflar, von Mehren* and *Trautman* and, last but not least, by *Weintraub*. The order used in the above list also reflects the intensity with which the relevant authors distinguished their approach from the neutral conflict-of-law approach, where *Currie* represented the most significant deviation; on the other hand, *Weintraub* and his ideas might be considered least distant from the traditional European concept.[31] Only some of the relevant authors have been chosen to illustrate the basic differences between the European approach and American concepts.

30 However, Ehrenzweig refused to be considered as the creators of the chaos caused by the vague evaluation of various interests, while rejecting certain and historically well-established conflict-of-law rules by the vague evaluation of various interests – viz Ehrenzweig, A. A. A Counter: Revolution in Conflicts Law? From Beale to Cavers. *Harvard Law Review*. 1966, Vol. 80, No. 2, p. 380.

31 Kegel, G. Fundamental Approaches. In: Kurt, L. (ed.). *International Encyclopedia of Comparative Law*. Vol. 3. Tübingen: J. C. Mohr, 1986, p. 58.

Currie, who is denoted as a revolutionary by *Symeonides,*[32] stated that the problem did not lie in bad rules, but rather in the existence of legal norms as such.[33] His approach is based on an analysis of the state's interests in application of its norms (government interest analysis),[34] where interpretation of the individual substantive rules is used to identify, within these rules, the interests of the state that issued the given norm in terms of when and how intensively the state insists on the application of the rule. Including the interest of the state in resolving a private-law relationship with an international element – indeed, he refused to distinguish between national and cross-border relationships.[35] A shortcoming of *Currie's* teaching lies in the fact that he does not distinguish between private and public law, or rather focuses only on interests of the state,[36] while neglecting individual interests[37] – as if everything that takes place within a certain state was conditional on the state's interest. Therefore, when dealing with a private-law issue with an international element, he does not perceive justice as a matter of individuals and, along with that, of society as a whole, or justice in the sense of correctly functioning legislation, but rather as an expression of the state's interest in application of general, broad groups of substantive norms. Given that only the state can express an interest, the need for application of a substantive rule can be assessed separately without the need to apply a conflict-of-law rule. He believes that the state's interest has to be attributed to substantive rules and, by examining the structure of a given norm and

32 Symeonides, C. S. Exception Clauses in American Conflicts Law. *The American Journal of Comparative Law*. 1994, Vol. 42, No. 2, p. 816.

33 Currie, B. Selected Essays on the Conflict of Laws. Chapter Four [online]. *Notes on Methods and Objectives in the Conflict of Laws*. Published in 1963, pp. 180–183 [cit. 7. 12. 2019]. https://heinonline.org/HOL/Page?public=true&handle=hein.beal/secl0001&div=8&start_page=177&collection=beal&set_as_cursor=2&men_tab=srchresults

34 He considers this to be a crucial factor in the choice of applicable law – viz Leflar, A. R. Conflicts Law: More on Choice-Influencing Considerations. *California Law Review*. 1966, Vol. 54, No. 4, p. 1585.

35 Symeonides, C. S. *The American Choice-of-Law Revolution: Past, Present and Future Account*. Leiden: Martinus Nijhoff Publishers, 2006, p. 14.

36 Similarly Kegel, G. Fundamental Approaches. In: Kurt, L. (ed.). *International Encyclopedia of Comparative Law*. Vol. 3. Tübingen: J. C. Mohr, 1986, p. 31 or Vischer, F. General Course on Private International Law. In: *Recueil des cours 1992*. Vol. 232. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993, p. 55.

37 Symeonides, C. S. *The American Choice-of-Law Revolution: Past, Present and Future Account*. Leiden: Martinus Nijhoff Publishers, 2006, p. 1852.

by interpreting it,[38] it then has to be identified whether the state has any interest in application of the given norm to a private-law issue with an international element, and if so, what that interest is.[39]

Leflar set five criteria for the choice of applicable law. He believes that these should be realistic reasons why the judge proceeds – chooses a law – in the way he/she does, or help the judge to modify his/her procedure. The individual criteria should be balanced, but he admits that some of them may prevail in certain situations. These criteria include predictability of the result, compliance with the interstate and international order, simplicity of the court procedure, promotion of the interests of the forum and selection of the "better law". Just like other authors, *Leflar* considers that a judge does not have the right to choose blindly. *Symeonides* considers *Leflar* to be one of the first American advocates of the concept of material justice.[40] As a matter of fact, *Leflar* claimed that judges do not choose the law blindly anyway, although they will not explicitly admit this.[41] Even though the choice of applicable law by the court might appear as a choice between legal systems (European view), according to *Leflar*, judges in fact make a choice among individual substantive norms. A drawback of *Leflar's* concept of better law lies in the fact that he does not explain how to determine the laws among which the better one should be chosen. He provides no guidance as to how to determine the laws that will subsequently be compared.

The considerations of *von Mehren* and *Trauman* are perhaps the closest to the European concept. The first step in their approach designated as functional (functional analysis) is identification the relevant laws.[42] These are both actually and potentially affected laws, which manifest a connection to the relevant facts through persons, place of conduct, arrangement of private legal matters or arrangement of community issues. The next step is to determine how each of the relevant jurisdictions would deal with the given question,

38 Juenger, K. F. General Course on Private International Law (1983). In: *Recueil des cours 1985*. Vol. 193. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1986, p. 215.

39 Symeonides, C. S. *The American Choice-of-Law Revolution: Past, Present and Future Account*. Leiden: Martinus Nijhoff Publishers, 2006, p. 15.

40 Ibid., p. 25.

41 Kegel, G. Fundamental Approaches. In: Kurt, L. (ed.). *International Encyclopedia of Comparative Law*. Vol. 3. Tübingen: J. C. Mohr, 1986, p. 47.

42 Ibid., p. 50.

i.e. whether through its own law, a foreign law or norms of its law which, however, have been specially created for relationships with an international element. If the legal solutions offered differ (there is a true conflict), the "predominantly affected" norm can most often be applied. Such a norm is a norm of the state that exercises ultimate, effective control over the legal question to be resolved[43] – there again is an apparent marked connection between the substantive and procedural solutions.

The option of respecting the individual aspects of a specific case can undoubtedly be perceived as an advantage common to the American approaches. However, this leads to the above-mentioned choice of applicable law without any fixed rules, i.e. *ad hoc* decision-making. Decision-making thus becomes unpredictable and the parties to the legal relationship lose legal certainty. All approaches significantly increase the influence of courts, which, in real life, tend to apply *legis fori*. The situation in the United States is fittingly described by *de Boer*. He considers the above-mentioned approaches to be a criticism of blind determination of applicable law. According to him, this was reflected in the following decades of experiments, which resulted in a confusing mix of traditional conflict-of-law rules combined with lines of thought aimed to determine the applicable law.[44]

3 Relationship between predictability and flexibility

It follows from the above that a legal norm that provides for a predictable solution is rigid at least to a certain extent and does not allow for considering all the aspects of potentially existing legal relationships. In contrast, an approach that is highly flexible and allows for such considerations does not ensure sufficient predictability and legal certainty. The relationship between the two values is thus contradictory. As a matter of fact, this was already perceived by Aristotle, according to whom any pre-defined rule, even if formulated with utmost care, diligence and wisdom, could lead, precisely because of its generality, to results that are at variance with the objectives

43 Ibid.

44 Boer, M. T. de. The Purpose of Uniform Choice-of-Law Rules. *Netherlands International Law Review*. 2009, Vol. 56, No. 3, p. 297.

to which the rule should have led.[45] A number of other authors also mention the contradictory nature of the two values.[46] However, it is also clear that an ideal state of affairs would exist if a legal norm provided sufficient legal certainty and, at the same time, was able to ensure individual justice. *René David* stated similarly that "there is and will always be in all countries, a contradiction between two requirements of justice: the law must be certain and predictable on one hand, it must be flexible and adaptable.[47]

Legal "export" from the United States to Europe also brought the debate in Europe to a state where authors ask whether conflict-of-law rules should be simple and provide a predictable solution, or whether they should also take into account the result that will be provided by the applicable law.[48] Others speak, in connection with modern European conflict-of-law rules, about emphasised flexible approach and importance attached to achieving individual justice,[49] or about an inclination towards reflecting substantive law and the results that it provides when dealing with a specific legal question.[50] Simply put – today's Europe no longer asks, with regard to flexibility, where or not this aspect is relevant, but rather to what degree and how the traditional European model should be enabled to consider the individual aspects of a specific case.

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45 Nicomachean Ethics.

46 Symeonides, C. S. Codification and Flexibility in Private International Law. In: Brown, K. K., Snyder, V. D. (eds.). *General Reports of the XVIIIth Congress of the International Academy of Comparative Law*. Dordrecht: Springer. 2011, p. 14; Hay, P. Flexibility versus Predictability and Uniformity in Choice of Law. Reflections on Current European and United States Conflicts Law. In: *Recueil des cours 1991*. Vol. 226. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1992, p. 304; Wolff, L-C. Flexible Choice-of-Law Rules: Panacea or Oxymoron? *Journal of Private International Law*. 2014, Vol. 10, No. 3, pp. 432–435.

47 David, R. English Law and French Law. In: Symeonides, C. S. Exception Clauses in American Conflicts Law. *The American Journal of Comparative Law*. 1994, Vol. 42, No. 2, p. 814.

48 Weintraub, J. R. The Choice-of-Law Rules of the European Community Regulation on the Law Applicable to Non-Contractual Obligations: Simple and Predictable, Consequences-Based, or Neither? *Texas International Law Journal*. 2008, Vol. 43, p. 402.

49 Rozehnalová, N. *Instituty českého mezinárodního práva soukromého*. Praha: Wolters Kluwer ČR, 2016, p. 27.

50 Forsyth, Ch. The Eclipse of Private International Law Principle? The Judicial Process, Interpretation and the Dominance of Legislation in the Modern Era. *Journal of Private International Law*. 2005, Vol. 1, No. 1, p. 100.

4 Balancing mechanisms

It follows from the above that approaches absolutely accentuating predictability, on the one hand, or flexibility, on the other hand, are no longer considered entirely suitable. The need for sufficient predictability and legal certainty is perceived along with the requirement for a suitable degree of flexibility to achieve individual justice. What mechanisms can be used to balance these values? It cannot be said that there exists some kind of consensus "half way" between the European and American approaches. They influence each other, while it is borne in mind that the two approaches can have their benefits and drawbacks. However, Europe has not abandoned its concept of determining the applicable law through a conflict-of-law rule. It has not resolved to push conflict-of-law rules aside and start using alternative, "soft" approaches. Therefore, the following text must also be perceived from this point of view. I still consider conflict-of-law rules a basis for choosing the applicable law. As every legal norm (if properly formulated), it specifies a rule for making a choice. And even though the existence of a legal norm itself is not a sufficient guarantee of predictability and legal certainty (see above), this is nevertheless a condition *sine qua non*. Rejection of legal norms leads to decision-making *ad hoc*, which I consider unacceptable from the viewpoint of continental private international law. It is clear at the same time, however, that an excessively general rule of conduct cannot be capable of respecting the individual aspects of all situations that may occur. This is all the more true in the case of conflict-of-law rules if the rules, or their scope, are formulated in more general terms (contract; constructive obligation; rights *in rem* to real properties and movable assets). However, there also exist certain legislative techniques that enable to avoid excessively mechanical approach and inability to respond to differences in real life, also with regard to conflict-of-law rules.

These include:

- a combination of the basic connecting factor, firmly and objectively formulated, with special connecting factors;
- accumulation of connecting factors;
- flexible connecting factors;
- escape clauses.

The first two variants have in common that they enable to take into account several aspects of the relevant facts, but still with regard to generally (more broadly) specified groups of facts. In contrast, the third and fourth variants represent an even higher degree of flexibility as they allow to take into consideration the individual aspects of the specific situation. A combination of general and special connecting factors forms the foundation of the entire Rome II Regulation, which supplements the basic connecting factor of legis loci damni infecti with special rules for product liability, unfair competition, distortion of competition, damage to the environment, infringement of intellectual property rights, industrial action, unjust enrichment, negotiorum gestio and culpa in contrahendo. It also envisages a separate rule for a defamation (this question is excluded from the substantive scope of Rome II Regulation).

Accumulation of connecting factors can take several forms. A higher degree of flexibility will be ensured by the use of alternative connecting factors or putting them in order based on the cascade rule. On the other hand, a higher degree of rigidity will be provided by accumulation of connecting factors – the British *double-actionability rule*, according to which conduct can be considered unlawful only if it can be classified as an offence under both the law of the place of such conduct and the British law, can serve as an example. Alternation of connecting factors is used in cases where a certain objective or entity is to be preferred:

- preference of validity of a legal act (Art. 11 para. 2 of Rome I Regulation; a contract is considered formally valid if it meets the conditions of at least one of the legal systems – *lex causae* of a contract, place where each of the parties was present at the time of conclusion of the contract, or the place of habitual residence of each of the parties);
- preference of a certain status, such as adoption or divorce;
- preference of the position of a certain person (Art. 7 of Rome II Regulation – The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Art. 4 para. 1, unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred).

A cascade structure of connecting factors is a situation where a certain basic conflict-of-law rule has been formulated, covering most situations or at least situations which occur most frequently. Further stages then apply to facts which are defined more narrowly, while at the same time, progress to the next stage is based on non-fulfilment of the conditions set down in the previous stage. An example can again be found in Rome II Regulation, specifically in its Art. 5, where the application of the law in individual stages is conditional on placing the given product on the market in the given country. If this condition is not met, one proceeds to the next stage of the cascade:

the law applicable to a non-contractual obligation arising out of damage caused by a product shall be:

a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that,
b) the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,
c) the law of the country in which the damage occurred, if the product was marketed in that country.

However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c).

A flexible connecting factor goes even further in terms of flexibility. It is not formulated in precise terms in relation to the facts to which it is connected, but rather permits considerations regarding the contents. Therefore, in its application, it enables to take account of the individual aspects of the specific facts of the case, whereby it provides a margin of discretion to the decision-making body (a contract is governed by the law whose application corresponds to a reasonable arrangement of the given relationship).

An escape clause is a mechanism ensuring the greatest degree of flexibility. This is a specific concept of private international law that allows for derogation from a general (basic, generally applicable) conflict-of-law rule, which ultimately enables the relevant court to take into account the specific characteristics of the case in view of which the application of the general conflict-of-law

rule appears to be inappropriate.[51] It represents a concept that is used in special situations which are subject to the statutory conflict-of-law rules, but the latter prove to be inappropriate in view of the specific and exceptional nature of the facts *in concreto*.[52] According to another definition, an escape clause enables the application of a conflict-of-law rule leading to a different law, instead of a conflict-of-law rule which is otherwise objectively laid down by the statutory law.[53] Potentially, it can also be perceived as an instrument modifying the result of application of a conflict-of-law rule, where in the given case, the close connection envisaged by the conflict-of-law rule exists only to a very limited extent, while there exists a much closer connection to another law.[54] Although specific deviations may exist in individual laws, application of an escape clause is subject to two conditions – a clearly weak connection of the facts to the envisaged law, and a much closer connection to another law, where the latter may be applied as a result of the escape clause. General escape clauses, which enable avoidance of all conflict-of-law rules of the given law, are comprised in Swiss, Belgian, Dutch and Czech laws (Belgian and Dutch provisions do not allow for the use of an escape clause in the case of conflict-of-law rules aimed at protecting or benefiting a certain entity); special escape clauses can be found in Rome I Regulation and Rome II Regulation.

5 What is the current state of affairs?

European conflict-of-law rules are still based on the primary requirement of predictability and legal certainty. Nonetheless, due to the influence of the American doctrine, as well as social and economic development, flexibility and the requirement for a certain degree of individualisation of decision-making have begun to be perceived as fundamental and worthy of respect in formulating

51 Pauknerová, M. Escape Clauses and Legal Certainty in Private International Law. In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2016/2017*. Vol. XVIII. Köln: Verlag Dr. Otto Schmidt; Lausanne: Swiss Institute of Comparative Law, 2017, p. 65.

52 Pauknerová, M. § 24. In: Pauknerová, M., Rozehnalová, N., Zavadilová, M. et al. *Zákon o mezinárodním právu soukromém. Komentář*. Praha: Wolters Kluwer ČR, 2013, p. 175.

53 Rozehnalová, N. *Instituty českého mezinárodního práva soukromého*. Praha: Wolters Kluwer ČR, 2016, p. 40.

54 Boele-Woelki, K., Van Iterson, D. The Dutch Private International Law Codification: Principles, Objectives and Opportunities. *Electronic Journal of Comparative Law*. 2010, Vol. 14.3, p. 10.

modern conflict-of-law rules. The mechanisms presented above represent the possibility of introducing individual justice into a truly mechanical manner of choosing the applicable law. However, it must be borne in mind that these are still mechanisms which are primarily based on a geographic criterion and do not simultaneously allow to reflect substantive law in a conflict-of-law choice (subject to preference of a certain status with regard to alternative connecting factors). It is therefore necessary to continue distinguishing between an objective consisting in achieving individual justice, while simultaneously insisting on conflict-of-law justice, and an objective of achieving material justice.

Material justice means reflecting the impact of the chosen substantive law on the relevant facts. Private international law is also capable of dealing with this aspect. However, other concepts of private international law serve this purpose, such as materialisation of the conflict-of-law solution or reservation of public policy, possibly while taking into account mandatory provisions. At the same time, however, a significant difference can be seen between the manner of achieving individual justice and individual material justice. While mechanisms bringing flexibility into conflict-of-law decision-making are used to achieve individual justice, material justice is attained in the opposite way. Materialisation of a conflict-of-law solution leads to limitation of conflict-of-law decision-making where a certain law either cannot be applied, or it can be applied but its application is limited by protective mechanisms originating in some other law (see, e.g., the provisions on a choice of law in consumer contracts or individual employment contracts in Rome I Regulation).

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Flexibility in Approaches to Conflict-of-law Solutions – Section 24 (1) of the Private International Law Act

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Abstract

The paper deals with the question of flexibility in approaching conflict-of-law rules as a whole. The Czech Private International Law Act (adopted in 2012, in force since 1 January 2014) inclined towards the possibility of not applying the conflict-of-law rules contained in the Act itself under certain specific conditions. This represents a significant change compared to the previous regulations. The paper analyses the escape clause in section 24 (1) Czech PILA.

Keywords

Flexibility vs. Rigidity in Conflict-of-law Approaches; Czech Private International Law Act 2012; Section 24 (1) Czech PILA.

1 Introduction

Act No. 91/2012 Coll., on Private International Law (Czech Republic) ("Czech PILA") entered into effect on 1 January 2014. After decades of preparations and discussions regarding the sense of national codification or, to the contrary, its redundancy in view of the process of unification within the European Union ("EU"), the Czech PILA was adopted in 2012. It is true that this piece of national legislation has been losing its weight in view of the gradual unification in the EU. From among areas covered by EU rules in the fields of conflict of laws and procedure, one could mention, for example, obligations arising from contracts, tort obligations, succession law, insolvency law and family law. In the case of conflict-of-law rules, this is true not only with regard to links existing within the EU but, thanks

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to their universal nature, also in respect of third countries. The national provisions enshrined in the Czech PILA apply only in certain areas. Examples include the general part of the conflict-of-law legislation; rights *in rem*; certain selected delicts, such as defamation; treatment of foreign law; and the entire area of procedure, as regards relations to third countries.

The five years of effect of the Czech PILA have not provided sufficient time for its evaluation, or to assess the progress achieved. Although the relevant questions are discussed in literature, a number of significant substantive changes, which have cleared the path for a change in the approach to conflict-of-law solutions, have not yet been reflected in the case-law of courts.

Let us first briefly recapitulate[1]. The Czech PILA introduced a number of changes. First of them was structural in nature – the systematics of the law changed. The new Czech PILA no longer deals separately with procedural and conflict-of-law issues. It prefers an approach "mapping the procedural sequence and subsequent understanding of conflict-of-law issues". It deals first with the questions of jurisdiction and then turns towards issues of determining the applicable law (unless, however, direct rules apply). New concepts were also incorporated in the new Czech PILA, both under the influence of the new Act No. 89/2012 Coll., Civil Code (Czech Republic) ("Civil Code") and in an attempt to include in this codex certain questions that have so far been regulated in separate norms (e.g. relationship to foreign countries as regards arbitral proceedings). And thus also strengthen its "codification mission". The new Czech PILA also shifted, in terms of its contents, towards the European judicial area. The general part includes concepts that were previously only elaborated in literature or case-law. They were, however, unknown in legislation. Mandatory provisions and evasion of the law can be mentioned as an example in this regard. All these changes are clear and easily identifiable. And, to a certain degree, they were also predictable in view of the previous debates.

1 See Pauknerová, M., Rozehnalová, N., Zavadilová, M. et al. *Zákon o mezinárodním právu soukromém.* Praha: Wolters Kluwer, 2013; Bříza, P., Břicháček, T., Fišerová, Z., Horák, P., Ptáček, L., Svododa J. *Zákon o mezinárodním právu soukromém. Komentář.* Praha: C. H. Beck, 2014; Dobiáš, P. et al. *Zákon o mezinárodním právu soukromém – komentář.* Praha: Leges, 2014.

The question is whether or not anything else has changed as well. Has the approach of Czech private international law changed in its doctrinal basis? Has flexibility in the approach to the rules of private international law or flexibility in determining the applicable law changed, and if so, in what direction? Has there been any change in the scope of autonomy of the parties' will, in the relationship of conflict-of-law rules to *legem fori* and in the overall position to national law?

In our paper, we deal with the question of flexibility in approaching conflict-of-law rules as a whole. The new Czech PILA inclined towards the possibility of not applying the conflict-of-law rules contained in the Czech PILA itself under certain specific conditions. This represents a significant change compared to the previous regulations. At the same time, it came unexpected, and for a number of reasons. No discussions had been held in this regard on professional forums. The previous laws – dating back to 1948 and 1963, respectively – used a rigid approach in treatment of conflict-of-law rules, as well as in determining the applicable law. Application of conflict-of-law rules of *legis fori* was the starting point for a holistic conflict-of-law approach and any derogation from these rules was rejected. Exceptions existed only in a few cases of *renvoi* or preliminary questions. An analysis of the relevant change and options brought about by Section 24 (1) is interesting from this point of view as well.

2 Flexibility vs. rigidity in conflict-of-law approaches

An emphasis on legal certainty and predictability of a conflict-of-law solution necessarily entails a certain degree of rigidity of the conflict-of-law solution adopted by the legislature. On the other hand, if *ad hoc* solutions and the goal of achieving justice in a specific case are accentuated, this implies a flexible approach. The possibility not to apply conflict-of-law rules of *legis fori*, as stipulated in Section 24 (1) of the Czech PILA, brings a new dimension into the Czech debate on flexibility and rigidity in conflict-of-law approaches. On the one hand, this allows to take account of the specific circumstances of an individual case and, on the other hand, it can reduce predictability for the parties as to the law under which a decision will be made.

Before we proceed with analysing the legislation, we should shortly explain what a "rigid" or a "flexible" approach entails.

In one of his earlier articles, *P. H. Neuhaus* described the tension between legal certainty and equity, or decision-making justice in a specific case, which is reflected in a more rigid or a more flexible approach to treatment of cross-border situations. In a nutshell, *Neuhaus* pointed out fittingly both the differences between civil-law (continental) and Anglo-American approaches from the historical and current viewpoints (written in the 1960s – note by the author), and the mutual influences as regards the background, methods and approaches to resolving issues of cross-border relationships. The time elapsed since that paper was presented has by no means rendered it obsolete. Quite to the contrary.

"*Whatever terms are used, they refer to two different aspects of the law. One is the public interest in clear, equal, and foreseeable rules of law which enable those who are subject to them to order their behavior in such a manner as to avoid legal conflict or to make clear predictions of their chances in litigation. The other is the need for deciding current, concrete disputes adequately, by giving due weight to the special and perhaps unique circumstances of each case. The former aspect calls for legislation, the latter for judicial decision.*"[2]

There are a number of technical elements affecting the final result and evaluation of whether a certain approach is more or less flexible or rigid. This basically concerns the question of whether the norms determining the applicable law should be codified, and whether they should thus be comprised in a separate code. Or, on the contrary, should one opt for an *ad hoc* approach, where the legal regime is considered on a case-by-case basis and the decision-making authority is given some margin of discretion? This is the defining element on a virtual scale ranging between flexibility and an emphasis placed on legal certainty and predictability[3]. However, some further options may also be found between these two extremes. Emphasis might

2 Neuhaus, P. H. Neue Wege im europäischen internationalen Privatrecht? *Rabels Zeitschrift für ausländisches und internationales Privatrecht*. 1971, No. 3, p. 401 et seq.

3 See the example of the so called codification of the first and of the second generation in Symeonides, C. S. Codification and Flexibility in Private International Law. In: Brown, K. B., Snyder, D. V. (eds.). *General Reports of the XVIIIth Congress of the International Academy of Comparative Law/Rapports, Généraux du XVIIIeme Congrès de L'Academie Internationale de Droit Comparé* [online]. *Springer Science+Business Media.* Published on 19 October 2011 [cit. 23. 8. 2019]. http://ssrn.com/abstract=1945924

be put on a more *a priori* approach or, to the contrary, on the judge's discretion and assessment "*ex post*". This may be a duty to apply conflict-of-law rules *ex officio*, the duty to apply only and exclusively national conflict-of-law rules, or in contrast, the option not to apply the set conflict-of-law rules and refer to an *ad hoc* rule. Another option is to perceive connecting factors as rigid (non-flexible) or, on the contrary, introduce elements of elasticity into this area and permit a greater influence of the decision-making body or parties on the approach to the connecting factor. This can be achieved by using alternative connecting factors or general terms such as "reasonable arrangement of relationships" or "closer connection" and "closest connection". Last but not least, this also concerns the scope of autonomy of the parties' will. This is true not only with regard to conflict-of-law rules, but also in procedural treatment of such rules. The specific understanding of each of these elements affects the conclusions regarding flexibility or rigidity, justice in a specific case or, *vice versa*, an *a priori* setting of the rules for determining the applicable law.

The starting point for Czech private international law became apparent after World War II. The choice between codification, which is based on legal norms (more or less general in terms of the concept of their link to the legislation) and represents certain abstract concepts applied to a specific case, on the one hand, and an *ad hoc* pragmatic solution, was resolved at the national level in favour of codification of the rules of private international law. The legislature is the one who determines the application of any law other than national law before courts or bodies of the given country and, at the same time, specifies through a series of norms the rules for determining the law. This is an *a priori* concept of determining the applicable law, which is a process following certain pre-determined rules. The judge's position, including his/her margin of discretion, is defined by this framework. It should also be noted that considerations regarding the courts' margin of discretion or broader discretion were not developed methodologically in Czech private international law, as is common in doctrines preferring a choice by approach to a "choice based on norms". In this respect, the new regulation is surprising and interesting.

3 Escape rule within the regime established by the new Czech PILA

How does the rule set out in Section 24 (1) of the Czech PILA differ from other solutions that were also known in the previous Czech codices? In concise terms, there are two differences: (a) the possibility of replacing conflict-of-law rules laid down by the law by judge's considerations; (b) the general impact**.**

Re: a) Previous regulations provided a freedom of discretion in selected cases only with regard to the connecting factor. This comprised a limited number of cases where alternative connecting factors were used.

Re: b) An escape rule, as known before the relevant provision was introduced in Section 24 (1), concerned a specific situation and a specific conflict-of-law rule. It did not apply to the conflict-of-law system as a whole. The following can be mentioned as examples: Art. 4 (3) of Rome I Regulation[4]; Art. 4 (3) of Rome II Regulation[5]; Art. 21 (2) of the Succession Regulation[6] (i.e. cases brought into the Czech legal area by EU law), and also the first sentence of Section 87 (1) of the Czech PILA. In these cases, flexibility acts "internally", within a specific conflict-of-law rule. The escape clause increases the flexibility of determination of applicable law (typically, Art. 4 of Rome I Regulation) or provides for flexible determination of the applicable law with a margin for the judge's discretion (typically, the first sentence of Section 87 (1) of the Czech PILA). This is not a general exemption affecting the entire set of codified rules.

In these features, the previously known options differ from the escape rule contained in Section 24 (1) of the Czech PILA. The latter enables, under the conditions set out therein, to apply a rule leading towards a different law with regard to any conflict-of-law norm. The exclusion of the original

4 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

5 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

6 Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European certificate of succession.

norm applies both to a conflict-of-law rule leading towards foreign law and to a conflict-of-law rule leading to the Czech law.[7] It does not apply to procedural or mandatory rules. The said provision newly provides for general overall flexibility of Czech conflict-of-law rules.

The first question pertains to the notion under which the given phenomenon appears and which we shall use. The term "escape clause" has been used in Czech literature since the debates regarding the first sentence of Art. 4 (5) of Rome I Regulation.[8] A descriptive term, which is used in the Czech PILA for the whole provision under scrutiny (including gaps) and also in one of the commentaries, reads as follows: "exceptional and subsidiary application of the applicable law".[9] This phrase is rather ponderous. For the situation set out in Section 24 (1), we use the term "escape rule".

Where does this regulation draw inspiration from? The Czech legislation was inspired by debates and provisions that appeared in foreign continental (civil-law) codifications over the past decades. The Swiss law and experience from Swiss practice are referred to in this regard.[10]

The escape rule was advocated for the first time in Europe by *Maridakis* and, several years later, by *F. Vischer*.[11] It is therefore no accident, as will also be seen below, that Switzerland was the country where it has been incorporated in the law. However, it is not brand new. An escape rule was already known in the Vienna Draft of Private International Law of 1913.[12] Today, a general escape rule can be found in a number of codified regulations. For a list of such

7 There are also other regulations. See for example lithuanien regulation in § 1.11 para. 3, First book of the Civil Code of the Lithuanian Republic No. VIII-1864 published on 18 July 2000; Bělohlávek, A. J. *Mezinárodní právo soukromé evropských zemí*. Praha: C. H. Beck, 2010, p. 580.

8 Rozehnalová, N. *Závazky ze smluv a jejich právní režim (se zřetelem na evropskou kolizní úpravu)*. Brno: Masarykova univerzita, 2010, p. 128.

9 Bříza, P. Komentář k § 24. In: Bříza, P., Břicháček, T., Fišerová, Z., Horák, P., Ptáček, L., Svododa J. *Zákon o mezinárodním právu soukromém. Komentář*. Praha: C. H. Beck, 2014, p. 151.

10 Pauknerová, M. Komentář k § 24. In: Pauknerová, M. Rozehnalová, N., Zavadilová, M. *Zákon o mezinárodním právu soukromém*. Praha: Wolters Kluwer, 2013, p. 176–177; See also Pauknerová, M. Prostor pro uvážení v českém mezinárodním právu soukromém. *Právník*. 2016, No. 1, pp. 12–28.

11 Keller, M. Siehr, K. *Allgemeine Lehre des internationalen Privatrechts*. Zürich: Schultess Polygraphische Verlag, 1986, pp. 121–122.

12 Pauknerová, M. Prostor pro uvážení v českém mezinárodním právu soukromém. *Právník*. 2016, No. 1, pp. 17–18.

regulations, we refer to other authors. Specifically, *Hirste*[13] or *Symeonidis*[14]. We shall provide two examples of foreign laws that will enable us to grasp the Czech approach. The first presents a general rule which is applicable vis-à-vis all conflict-of-law rules set out in the relevant code. The second then comprises a rule applicable only to a selected group of norms.

The Swiss provisions encompassed in Art. 15[15] of the Federal Code No. 291 on Private International Law (Switzerland) serve as an archetype of the civil-law concept of generally conceived escape clauses. The mentioned article states as follows:

"*(1) The law designated by this Code shall not be applied in those exceptional situations where, in light of all circumstances, it is manifest that the case has only a very limited connection with that law and has a much closer connection with another law. (2) This article is not applicable in the case of a choice of law by the parties.*"

This legislative concept has quite an interesting history and origin in the case-law of Swiss courts, specifically in the case of *Chevalley v Genimportex* of 1952, heard by the Swiss Federal Court. The actual proposals for the given rule date back to the 1970s and include both a version more closely related to substantive law and the current version, which can be described as a conflict-of-law rule.[16]

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13 Hirste, T. *Die Ausweichklausel im Internationalen Privatrecht.* Tübingen: Mohr Siebeck, 2006, pp. 31–38; For analysis of the art. 46 EGBGB see also Paffenholz, CH. *Die Ausweichklausel des Art. 46 EGBGB.* Jena: Jenaer Wissenschaftliche Verlag-Ges., 2006, 199 p.

14 Symeonides, C. S. Codification and Flexibility in Private International Law. In: Brown, K. B., Snyder, D. V. (eds.). *General Reports of the XVIIIth Congress of the International Academy of Comparative Law/Rapports, Généraux du XVIIIeme Congrès de L'Academie Internationale de Droit Comparé* [online]. *Springer Science+Business Media.* Published on 19 October 2011, p. 182 [cit. 23. 8. 2019]. http://ssrn.com/abstract=1945924

15 Bělohlávek, A.J. *Mezinárodní právo soukromé evropských zemí.* Praha: C. H. Beck, 2010, p. 465; See also Pauknerová, M. Escape Clauses and Legal Certainty in Private International Law. In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2016/2017.* Vol. XVIII. Köln: Verlag Dr. Otto Schmidt; Lausanne: Swiss Institute of Comparative Law, 2017, pp. 67–68.

16 Overback, A. E. von. The Fate of two Remarkable Provisions of the Swiss Statute on Private International Law. In: Sarcevic P., Volken P. Bonomi, A. (eds.). *Yearbook of Private International Law.* Vol. I. The Hague: Kluwer Law International, 1999, p. 128–129. According to *von Overback* proposad first the general escape clause *F. Vischer* (1971) and *H. Dietzi* (1973). *Dietzi* combined conflicts and substantive elements: justified expectations of the parties, a closer connection with another law, the avoidance of a contradictory results, a result contrary to fundamental principles of Swiss law and intolerable hardshipp on a party.

Because of the tension between the two extremes (rigid provisions of the law vs. an illustrative list of options), new codes tend to use various intermediate steps and solutions. The application of a conflict-of-law rule can be revised at various levels. Art. 15 of the Swiss Code adopts a conflict-of-law approach and makes no difference between Swiss and foreign laws. This approach used by the Swiss legislation is based on *Savigny's* concept of private international law: the choice is based on a narrower connection between the relevant facts and the law. In this case, a conflict-of-law rule is abandoned only if its application would favour a law that is only marginally connected with the facts. At the same time, this rule is exceptional in nature. The commentary emphasises that the interpretation adopted by the Federal Court is restrictive.[17] It is quite interesting that, over the years when the regulation was applied and when this exemption was used,[18] Swiss authors have not expressed any reservations or pointed out any excesses. The regulation has been evaluated in positive terms.[19] On the other hand, *Symeonides* considers the Swiss provisions and later similar continental laws overly strict and applicable only in extreme cases.[20]

A different position has been adopted by the German legislature. The latter enacted only certain special escape clauses bound to specific areas. If we leave norms based on EU regulations aside, this is true of Art. 46 of the Introductory Act to the Civil Code (Germany) ("EGBGB"), which provides an option to deviate from the rules specified with regard to rights *in rem* (Art. 43) and rights to means of transport (Art. 45):

"*If there is a substantially closer connection with the law of a country other than that which would apply under Articles 43 and 45, then that law shall apply.*"[21]

17 Machler, M., Wolf-Mettier, E. S. Art. 15. In: Honsell, H., Vogt, N. P., Schnyder, A. K., Berti, S. V. *Basler Komentar.* Basel: Helbing Lichtenhahn Verlag, 2007, 2303 p.

18 See in details in Pauknerová, M. Komentář k § 24. In: Pauknerová, M., Rozehnalová, N., Zavadilová, M. *Zákon o mezinárodním právu soukromém.* Praha: Wolters Kluwer, 2013, pp. 176–177; Dobiáš, P. et al. Komentář k § 24. *Zákon o mezinárodním právu soukromém. Komentář.* Praha: Leges, 2013, pp. 123–125.

19 Overback, A. E. von. The Fate of two Remarkable Provisions of the Swiss Statute on Private International Law. In: Sarcevic P., Volken P. Bonomi, A. (eds.). *Yearbook of Private International Law*. Vol. I. The Hague: Kluwer Law International, 1999, p. 133.

20 Symeonides, C. S. Codification and Flexibility in Private International Law. In: Brown, K. B., Snyder, D. V. (eds.). *General Reports of the XVIIIth Congress of the International Academy of Comparative Law/Rapports, Généraux du XVIIIeme Congrès de L'Academie Internationale de Droit Comparé* [online]. *Springer Science+Business Media.* Published on 19 October 2011 [cit. 23. 8. 2019]. http://ssrn.com/abstract=1945924

21 Bělohlávek, A. J. *Mezinárodní právo soukromé evropských zemí.* Praha: C. H. Beck, 2010, pp. 245–246.

The prudence required in application is substantiated by interests in the field of family law. To compare solutions based on an alternative type of linkage and on an escape rule, it might be interesting to note that while considerations regarding alternative linkage do not require any extraordinary evaluation, and this is a common decision, an escape rule has an absolutely exceptional nature.[22] From a different point of view, an escape clause has to be denoted as a conflict-of-law rule which is based on a closer connection with the law, compared to the situation set out in Art. 43 and 45 EGBGB. *Looschelders* mentions cases of possible utilisation.[23] Primarily, what might be interesting in this regard is the application of *legis causae* to matters related to transfers of the ownership title. Naturally, this must take place within limits protecting legitimate expectations of the parties. On the contrary, in view of its nature, it cannot be used with regard to real property.

4 Czech legislation comprised in Section 24 (1)

Section 24 (1) reads:

"*The law that should apply pursuant to the provisions of this Act may be not applied in absolutely exceptional cases if, based on due and justified consideration of the aggregate of all the circumstances of the case and, in particular, the justified expectations of the parties regarding the application of some other law, this would appear disproportionate and contrary to a reasonable and fair arrangement of the relationships between the parties. Under these conditions and provided that the rights of other persons are not affected, the law whose application corresponds to this arrangement shall apply.*"

In Section 24 (1) of the Czech PILA, the Czech legislation is based on the conflict-of-law concept, and does not apply or use any value criteria. This is a general rule affecting conflict-of-law rules and representing a statutory exemption from them. The way the conditions of application are set also defines and limits the margin for discretion on the part of the body applying the law.

22 Rauscher, Th. *Internationales Privatrecht*. Heidelberg: C. F. Müller Verlag, 2009, p. 76.

23 Looschelders, D. *Internationales Privatrecht – Art. 3–46 EGBGB*. Berlin, Heidelberg: Springer Verlag, 2004, pp. 661–665.

This rule is intended to be used on an exceptional basis and the application of this rule has to be properly justified.[24] This is indicated both by the wording of the provision and by the conditions specified for its application: a) due and justified consideration of the aggregate of all the circumstances of the case; b) justified expectations of the parties; c) proportionality or disproportionality of applying certain law; d) the principle of reasonable and fair arrangement of the relationships between the parties; e) protection of third-party rights.[25]

With regard to the general background of the law, it is interesting how the principle of reasonable and fair arrangement of the relationships between the parties is applied. This, specifically, is a matter of relationship between the closest connection, expressed in a number of other provisions of the law and in the general background, and this criterion. This issue is also interesting in the context of how escape clauses set out in other laws accentuate the closer or closest connection. They do not use any other criteria. As stated in the commentary, the principle of reasonable and fair arrangement of the relationships between the parties is a classical principle of Czech private international law. It is conceived in the form of achieving conflict-of-law justice. It was included in the previous Czech PILA, e.g., in Section 35 (reasonable and fair) and Sections 4, 13 (2) or 10 (1). As stated in the commentary, this formulates an objective that is to be achieved only as regards the choice of law. In order to demonstrate the relationship to the closest connection, we can cite directly from the explanatory memorandum:

"*The requirement for reasonability (and fairness) in the conflict-of-law sense corresponds to the choice, from among two or several relevant laws, of the law to which the given legal relationship has the most significant connection.*"

In this understanding, the principle of reasonable and fair arrangement, which is used in the conflict-of-law sense, is a legislative expression of the general principle of the closest connection between a case and a law. Another

24 Pauknerová, M. Escape Clauses and Legal Certainty in Private International Law. In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2016/2017*. Vol. XVIII. Köln: Verlag Dr. Otto Schmidt; Lausanne: Swiss Institute of Comparative Law, 2017, p. 69.

25 Pauknerová, M. Komentář k § 24. In: Pauknerová, M., Rozehnalová, N., Zavadilová, M. *Zákon o mezinárodním právu soukromém.* Praha: Wolters Kluwer, 2013, pp. 178–179; See also examples of usage in Pauknerová, M. Prostor pro uvážení v českém mezinárodním právu soukromém. *Právník*. 2016, No. 1, pp. 20–26.

test could be based on the relationship between justified expectations of the parties and protection of third-party rights. The following can be stated in this respect[26]:

- The escape rule reflects a specific, unique case, which differs – in terms of the aggregate of conditions – from the situation established regularly by a conflict-of-law norm. The factual specification is based on the criteria set out in the first sentence of Section 24 (1). These are conditions that approach the case as a whole, which distinguishes it from regular situations where the norm set out in the law is applied.
- Subsequently, the situation under the second sentence is subjected to the second step – evaluation of (non-)infringement of third-party rights. These tests are not parallel. The second step follows the first.

5 Conclusion

A legislative development which can be seen in the codified regulations and which loosens the system of rigidly set conflict-of-law rules has also been reflected in the Czech PILA. Various shifts are apparent in this regard. In this paper, we analysed one of them – the escape clause generally laid down in Section 24 (1) of the Czech PILA. This is a new element in the regulation. Nevertheless, it is still waiting for its practical application or use.

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Sharia – Conflict of Law and Culture in the European Context

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Abstract

Sharia and its conflict with the private law within the EU is one of the most current problems in the conflict of laws. In accordance with the doctrine of *ordre public*, a foreign law that is otherwise applicable is disregarded if its application would violate some fundamental interest, basic policy, general principle of justice, or prevailing concept of good morals in the forum state. This doctrine is used and followed by judicial procedures not only at "the old continent" but also in Islamic countries. This article shows the basic aspects of Sharia, Islamic legal tradition and the reflection of all the connected aspects in European Union private law and legislation. Some selected chapters analyse the most important differences in the legislation and judicial practice in the EU member states.

Keywords

Sharia; Public Order; International Private Law; Legislation; Juridical Practice; Conflict of Laws; *talaq; iğmā; qiyas; urf; ādā.*

1 Introduction

Private International Law is an instrument for the solution of a conflict of legal systems in the situations, where the private relationships with international element are the reasons for the obligatory application of foreign legal systems. Especially in the situations, which are today connected to the problematics of migration and its residual symptoms, familial relationships, questions connected to free movement of goods, are not only the judge and the bride legal society in the position of legal comparatists.

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Confrontation with a foreign law and its comparison with the relevant national legal order are in many cases associated with the obligations *ex officio*.[1] From a historical point of view, we can substantiate these premises by teaching of *Nikolaus von Kues*[2] , who had clearly defined comparative science, as part of every scientific work. It is typical for legal science, than it has been viewed since the 20th century as a national scientific discipline, with exceptions to legal philosophy and platforms of international law, however, in the end of 20th century and in early 21st century we are reflecting an increase in the reterritorialization of legal science. This process is linked to aspects of the global context, of the views of legal science, technical and communication tools implemented at present time, the positive and negative effects of the Internet and aspects linked to electronic commercial matters.

All these processes and changes pose new importance to international law and private legal comparative studies, especially given by the evidence of considerable divergence in national legislations. These processes have social influence when they are combined with significant political changes. This was the also the case in the past in the fall of the Soviet Empire, when a significant wave of comparative activity as the alignment of the states of the former eastern bloc territory from the countries with the democratic community, not only within the European continent, played an important role. Another important element for the factual practical needs of comparative knowledge is European integration, where the EU states with their national legal systems resonate with the need for comparative knowledge, not only with regard to unification and harmonisation trends.

Enhanced judicial cooperation between European Union ("EU") member states also entails the need for knowledge of individual national legal systems. Finally, the migration crisis itself, seen as an external and internal platform, which represents the initiation of a conflict of laws of the states, where

1 The cases with which the European courts have been confronted over the past five years prove this in particular in connection with Islamic law and divorce in the form of repudiation (talaq).

2 Here you can refer to his file *Comparatio est omnis investigation*, see Gottlöber, S. Nikolaus Cusanus – philosophische Grundgedanken [online]. *PortalRheinische Geschichte* [cit. 20. 1. 2020]. http://rheinische-geschichte.lvr.de/Epochen-und-Themen/Themen/nikolaus-cusanus—-philosophische-grundgedanken/DE-2086/lido/57d1225a917845.06989268

migrants originate and the member states in the EU context, also underlines the need for knowledge of foreign law, as well as the ability to analyse it.

This issue is not only related to the comparative aspects, but also to an adequate approach of qualification under private international law and also to other legal sectors, as migration is also linked to the application system of the public legal sector, in particular, administrative law is linked to the decision-making of the administrative authorities. Although the principle of territoriality for the public sector means a precondition for the importance of comparative studies only for the private law sector, some initiation elements, particularly related to asylum problem areas, need to be linked also to the public sector.[3] The comparative approach has evident importance in the revision of the content of the legal order. Therefore, it is also of importance, identifying the necessity of amendments and steps toward making a reform, where it is appropriate to confront the current state of foreign legal order related to the legal tradition in such procedures.[4]

One way or another, to the comparative work under private international law should be given more attention. Attention not only within the practical field, but also in the studies of the sector itself. Students, like the practical public sector, should not only perceive legal dogmatic, but also legal comparative work as its legitimate complementary legal method.

While the courts in the Czech Republic do not meet much with the need to assess a certain legal relationship on the basis of foreign legal standards because it is not tied to an unsecularised relationship with Islam, as it is in the legal order of Syria, Afghanistan, Pakistan or Iraq. In other European countries, such as Germany, France and Austria are situation much more different. In the view of existing disproportions[5] within the social systems of EU member states, migrants, whom we cannot currently call refugees, are looking especially in those countries. Neighbouring Austria is subject to this targeting to bigger extent than the Czech Republic, which is also consistent with

3 Wieser, B., Stolz, A. *Vergleichendes Verwaltungsrecht in Ostmitteleuropa*. Vienna: Verlag Österreich, 2004, 864 p.

4 Nehne, T. M*ethodik und allgemeine Lehren des europäischen Internationalen Privatrechts*. Mohr Siebeck, 2012, p. 82.

5 See the study on refugee support within the EU Leistungen für Flüchtlinge im EU-Vergleich [online]. *dw.com*. Published in 2018 [cit. 20. 1. 2020]. https://www.dw.com/de/leistungen-f%C3%BCr-fl%C3%BCchtlinge-im-eu-vergleich/a-44287802

the current case-law of the Austrian courts. In the context of the application of standards linked to Sharia law, these decisions are linked to the question of compliance or conflict with Austria's public order and its protection.

Islamic legal institutes, such as a unilaterally pronounced divorce by a man, the issue of maintenance related to the three subsequent prolific periods of the woman after the divorce of the marriage are not only predicting already mentioned confrontation with public order but also demonstrate the need for adequate use of comparative work as the scientific methods.

2 Qur'an as a basis for Islamization – theological and legal reflection

Facing the fact, that only in Arabic language the Qur'an is authentic form an Islamic point of view, translation in another language can only be an approximate reproduction of its content, that is, in the best case, commentary, not a translation. The legal meaning of the Koran – *Qur'ān*, which contains rules of conduct for believers, is a fundamentally immutable message for religious Muslims in the "pure Arabic language". Therefore, it cannot be translated into a foreign language. Foreign-language versions refer only to approximate content. For a long time, the translation of the text into a foreign language was seen as inadmissible. However, the paradox is that only a third of Muslims are Arabs and therefore it is necessary to make the approximate content of the Qur'an available to those who do not know Arabic.[6]

The basic structural concepts of Islamic law are *Sharia* and *Figh*. Sharia (direct path to the source, self-subjugation to God) is an Islamic normative order that governs earthly life; it is a law in a narrower sense and also the life in the otherworld – five pillars of Islam. *Figh* is then a legal science and doctrine of interpretation, taking into account the fundamental difference between religious behaviour *ibādāt* and interpersonal relations *mu'āmalāt*. This point to the fact that the sanctions for violations of the law, which are considered as "sin" will be imposed in the afterlife, if individuals do not

6 For more information, see the study by the Society for Arabic Language and Literature Lisan. Der Status der arabischen Sprache im Islam [online]. *arabisch-lernen.co.* Published in 2019 [cit. 20. 1. 2020]. https://www.arabisch-lernen.co/der-status-der-arabischen-sprache-im-islam.html

respect the legal norms for social co-existence, they will be punished already in this world.[7]

The primary sources of law are following the ideological concept the *Qur'an*: "The first and fundamental source of Islamic law" and "the way of God" and *Sunna*, that is the life of the prophet, in the submission of *Hadis* "the way of the prophet."[8] Secondary sources of law are *iğmā,* the consent of the believers, *qiyās* as the parallel derivation, *'urf* and *'ādā* – the recognized customs and morals, *ra'y*, a considered personal opinion, *istihsān* is representing public interests and justice. Islam and Islamic law also include legal schools, such as Sunni Legal Schools (Madh-hābib), Hanafī Madh-hāb (Hanafit school), Mālikī Madh-hāb (Málikov School), Sāfi'ī Madh-hāb (Shahi school), Hanbalī Madh-hāb (Hanbach School) and also the Shiite Legal School – Ča'fari Madh-hāb. A clear wide range of learnings and schools can be reflected as an internal problem of interpretation of Islam. These schools are also a reason for many different interpretations of individual aspects and institutes.

Islamic law is currently in terms of its application required by many Muslims in individual *diasporas,* mainly in the judgments of the questions of divorces and inheritance law. From an economic point of view, the area for Islamic implementation of contracts and related Islamic banking and financial law is important not only for private sector. In this area, we recognize the specifics of *riba* – the prohibition of interest, *gharar* – ban on indeterminate contractual content, *maysir* – the ban on speculative trade with goods and also *qimar* – the prohibition of gambling.[9]

The Qur'an is divided into 114 sur (chapters), contains 86 430 words, in 6 666 verses[10] – of which less than 10 %. deals with legal issues. The Qur'an was communicated to the Prophet through the archangel Gabriel between 609 and 632 after Christ. He was written by Muhammad's disciples, Muhammad couldn't write. For religious Muslims, the Qur'an is not a "book created"

7 Pabel, K. Das Islamgesetz in rechtsvergleichender Perspektive. In: Hinghofer-Szalkay, S., Kalb, H. *Islam, Recht und Diversität.* Vienna: Verlag Österreich, 2018, p. 318.
8 Rohe, M. *Das islamische Recht: Eine Einführung.* Mnichov: C. H. Beck, 2013, pp. 22–36.
9 Ibid., pp. 9–13.
10 In connection with this numbering there are often different calculations and quotations of the Qur'an.

that describes Christ's life as a Bible, but an authentic, immutable, entrusted, binding word of God. The Qur'an provides the faithful Muslims with the right guidance, which is *hudā*, ordering how to behave in social and especially in family life, and sets the rules for their religious behaviour. The five pillars of Islam remain untouchable, *shahāda* – confession of faith, *salāt* – ritual prayer, *saum* – fasting in the month of Ramadan, *zakāt* – principles of alms, tax, *haǧǧ* – the aspects of pilgrimage to Mekka.[11]

In the 19th century, the Qur'an was in the Ottoman Empire complemented and supplemented by legislation. In the 20th century, Qur'an was for the first time artificially "overlaid" by a legislature influenced by Western culture. One of the consequences of the decline of the Ottoman Empire and the end of the caliphate was the demise of Ottoman civil law, where Sharia law was applied in family and inheritance law and in the obligation and substantive law where governed by the state legislature – *meğelle*.[12] Colonial powers have also brought changes into the Islamic legal system. After 1919, during the British and French mandate was the reception significant. The influence of the British colonial interests and the French law is evident in the above-mentioned era in Palestine, Syria, Lebanon and Egypt, and this have been proven mostly because of the texts in the Civil Code.[13] In Turkey, there was a strong influence because of the reception of Swiss law. The end of the system of colonies had caused a return to the Islamic legal tradition.

11 Closer to that in Rohe, M. *Das islamische Recht: Geschichte und Gegenwart*. Munich: C. H. Beck, 2009, p. 48.

12 Rohe, M. *Der Islam in Deutschland,Eine Bestandsaufnahme*. Munich: C. H. Beck, 2016, p. 53

13 See Egyptian Civil Code of 1948 Author: as-Sanhūrī (1895–1971), influenced the material-legal, civil-law codification of the following Islamic states: Syria (1949), Libya (1953), Somalia (1973), Algeria (1975), Afghanistan (1977). Meğelle's stronger influence remained in civil law in the countries of Iraq (1953), Jordan (1976), Kuwait (1980) and the United Arab Emirates (1985); Meğelle – Code of the Ottoman Empire of 1877 – the result of the Tanzimate period. So far in the legislation of some successor states of the Ottoman Empire; once again more recognized throughout the Islamic world; (not Salafity). It is limited to regulations which relate to the right of ownership (both contractual and substantive). By: Ahmad Hawdat Pasha (1822–1895); 16 books: First book: Purchase contract (bey), then: Loan contract (ujret, or .. ijar, istijar), contractual security (kefalet), debt assumption (hawale). Fifth book: Pledge contract (rehn), further: Custody contract (emanet) and donation contract (hibe). Further: Property deprivation, damage (ghasb, itlaf), co-ownership, servicing, company (shirket) and agency (vekyalet). Procedural law and rules on the duties of a judge complement the content of this codification; More on the causes of recodification in Rohe, M. *Das islamische Recht: Eine Einführung*. Mnichov: C. H. Beck, 2013, p. 53.

Under Islamic law, it is possible to distinguish between wide groups of behaviour of the believers. The range of behaviours is divided according to Islamic legal science – *fiqh* hierarchically to the acts commanded, mandatory – *wāǧib*, recommended or desirable – *mandūb*, permitted, neutral, without value – *mubāh* , rejected – *makrūh*, forbidden – *harām*. According to the *Hanafit* school, it is also *fard*, i.e. "absolutely binding".

This behaviour is then consistent with a system of sanctions, where the "otherworldly" and not legal but religious sanctions, while respecting the commanded – *wāǧib* is remunerated, violation punished; adherence to the recommended – *mandūb* is rewarded, however, it is not punished; when observance of the permitted – *mubāh* is remunerated, its violation is not punished; abstaining from the rejected – *makrūh* is remunerated, its realisation is not punishable and abstaining from the forbidden – *harām* is remunerated, the realisation is punished.[14]

3 Sharia

Sharia constitutes religious standards that set sanctions after an individual's death and also the rules of law, establishing sanctions in this world. Sharia is the subject of Islamic jurisprudence. *Fiqh* is then an interpretation of Sharia, a "paved path to the spring. *Fiqh's* tasks are clarification of the rules of God, which are not always clearly arranged in connection with the above-mentioned diversification and the different status of individual legal schools. Religious Muslims are reluctant or at least sceptical of the idea of codifying the law by the state,[15] because the traditional law is mostly given by God and is immutable. According to this understanding of the law, the sources of law differ from the sources of secular, democratically formulated state law, in which the law is based on the people's will.

Overall, the complicated position of the sources of law led to the independent development of teaching on the proper treatment of legal sources – *iǧtihād*. Sharia rules are not strictly enshrined in the form of a code, nor are

14 Krawietz, B. *Hierarchy der Rechtsquellen im Tradierten Sunnitischen Islam.* Berlin: Duncker und Humblot, 2002, p. 64 et seq.

15 Anderson, J. N. D. Codification in the Muslim World: Some Reflections. *The Rabel Journal of Comparative and International Private Law*. 1966, Vol. 30, p. 248 et seq.

the Qur'an, whose verses have less than 10 % of legal content. Islamic law is more a set of precedents, legal decisions and general principles, similar to English case law especially on the issue of private law aspects. That concerns mainly obligations, contracts, and issues of personal status – *huquq al-ibad*. In addition, the legal provisions, the rights of God, under the heading *huqq Allah*, which determine the obligations of the Islamic community and whose violation is sanctioned in the afterlife. The Sunni tradition distinguishes between primary and secondary sources of law.[16]

The primary sources of law are therefore the Qur'an – *Qur'an*, *Sunna* – the life of the Prophet in the form of *Hadís(s)* is about statements, judgments, instructions, behaviours and attitudes of the Prophet in contact with the believers – "the way of the prophet", everything that "*has been preserved about the Prophet's words, acts or its silent consent, but is not the Qur'an*".[17] Next, the Messages – *ahādīth,* are describing the Prophet's statements on the issues of religion and coexistence of believers. They were first passed only orally, later also recorded. In *ahādīth*, opinions on legal issues (*qal*) can always be found. The tradition is made up of the actions or testimony of the Prophet, which announces a chain of traditions, which together have to reach back to Muhammed (*isnād*). The reports are not equally credible and have different weights. Thus, traditions are distinguished as "real" or "perfect" (*sahīh*), "good" or "beautiful" (*hasan*), and "weak" (*da'īf*). The most important collections of Hadis were carried out by Muhammad b. Ismail al-Bukhari (810–870), so-called *Sahih Bukhari* and Muslim ibn al-Hajjajs so-called *Sahih Muslim*, (817–875), *Sunan Abu Dawud* – compiled by Abu Dawud Suleiman Ibn AlAshtah (817–888).[18]

The Qur'an contains implicit learning system, but explicitly tells a person what God expects from him or her. Above all, it is a revelation of the will of God, and sets out what people must do to please God, and how they will be judged in the last judgment. It contains several explicit commands, such as the aspects of the marriage and the division of property

16 Closer to the Formation of the Teachings of Krawietz B. *Hierarchie der Rechtsquellen im tradierten sunnitischen Islam*. Berlin: Duncker and Humblot, 2002, p. 59 et seq.

17 Hourani, A. *Die Geschichte der arabischen Völker*. Frankfurt n. M.: Fischer, 2016, p. 106.

18 Krawietz B. *Hierarchie der Rechtsquellen im tradierten sunnitischen Islam*. Berlin: Duncker and Humblot, 2002, p. 172.

after the death of a Muslim. However, there are only a few such provisions; in most cases, the God's will is expressed in the form of general principles. Commandments and principles relate to how people should worship God but also how they should behave with each other. In the period of the first caliphates and *Umaiyads*[19], there were two developments occurred. Rulers, governors and authorised representatives, *qadis* "judges", interpreted the law and decided the disputes. In doing so, they took into account the customs and laws of individual regions. At the same time, Muslims have tried to substantiate all human actions to the judgment of their religion and develop an ideal system of human behaviour. In such a system, they had to not only consider and interpret the wording of the Qur'an, but also transferred the memories of the religion. They had to examine how the Prophet allegedly acted in his usual behaviour, his teachings or *Sunna*, which increasingly adhered to traditions or *hadisses*.

4 Secondary sources of law

Secondary sources of law are mainly following institutes: *iğmā* as an agreement of believers is presented as a common journey of the community of all lawyers and believers. By applying *iğmā*, an adjustment of the immutable divine law can be achieved and in this way some change the framework of conditions for the Muslim society.[20]

Qiyās is an analogous derivation, i.e. the use of prescribed orders and prohibitions in the Qur'an for similar situations. Legal schools assess the importance of this derived resource differently. This applies, for example, to the ban on drinking wine from grapes or dates and the question of whether to extend this to all types of alcohol to prevent any form of intoxication. Does the ban on the consummation of spirit drinks from cereals, apples or stone-fruit? Are "liberal Muslims" behaving properly if they do not see consummation of whisky as a contradiction with the Qur'an and reject of analogy?

Also *'urf* and *'ādā* are recognized customs and manners. The function of customs as the sources of law is not universally recognized in the Islamic world;

19 Berger, L. *Die Entstehung des Islam: Die ersten hundert Jahre*. Munich: C. H. Beck, 2016, p. 37.
20 Krawietz, B. *Hierarchie der Rechtsquellen im tradierten sunnitischen Islam*. Berlin: Duncker und Humblot, 2002, p. 184.

rather it is an auxiliary source. The meaning of the terms *'āda* and *'urf* is not clarified enough. Some sources explain the term *'urf* as individual custom and the term *'āda* means social custom. In order to be recognized as a source of law, the habit must be correct – *'urf mu'tabar*. It must not be contrary to either the clear rule of the Qur'an, nor with the rule the *Sunna* or the consensus of scholars. Additionally, it may be ony a supplementary source of law in situations, where statements are not clearly derived from recognised sources of law.[21]

We also recognize *ra'y*, an independent, considered personal opinion. If no other sources of law can be used to address the legal issue, the final judgment of the believer, respectively of the legal scholar who is responsible for the decision, will be deciding. Therefore, it is necessary to find an answer to the new legal questions, raised by social development. In this way, the flexible application of God's inherent law can be achieved within a limited framework.

The institute *istihsān* means an appeal to the public interest; it can serve as an argument, that one of two possible legal interpretations is preferable. Citing *istihsān*, liberal Muslims promote a more modern understanding of Sharia, adapted to changing social conditions such as the perception of the role and importance of the gender.[22]

5 The Qur'an as a source of law and its linguistic mutation

Moreover, the translation of the Qur'an varies depending on the translator's personal approach to the Islamic religion. In support of this, the translation of verse 4:34 will be presented, when Henning is given the following text:[23]

"*Men are superior to women because of what Allah has given one before others, and because men give out from their property (to the women). And virtuous women are humbly devoted and guard in the absence (of their men) what Allah has commanded them to guard. And those whose disobedience you fear, warn, banish them from the bedrooms and beat them. And if they are obedient, do not look for reasons against them. Allah is noble and great.*"

21 Ibid., pp. 294–300.
22 Ibid., pp. 283–286.
23 Henning, M. *Der Koran: Vollständige Ausgabe*. Nikon, 2019, p. 109.

To the verse 4:34, the translation by *Murada W. Hofmann* can be added for to reflect the differences:[24]

"*Men are responsible for women, given that Allah has endowed one more than the other, and because men give from their property (to the women). The right women are humble and careful in preserving Allah's commanded intimate sphere. And those whose disobedience you fear, warn, banish them from the bedrooms and beat them. And if they are obedient, do nothing else for them; Allah is noble and great.*"

And the same text in HUDA translation:[25]

"*Men stand alongside women in strong solidarity with regard to the numerous gifts God has given them, and with regard to the given wealth they put into circulation. Honest women, who are open to a divine presence, are guardians of the hidden in the sense of what God has kept. But to those women, whose unsociable behaviour you fear, give them good advice, leave them to themselves in their private rooms, and strongly suggest them the change of their behaviour. But if you recognize their arguments, look for no reason to anger them. God is noble and grea*t."

What does verse 4:34 mean and how the term "*darb*" or "*daraba*" should be interpreted? It means primarily "*hitting*", but it can also mean stamping of form, or coins, roam, travel, set up protection from the sound, turn away, stay away, pull something out of something, capture, stop, separate, set up. Other meanings of the word *daraba*, however, are also a blow to the cane, the scorpion bitten, the heartbeat, someone has caused trouble, someone is looking for glory, the birds have flown, prevented something…, the camel male climbed onto a camel female, riding camels, etc.

Can a judge in the Czech Republic, Germany or Austria grant to the clause of Qu ran 4:34 a correspondent legal relevance? Does the application of this provision, according to which a man is allowed to beat an "unsubordinated" woman, violate the law and thus order public or the fundamental values of the order public? Can this 'provision' be applied only if the content of codification of material private law is supplemented? Independent to this question is the mentioned above demonstrating the problematical aspects by translations and writings in Islamic law.

24 German convert, author of many works on Islam with partially fundamentalist content. Publisher of the Quran in German language, closer to his text in Hofmann, M. W. *Der Koran. Arabisch – Deutsch, translation from German language.* Diederichs, 2001.

25 See Association of German Muslim women [online]. *Islam.de* [cit. 20. 1. 2020]. http://islam.de/1624.php

6 Family law in the System of Islamic Law

Normative foundations for family and inheritance law are found mainly in the aspects regulated through the Qur'an and Sunny. The supporting passage of the Qur'an is for this circle of legal conditions 2. and 4. *sūrah*. The relationship between a married couple within the family and the legal status of a woman in the family, as well as the relationship between parents and children, are touched by many of the *hadith* reports.[26] Inconsistencies in terms of equality can be found in the reference to the Qur'an on issues, where women are required to behave or tolerate the case of sexual suffering, referring to specific *sūrah*. The most problematic platform is the different interpretation, carried out by *fiqh* legal science. The legal systems emancipated, such as the legal order of Morocco, must be distinguished from the legal order built in the old or traditional way.[27]

As a result of colonial influences and inference of legal traditions, it was always possible to reflect the significant influence of European legal tradition on the Egyptian legal order. However, there are legal systems of countries where changes can be reflected more intense and democratic than in the Egyptian legal order. This is mainly reflected in the situation of Morocco.[28] Here, positive legislative steps have been created. These steps have transformed Islamic rules of society into a code called *Moudwana*.

The *Moudwana* Code contains a codification of the legal rules into 400 articles and is in fact the codification of family and inheritance law. Not only because of its scope, but also by individual institutes, which are introduced contrary to Islamic tradition, such as the Institute of last will, implemented through Art. 277 and the following, constitutes an important activity. The Code is designed in a similar way to the European codifications, in its

26 In fact, it is the knowledge of the behavior and teachings of the prophets, Rohe, M. *Das islamische Recht: Geschichte und Gegenwart*. Munich: C. H. Beck, 2009, p. 67.

27 See also Wohlgemuth, G. Die neue Moudawana – Ausblick auf das Marokkanische Familienrecht und Seine Reform. *FamRZ*. Bielefeld: Gieseking Verlag, 2005, pp. 1949–1960.

28 This positive excess is marked by the 1995 Moroccan political movement of women called Collectif 95 Maghreb Egalité and the development of a plan for the integration of women in relation to their rights. This plan resulted in significant recodification changes in 2004. See more Collectif 95 Maghreb Egalite [online]. *arab.org* [cit. 20. 1. 2020]. https://arab.org/directory/collectif-95-maghreb-egalite/

introductory part it contains general provisions relating in particular to the persons, followed by 1st book governing the marriage and marriage ceremony, 2nd book regulates the termination of the marriage contract. The 3rd book regulates then the birth and its legal consequences and the 4th book of legal capacity and the aspects of representation. The 5th Book represents a significant modernist attempt with the regulation of the last will. The 6th book then regulates the legal succession.

The question of polygynous marriage has not been excluded from this codification, but its implementation is the subject to significant obstacles and limitations. Persons wishing to be married must be able to marry concerning their personal status, and a gift to the bride must be guaranteed. This gift is for the purposes of this codification called *sadaq*. As a third condition, the presence of the curator of a female is necessary and it is associated with the term *wali*. Consent statements of partners must be verified by two *adulses*.[29] As for the individual conditions, it is necessary to state, that women are eligible for marriage from the age of 18 onwards, just like men. In addition, Art. 51 of that codification foresees the same rights and obligations for women as for men and women are not obliged to comply with the will of their spouses. Another significant progress is that the distinctive patriarchal elements are elsewhere replaced by parental responsibility.[30]

The Qur'an, as the primary source, requires from the faithful to marry – *nikāh,* and the foundation of a family, while celibacy is not considered as a way of approaching closer to God.[31] The verses of the Qur'an further introduce the extramarital community life as the partnerships that contradict Islam itself.[32] In the context of guaranteeing the spread of true faith, Muslim men should found families at a young age. From a sociological point of view, this factor is very important, especially with regard to the population

29 This is how a notary is referred to under traditional Islamic law. Notaries may also divorce marriages within the framework of the profession. More on this see Rohe, M. *Das Islamische Recht: Geschichte und Gegenwart*. Munich: C. H. Beck, 2009, p. 216 et seq.

30 Wohlgemuth, G. Die neue Moudawana – Ausblick auf das Marokkanische Familienrecht und Seine Reform. *FamRZ*. Bielefeld: Gieseking Verlag, 2005, pp. 1949–1960.

31 According to verse 4:16, homosexual relationships are to be punished, but without specifying the type of punishment.

32 Since extramarital forms of cohabitation are severely punished by physical punishment, the importance of marital cohabitation of *nikāh* and its proper form is increasing.

curve of European society. The family is seen as the foundation of Islamic society. A life community is formed between the spouses and their children within the marriage.

There are many contradictions and specifics regarding to marriage representation. Irrespective of whether the condition of legal personal capacity is fulfilled, or whether it is an untouched woman or a woman who wants to marry repeatedly, questions arise as to whether it is possible or necessary to marry through a *wali* representative. The scope of authority in representation is called *ijbār*, and in particular, the question of whether a representative has the right and authority to marry on behalf of the wife is interpreted differently by different legal schools. Differences arise mainly in the right of the marriage representatives to agree with the marriage without the consent of the woman herself. In many Islamic states, it is customary for a woman to be involved in the marriage through the representative, a grandfather or a father.[33]

According to Sharia, marriage is sealed only if several traditional Islamic legal conditions have been met. The primary condition is that the consent for marriage to both partners has been announced. In the marriage contract, the parties may negotiate the conditions under which the circumstances of the future life of the future spouses will be formed. It is also permissible to agree on the future matrimonial property situation and to negotiate the terms of the divorce, which may be extended to include the right for to seek divorce by both spouses, since in normal cases only a man is entitled to take such a step – *talāq*. Furthermore, the so-called *mahr* donation to a woman and man should not be neglected.

Here is a deviation from the standard practice of Western legal science and opinion reflected, following what the *mahr* is to be only a form of alimony in the event of marriage.[34] Mahr is to be understood as a gift to the wife, expressing the respect of the husband, and as such is of great importance in the marriage.[35]

33 Rohe, M. *Das islamische Recht: Geschichte und Gegenwart*. Munich: C. H. Beck, 2009, p. 210 et 227.

34 Rohe, M. *Das islamische Recht: Eine Einführung*. Mnichov: C. H. Beck, 2013, p. 24.

35 More on the nature and purpose of the morning gift available at Islam Fatwa [online]. *islamwatwa.de* [cit. 20. 1. 2020]. https://islamfatwa.de/soziale-angelegenheiten/87-verlobung-a-ehe/verlobung-a-eheschliessung

On the basis of the texts 4:4, 4:19 also 4:21 and 4:24 the *mahr* is to be given to the woman in the form of money or other property. This gift is also expected in the case of marriage to a Jewish or Christian woman. As a matter of principle, the gift is to be realized during the marriage itself; according to some legal schools, at least its exact specification is acceptable as a minimal standards or form.[36] Significantly, at the time of marriage, a precisely specified gift can be requested immediately by the wife, provided that the woman wishes so, the gift is realized later. Provided that the spouse dies before the gift is realized, the wife has a legal claim against the succession. For underage husbands, their fathers are obliged to prepare and overhand a gift. The wife acquires the right of ownership and does not have to return it, provided the marriage was consumed. The wife is entitled to this gift even if the husband has been demonstrably alone with her for a certain period of time, or at the death of one of the spouses.

An interesting situation arises in the divorce of a consumed marriage, when a man can claim half of the gift back. The legitimacy of such a request is connected to the words of Allah, who says "but if you divorce before you touch your woman, and you have already committed each other to the "*mahr* gift", you will overhand half of what you committed. It should also be reflected, that everything the father of a wife or her brother has taken from a husband as a gift, such as a dress or household items, etc., is considered to be part of the gift itself.[37]

Provided that the marriage was entered into or the marriage contract was negotiated without a specific gift, the gift must be given in the usual form to the woman without a need for written obligation. To the equal status of men and women, it should be added that, provided that the divorce of the marriage was initiated by the woman before the marriage was consumed or the husband was not alone with her, she loses the right to the gift itself. Similarly, these conditions apply, provided that the woman requests marriage annulment due to a defect on the side of her husband. If the husband is late

36 Rohe, M. *Das islamische Recht: Geschichte und Gegenwart*. Munich: C. H. Beck, 2009, p. 214.

37 Compare this to the original Arabic text: "{لَا جُنَاحَ عَلَيْكُمْ إِنْ طَلَّقْتُمُ النِّسَاءَ مَا لَمْ تَمَسُّوهُنَّ أَوْ تَفْرِضُوا لَهُنَّ فَرِيضَةً}", ", for *mahr* see Islam Fatwa [online]. *islamwatwa.de* [cit. 20. 1. 2020]. https://islamfatwa.de/soziale-angelegenheiten/87-verlobung-a-ehe/verlobung-a-eheschliessung

with the donation or postponed the donation, the wife also has the right to deny him intimacy until the gift itself is realized.[38]

Barriers to marriage play an important role in Sharia law. Marriage cannot be concluded, if there are long-term obstacles or there is existence of real-time obstacles. Family relationships are considered as long-term obstacles to marriage, where Muslims are forbidden to marry with their mother, step-mother, grandmother, mother-in-law, daughter, niece, sister, aunt, grand-daughter, nurse, and apostate, all the rules are written in verse 4:23. In all Islamic countries, the bloodline is considered as an obstacle to marriage.

In addition, the husband is prohibited from entering into marriage with the mother or daughter of his wife. In the case of breastfeeding of an infant, there is an obstacle to the marriage between the infant and the wet nurse. An obstacle to foreign faith is specified in Sharia by prohibiting a Muslim from marrying a polytheistic religion, while women belonging to the Abrahamite religions, i.e. Jews and Christians, are "scriptural" persons in the context of 2:221 and 60:10 and belongs to a monotheistic religion and as such orthodox Muslim can married them.[39]

A temporary or short-term obstacle to marriage arises when a man would like to be married to sisters or wants to marry a woman before this woman is divorced. Even in these cases, the condition of verse 4:3 must be observed, where the maximum number of women is four. But strictly followed the word of the Qur'an, such approach would be only permissible

38 Rohe, M. *Das islamische Recht: Geschichte und Gegenwart*. Munich: C. H. Beck, 2009, p. 215.

39 On the text of the Qur'an itself on this issue, see http://www.vzdelavaci-institut.info/?q=system/files/Koran.pdf: 2:221 – Do not marry idolatry and believe it; and a believing slave is surely better than an idolatry, even if you like it more. Do not marry your daughters as idolaters unless they believe; and a believing slave is surely better than an idolater, even if you like it more. Such people invite you to the fire of hell, while God invites you to paradise and forgiveness, with His permission, and clarifies the signs of His people – they may recall it! And 60:10 – 10. You who believe! When the faithful women who have moved out come to you, put them to the test! But God best knows their faith; and when you find that they are believers, do not send them back to the unbelievers, for they are not allowed, nor are they allowed, but give unbelievers what they have given as their accusations! And it will not be a sin for you to marry them after you have given them their accusations, but do not crush unbelieving women in marriage and ask back what you have given as accusations, and unbelievers ask what they have given to their women. Such is the decision of God through which He decides among you – and God Knowing is wise.

if in the correspondent situation were orphans and widowed women protected, mainly in the times of war's, nature catastrophes and disasters, and provided that all these women are treated in the same way, this means that they treated equally.[40]

Marriage is also conceived as a community of different roles. This union is characterized by different rights and, in particular, obligations of the spouses with the husband which has significantly stronger position. This stronger position corresponds to his duty to protect his wife, after consuming the marriage, and also to ensure her happy life and adequate aliment. He has to pay for wife's subsistence, clothing and accommodation. The scope of these obligations is always proportionate to the social circumstances of the spouse. A woman must not tolerate any male persons in her household, regardless of whether they are relatives or not. She is also responsible for the preparation of ordinary foods and for the care of children before their sexual maturity.[41]

It is also interesting to compare the position of wife and children in marriage. When we speak about a weaker position of a woman, children are obliged to unconditionally obey their father. The husband's family is also strongly favoured, especially in establishing parents-to-children relations. In the event of a divorce, the children fall in principle to the father's family. Boys up to the age of 7 and girls up to the age of 9 may exceptionally be entrusted to the mother. Under the Islamic right is a child's interest in custody in the event of divorce disregarded. Systemically as theological-political seems the intention of spreading true faith in a measure that obliges parents to educate a Muslim child after the age of seven in the teachings of his faith.[42]

7 Divorce of the marriage

Moreover, there is big difference in the approach of Islamic law and continental or Anglo-American law. Additionally, differences also represent

40 If you fear that you will not be righteous to orphans ... marry women that are pleasing to you, two, three and four; but if you are afraid that you will not be righteous, then take only one or your right-wing rulers. And so you best avoid deflection.

41 Rohe, M. *Das islamische Recht: Geschichte und Gegenwart*. Munich: C. H. Beck, 2009, p. 214.

42 Wohlgemuth, G. Die neue Moudawana – Ausblick auf das Marokkanische Familienrecht und Seine Reform. *FamRZ*. Bielefeld: Gieseking Verlag, 2005, pp. 1949–1960.

confrontation in approach within the application of Sharia itself. Divorce of marriage is thus realized in several ways. It may be delivered by a judge at the request of one of the spouses, or it may also be made by a simple civil statement. In the case of divorce through the threefold banishment of a woman, called the *talāq* (already mentioned above), there are considerable problems in most of the confronted legal systems in recognition of this legal form of marriage dissolution. The form of *talāq* itself is realized in many formal mutations. There are forms in which the free wills of the wives themselves are involved in, or they must agree to such a divorce, or they are allowed to do so. Concerning the types, Islam recognizes form of irrevocable and revocable *talāq*. However, this method of private divorce is in modern codifications of private law and family law of Islamic states significantly reduced. In the case of a unilateral statement made three times in a row, the man can no longer marry the same woman. This obstacle ceases to exist provided that the woman is in the meantime married to another man and released by him from the marriage.[43]

8 Islamic law in the context of the European reality and case law

There is now a new, multinational Islam in Europe. More than 18 million Muslims can be registered in the EU, the number of unregistered and registered is up to 24 million, of which Germany represents more than 4,5 million, Austria officially around 600 000, unofficially around a million, France more than four million, from them more than half are citizens of France and UK about three million of Muslims. The population of Muslim citizens is increasing in all of these states and due to uncontrolled migration, the exact number is difficult to determine. This is caused also due to the absence of formal administration and registration. Given and reflecting the classical secularization of the state and religion, there are no precise surveys in the EU, especially for the situation in France.[44]

43 Compare this issue with Posch, W. Islamisierung des Rechts? *ZfRV*. 2007, No. 4, p. 124 et seq.

44 Rohe, M. *Der Islam in Deutschland: Eine Bestandsaufnahme.* Munich: C. H. Beck, 2016, p. 13, 75 and 117.

Partially, due to the growing problems of coexistence, radicalization of a minority of partially assimilated immigrant Muslims there are growing not only social phobias and various forms of extremism, but also importance of the need to know Islamic law. It is necessary not only to know Islam but also to study it because of militant forms of jihadism in connection with the activities of the IS.

European courts served with very different tendencies towards the verification and application of the legal rules of Islamic countries. In this context, the Judgment of the Supreme Court of Justice (OGH) 9Ob34/10f ("Supreme Court of Austria") should be mentioned as an example of the judgments of the Austrian courts.[45] This decision clearly demonstrates the need for an adequate approach concerning the Islamic law, not only by judges, but also by the correspondent legislative bodies. Migration in itself constitutes, in addition to the legal problems, also a political problem, which of course also affects the legislation of private international law. According to the Austrian private international law, some situations have been assessed for the benefit of Islamic law, i.e. Sharia law, while Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ("Maintenance Regulation") changed the conflict of law criteria from nationality to the criteria of habitual residence and that has later enabled the adjudication in favour of protection of the public order of European countries.

From a substantive point of view of the presented case, a maintenance claim by an Austrian citizen, originally from Saudi Arabia, against her former spouse with whom she was divorced, has been judged. The husband, however, retained the nationality of Saudi Arabia and the Supreme Court of Austria had to make a decision under the rules of the Private International Law Act, in force at the time of the decision, when he applied Saudi Arabia law *ex officio*. The court applied Saudi Arabia law provided that the couple, together with five children, lived in Austria for a long time. The Supreme Court of Austria first examined the content of the adequate

45 Compare the whole text at Judgment of the Supreme Court (OGH) of 28 February 2011, Case No. 9Ob34/10f.

provisions of Saudi Arabian law and the Senate in question also examined the consequences of applying the discovered content of the legislation. Under Saudi Arabia provisions, a divorced woman was entitled to alimony only for three months, exactly, three fertile periods, after the divorce of the marriage. This was not at the discretion of the judges contrary to the public order of Austria. The Supreme Court of Austria found, that the application of the provisions of Islamic law was the cause of a different assessment of the alimony rights, but did not find in the differences, arising from the legislation aspects, contrary to public order of Austria. Also did not consider the intensity of those aspects which would be incompatible with public order.

It was the necessity of applying the Austrian law on private international law, which was at the correspondent time not suppressed by the preferential application of EU regulations, and led to the shocking outcome, as this verdict was called in the Austrian press. Thus, the EU legislation has brought solutions in connection with the new follow-up system in the correspondent conflict of law criteria. In the light of the conflict-of-law principle enshrined in Maintenance Regulation, which would correspond to habitual residence, the Austrian court would apply the Austrian law and the divorced spouse's claims would be judged more positively. Thus, despite the nationality of the spouse, the *idda* institute would not be used.

In addition to the aforementioned public sphere aspects, it is also worth mentioning the decision of 6 September 2018, when the Administrative Court of Justice in an emergency regime ruled against the decision of the Federal Administrative Court of Austria to assess an asylum claim of a woman, in the case with the question, whether or not a marriage under Islamic religious law is contrary to public order in Austria.[46]

This decision is particularly important in the connection to the migration crisis. As a lady of a Syrian nationality has applied for asylum at the Embassy in Damascus in accordance with the Art. 35 of the Act No. 100/2005 Coll.,

46 Decision of the Supreme Administrative Court (Verwaltungsgerichtshof (VwGH)) of 6 September 2018, Case No. Ra 2018/18/0094 against the Decision of the Federal Administrative Court (Bundesverwaltungsgerichts (BVwG)) of 3 January 2018, Case No. Zl. W144 2163719–1/2E in relation to Art. 35 Asylum Act.

Federal Act Concerning the Granting of Asylum (Republic of Austria) ("Asylum Act") stating that her husband, who is also a Syrian citizen and living in Austria has the status of authorized asylum seeker. The situation is seemingly simple, however, when describing the status quo, it should be noted, that the engaged couple entered into a traditional Muslim marriage in Syria on 1 January 2015, which was later registered in the Syrian Personal status register, but not in the period of days but months. Then the Austrian Federal Office for Foreigners – BFAM informed the Embassy in Damascus, that granting asylum to the applicant on the basis of secondary protection claims is not appropriate since the Syrian marriage and its form are incompatible with the claims of Austrian law. In his view, the marriage was not established until it was registered with a public authority, at which time the husband had already left and the woman was thus not entitled to asylum rights.

The Federal Office relied on the legal opinion, that the applicant was not a family member and as such entitled to asylum at the time when asylum to her husband has been granted. He also argued that this was a marriage in substitution, since her husband was not present in Syria at the time of its registration and, as such, the marriage was contrary to public order of the Republic of Austria.

The applicant, who has in the meantime become a complainant, documented the conclusion of marriage by traditional testimonies of many wedding guests and several witnesses, and further demonstrated, that under Syrian law the marriage was concluded on the date of the ceremony and not on the date of its registration. Furthermore, she considers the registration itself to be a simple administrative act which could have been implemented through a legal representative. However, the Federal Office maintained its legal opinion and rejected the complaint against its decision. He maintained that the applicant could not be considered as a family member at the time of granting the asylum to the husband, as the complainant states. In addition to the legal assessment of this matter, it should be noted that the marriage was to be concluded in the traditional form on 1 January 2015 and its registration took place on 27 December 2015. The Federal Administrative Court of Austria investigated the content of Syrian law and stated that

under this law, the marriage must be construed as a contract between a man and a woman concluded for the purpose of establishing a life community and raising children, this form is legally permitted and can be implemented through a representative presence or activity.

Of course, the question of the realization of religious marriage itself remains problematic in the terms of migration. The marriage between Muslims can be realized before any known *Imam*, or even before a person only trained in Sharia law.[47] If the marriage is about to be brought before a court, a Sharia law certificate would also be issued. This marriage document would be sent to a public register and this would register the marriage. In this case, however, there was no court certificate existing and the application demanded a registration of the marriage before the Imam. Thus, there is a high risk of possible tactical behaviour in the form of waiting for granted asylum rights to the husband and then applying for registration of the fictitious marriage.

The Federal Administrative Court of Austria relied on the fact that a marriage is only recognized in Syria when it was registered, arguing that "the decisive factor in this case is whether or not the marriage was recognized retroactively after the traditional ceremony and the state registration". The Federal Administrative Court of Austria found that it would be contrary to Austrian public order for marriages under Sharia law to be valid for a certain period without State registration as well as valid for the Austrian authorities. In extraordinary revision was the decisions of the Federal Administrative Court of Austria changed. With the argumentation, there is no breach of fundamental rights in this situation and, in any case, no person is or was forced into marriage.

The Administrative Court of Austria then stated that the conclusion of a marriage in a traditional form with its subsequent registration with the competent state authority is not inconsistent with Austrian public order. He also argued that it would suffice if the form envisaged for the marriage was appropriate to the law of the place, where the marriage was concluded.

47 Rohe, M. *Das islamische Recht: Geschichte und Gegenwart*. Munich: C. H. Beck, 2009, pp. 214–215.

The Administrative Court of Austria annulled the decision of the Federal Administrative Court and founded the right to asylum.

This decision brings important insights not only from the point of view of the Syrian law in question. Of course, the systematic abuse of these different approaches of the different legal systems concerned in the context of migration and asylum policy remains secondary, but also significant. With a traditional Islamic marriage by an *imam*, there is a real risk of misuse of a non-existent ceremony with recognized asylum rights refugees for later registration of a feigned ceremony, that will be subsequently confirmed by the *imam*.

In Germany, in 2007, a 26-year-old naturalized German, a former Moroccan nationality, wanted to shorten the year of separation using German divorce law under § 1565 of the German Civil Code ("BGB"), because her husband, also a Moroccan, threatened her and mistreated her. The judge dismissed this with the argument, that it was not unusual for a 'Moroccan cultural environment' to execute corporal punishment over a woman. Ignoring the Moroccan family law of *Moudawana* in 2004 and using the Qur'an verse 4:34 made the judge an important mistake in the matter.[48]

In September 2007, four members of the Islamic Jihad Union (IJU) were arrested, including two converts, who have been trained in terrorism in the Pakistan-Afghan border and made concrete preparations for large-scale bombings in Germany, with targets tied to the US military. The trial ended on 4 March 2010 before the Higher Regional Court in Düsseldorf, (OLG – Oberlandesgericht) by imposing a multi-year imprisonment of 5–12 years.[49] Does Islam tolerate killing of other believers, or is it even demanded by the Quran texts? The terrorist activities of one minority of Muslims should not be seen as typical for Islam and the beginning of "Islamophobia". The proclaimed goal of extremist Islamic movements is to reintroduce sharia as the core of efforts for Islamic world domination. This has made the concept of Sharia in the broad circles of Western Christian societies a cause

48 Posch, W. Islamisierung des Rechts? *ZfRV*. 2007, No. 4, p. 124.

49 Compare to this approach the German Decision of the Higher Regional Court in Düsseldorf more closely at Schreyer, P. Ferngelenkte Terroristen? Anmerkungen zum Prozess gegen die Sauerland-Zelle [online]. *heise.de*. Published on 13 March 2010 [cit. 20. 1. 2020]. https://www.heise.de/tp/features/Ferngelenkte-Terroristen-3384836.html

of concern. Sharia in the broader sense refers to God-given norms of the Qur'an and rules derived from the example of the Prophet – *Sunna*. On the one hand, they represent the legal norms of terrestrial sanctions but are also religious arrangements of supernatural sanctions, as purification and perdition.[50]

One understandable reason for the – often justified – reaction of the European democratic platform is the fundamentally different understanding of the law itself. *Samir Khalil Samir* says: "*God is the source of all law. To be recognized by him, God first demands the fulfilment of 'his' law: total obedience to what God wants according to the Qur'an and Sunna for man. From these two main sources proceeds Sharia, an Islamic law that is legitimized by revelation and therefore superior to any other law based on human initiative. Sharia is therefore considered to be the perfect expression of the divine will to guarantee the righteous order of human society.*"[51]

If we end with the premise, that God is the source of all law, we will come to a fundamental difference in the perception of legal systems and also the necessary future connection of cultural and theological aspects and the public order question.

9 Conclusion

Is it, and if so, how is it possible to align the aspects described above with our perception of law and the rule of law? Nor is the situation easier by the fact that Muslims in in the diaspora show a limited willingness to follow in the aspects of family law the procedures by the state courts of the country of their residence. Converting and incoming people increasingly want to marry "under Islamic law", raise their children according to the Qur'an

50 Krawietz, B. *Hierarchie der Rechtsquellen im tradierten sunnitischen Islam*. Berlin: Duncker und Humblot, 2002, p. 115.

51 The nature of his teachings can be compared with the text cit. "I think most Muslims would like peaceful Islam, fraternal Islam. But they don't rule. Until there is no a real revolution, a complete change in the concept of Islam, internal conflict will continue. The only solution is to spread the culture of coexistence! In the 1920s the slogan was expanded in Egypt: Religion belongs to God, the homeland to all. That is the principle that we want. Religion is a personal matter, but living together, living together to create a nation, working on a common project is an ideal that God also wants for all." Samir, P. Islám potřebuje vnitřní reformu [online]. *Vatican News*. Published in 28. 5. 2018 [cit. 20. 1. 2020]. https://www.vaticannews.va/cs/vatikan/news/2018-05/p-samir-islam-potrebuje-vnitrni-reformu.html

rules, inherit their property under the Qur'an, and conclude banking operations while respecting the prohibition of interest rates. To remedy "internal family conflicts", Muslims are increasingly asking permission from the ADR senates, to make their decisions under religious Islamic laws.[52]

Many scholars and legal theorists are concerned with analysing the causes of differences in cultures and Islamic law after 622 AD, especially with regard to the departure of Prophet Muhammad from Mecca to Medina and the beginning of the first Muslim community. Obviously some historical, cultural and legal developments preceded the year 622 AD, the journey of the Prophet Muhammad to Jerusalem, which was precisely the point to which direction the prayers of his fellows usually turned. There is no longer space for any speculations, what and how would be the legal-political development, if his negotiations with representatives of the Jewish religion were successful. Rather, a forward-looking perspective and questions relating to private international law and the application of Islamic law as a set of norms from a foreign state in the context of Muslims living in EU, especially in individual member states and diaspores, is of high importance.

It is obvious, that there are models under which Islamic law, beyond its militant concept, can be accepted and measured amicably with the public order of individual EU member states. Individual national regulations approach the implementation of laws that regulate the position of religious societies. These are mainly Austria and Germany, of which Austria adopted in 2015 a relatively modern law regulating the position of Islamic religious groups. In Germany, efforts for a similar rule in the legal order have escalated over the past two years.

The question of Islamic law, viewed from the perspective of a democratic society and a secularized rule of law system, will always remain a sensitive issue. Within the European cultural environment, there is no other way, than to recommend a significant extension of the knowledge base on aspects related to Islamic tradition, culture and law. Especially because the people knowing the issues currently discussed will not be in a position of targets to populist and nationalist campaigns and can more accurately identify

52 Rohe, M. *Der Islam in Deutschland: Eine Bestandsaufnahme.* Munich: C. H. Beck, 2016, p. 243.

the pros and cons of the norms and ways of the art of life coming from the Islamic environment. In conclusion, we return to the importance of comparative law, for students of law and legal science, as well as of the open access to information for the general public, since only an adequate level of knowledge can bring light into obscurantism and extremist endeavours.

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Should the Discussion on Whether Non-state Law might be Elected as the Governing Law of Contract be Silenced Forever?

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Abstract

While the extent of the choice of law governing the cross-border contract is subjected to positive law, in the European Union being the Rome I Regulation, some always argued for expanded party autonomy regarding the non-state law. The European Commission proposed the incorporation of such in Rome I Regulation, but it has been ultimately rejected. This article considers the European development, debates whether discussion on non-state law being allowed as the governing law to a cross-border contract is still vital and provides an answer whether discussion on such should be ended or not.

Keywords

Non-state Law; Lex Mercatoria; Rome I Regulation; Hague Principles; Globalization; Dichotomy, Model Law, Doctrine.

1 Introduction

Each of every choice of law provision within written statutes is a mere imprint of freedom of contractual parties to choose a law of sovereign country deemed appropriate to govern their contract. However, do we ought to restrict the possibility to elect governing law to be one from the narrow list of simply less than 200 options? Perhaps, despite the philosophical question of whether the private parties to a cross-border contract essentially should want to deluge from such narrow-listed opportunities, does the European Union ("EU") itself positions the applicability of non-state law to be dead-end discussion or not?

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One might argue that many scholarly opinions on the applicability of non-state law or the *new lex mercatoria*[1] have been drafted yet no result in court litigation could be observed. But as has Lando correctly pointed out "*[…] in the field of European integration some fantasies have become realities. Before the Second World War there were people who talked wild of establishing a European Union. They formed small clubs and met in inexpensive cafés. Their shining eyes rediatted idealism, but their faces also betrayed that they were regarded as dreamers and not taken seriously by sensible people. It took the war to produce sensible people who established a common market which eventually became a European Union.*"[2] It may as well take time instead of war to produce sensible people[3] to overcome the dichotomy between arbitration[4] and litigation.

This article shall not permeate the historical connotations of freedom of choice to elect the law governing the contract or even the freedom of choice itself. Nor this article intents to promote and argue that non-state law should be permitted in litigation. Rather, this article should analyze whether the topic of non-state law being the law governing the contract is viable or not. Admittedly, should the topic still be of interest within the EU, the scope of development in this area shall be presented.

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1 "*The situation is not helped by the often-interchangeable use of lex mercatoria and 'new' lex mercatoria. In the first place, the expression lex mercatoria has long been associated with the medieval rules or 'system of law' based on usage or custom that merchants of the period were accustomed to regard as applying to their transactions. That lex mercatoria or 'law merchant' has traditionally been seen as having dissipated and been absorbed into national systems of law by the 18th and 19th centuries. This partly explains the preference by some for the use of 'new' lex mercatoria to describe the claimed modern body or system of non-State law which (or part of which) is considered applicable to international commercial transactions in certain circumstances. The modern lex mercatoria is seen as embracing more than usage or customary rules but also encompassing deliberately formulated legal instruments – including instruments formulated by international, indeed inter-state, organisations like the United Nations Commission on International Trade Law (UNCITRAL).*" See Stone, P., Farah, Y. *Research Handbook on EU Private International Law*. Cheltenham: Edward Elgar Publishing Ltd, 2017, p. 244.

2 Lando, O. Some Features of the Law of Contract in the Third Millennium. *Scandinavian Studies in Law 2000*. 2000, p. 401.

3 Berger, K. P. *The creeping codification of the new lex mercatoria*. Alphen aan den Rijn: Kluwer Law International, 2010, 464 p.; Lando, O. Some Features of the Law of Contract in the Third Millennium. *Scandinavian Studies in Law 2000*. 2000, pp. 359–363.

4 For further applicability of lex mercatoria in arbitration proceedings, see, for example, Elcin, M. Lex Mercatoria in International Arbitration Theory and Practice [online]. *European University Institute Research Repository. Vol. I*. Published in August 2016 [cit. 17. 10. 2019]. https://cadmus.eui.eu/bitstream/handle/1814/25204/2012_ELCIN_Vol1.pdf?sequence=1&isAllowed=y

While discussing the liveliness of such discussions, the court jurisprudence shall be omitted in favour of doctrinal approach, basically following point that "*There has been a strong and often hidden antagonism between their doctrines and the practice of the courts. The courts pretend to go by the rules in the books, but they do not. Often covert techniques are used to reach the outcome which the court wants. This impairs the predictability which the choice-of-law rules should provide.*"[5] For the sake of this article, discrepancies between what should be done in the eyes of book authors and what is truly exercised by the judges will not be considered.[6]

2 Law of sovereign state in current era

Before any assumption on the viability of discussion whether the non-state law may or should be applicable as the law governing the contract, existing law must be assessed. Interestingly, private law harmonization within Europe is not a subject of 20th and 21st century. *Code civil des Français*, alternatively *Code Napoléon*, which took effect on 21 March 1804 under the rule of Napoleon I, and consisting of unilateral conflicts rules, may be one of the prime examples of modern legal code with pan-European harmonization character, as it was imposed in occupied countries during and after Napoleonic Wars.[7] Allgemeines bürgerliches Gesetzbuch, the Austrian Empire civil code, passed on 1 July 1811, and enacted on 1 January 1812, might be considered another example of harmonization character legal code with a universal applicability in all crown lands but Lands of the Crown of Saint Stephen.[8]

Notwithstanding the above, in the current legal order, while the harmonization is mostly[9] derived from intra-governmental activities or by coordinated

5 Lando, O. Some Features of the Law of Contract in the Third Millennium. *Scandinavian Studies in Law 2000*. 2000, p. 349.

6 "*Na druhé straně je ovšem nutné říci, že literatura věnující se tomuto problému je někdy radikálnější než vlastní praxe.*" [translation by the author: "*On the other hand, it is necessary to say that literature dealing with this issue is occasionally more radical than the actual practice.*"]. See Rozehnalová, N., Střelec, K. Zásady mezinárodních smluv UNIDROIT, lex mercatoria a odvaha k aplikaci. *Časopis pro právní vědu a praxi*. 2004, Vol. 12, No. 1, p. 53.

7 Holtman, R. B. *The Napoleonic revolution*. Philadelphia: J. B. Lippincott Company, 1979, 224 p.

8 Consisting of Kingdom of Hungary, Kingdom of Croatia, Kingdom of Slavonia, Kingdom of Croatia-Slavonia, Free City of Fiume and Condominium of Bosnia and Herzegovina.

9 Harmonization occurs on the EU level as well. Pursuant Art. 114 of Treaty on the Functioning of the European Union ("TFEU") the EU shall "*adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.*".

effort of subjects of public international law, unification is derived primarily from the collective effort of the EU as allowed by the primary law.[10]

Convergence of national legal rules is, as is reasoned in the law-and-economics literature,[11,12] spontaneous "*in order to implement an efficient allocation of scare resources*"[13] and is underwent by legislators, judges and scholars as national law allows; arguably such literature is not yet accustomed to adapt specific framework of the EU, in which the unification is built upon the work of the European Commission.

Although unification procedure in the EU is certainly not restricted to the exclusive action of the European Commission, notably the important role of the Court of Justice of the European Union ("CJEU"),[14] it is the European Commission's "right of initiative", the publication of proposals in form of "green" or "white papers"[15] which is certainly the utmost accelerator of EU unification.

In simple words, the unification process is only sparkled when "*growing trade and capital flows crossing national borders*"[16] and thus induces states to "*iron out differences in their national laws.*"[17] It is proclaimed that "*Only when divergencies in a particular field of law shackled cross-border trade and commerce, nation-states showed a readiness to embark upon a unification project. That is, by eliminating legal obstacles to economic growth, a uniform law made extra gains from trade possible that would not have existed otherwise.*"[18] That is exactly what the EU integration ignites within its member states.

10 Chapter 2, Section 1 TFEU.

11 Marciano, A., Josselin, J.-M. *The economics of harmonizing European law*. Cheltenham: Edward Elgar Publishing, 2002, 288 p.

12 Mattei, U. Efficiency in legal transplants: An essay in Comparative Law and Economics. *International Review of Law and Economics*. 1994, Vol. 14, No. 1, pp. 3–19.

13 Crettez, B., Deloche, R. On the unification of legal rules in the European Union. *European Journal of Law and Economics*. 2006, Vol. 21, No. 3, p. 204.

14 In order to assess the binding effect of soft-law see Judgment of the Court of Justice (Second Chamber) of 13 December 1989, Case C-322/88.

15 Crettez, B., Deloche, R. On the unification of legal rules in the European Union. *European Journal of Law and Economics*. 2006, Vol. 21, No. 3, p. 214.

16 Herings, J.-J. P., Kanning, A. J. Unifying Commercial Laws of Nation States Coordination of Legal Systems and Economic Growth [online]. *PennState University Press*. Published in March 2003, p. 22 [cit. 19. 10. 2019]. http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.195.29&rep=rep1&type=pdf

17 Ibid.

18 Ibid.

2.1 Approach of the Rome Convention

Contractual relationships with international element fall under the unified Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I Regulation")[19] as of 17 December 2009, to which the Convention of 19 June 1980 on the law applicable to contractual obligations ("Rome Convention")[20] is a predecessor.

Historically speaking, the Rome Convention, that entered into effect on 1 April 1991, allowed merely of the traditional choice[21] of national law as the law governing the contract. While some commentators tried to argue that this is not explicitly stated in the Rome Convention,[22] therefore available to a discussion, neither the majority of subjects nor the CJEU even questioned otherwise. The essence of timing in drafting the Rome Convention, taking place between 1967 and 1980,[23] plays an immanent role in the assessment of whether legislator would even consider the possibility of non-state law being the governing law. Traditional line of drafting has been followed in such times when *new lex mercatoria* had not been fully developed yet[24] and no legislator had any intention to allow contractual parties to elevate from the requirement of national law.[25, 26]

19 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

20 Convention of 19 June 1980 on the law applicable to contractual obligations.

21 "*Bezesporu je to dáno starším datem vypracování úmluvy a samozřejmě i prvotním určením úmluvy pro použití před obecnými (státními) soudy.*" [translation by the author: "*This is undoubtedly due to the earlier date of the convention, and of course due to the primary purpose of the convention to be used in court (state) proceedings.*"]. See Rozehnalová, N., Týč, V. *Evropský justiční prostor (v civilních otázkách)*. Brno: Masarykova univerzita, 2006, p. 64.

22 Ibid., p. 65.

23 Grodl, L. International Perspective on Party Autonomy in Contractual Choice of Law [online]. *Masaryk University, Faculty of Law*. Published in 2019, pp. 35–49 [cit. 3. 11. 2019]. https://is.muni.cz/auth/th/dzcwx/Grodl_diploma_thesis.pdf

24 Tang, Z. S. Non-state law in party autonomy – a European perspective. *International Journal of Private Law*. 2012, Vol. 5, No. 1, p. 25.

25 Boele-Woelki, K. The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: How to Apply Them to International Contracts. *Uniform Law Review*. 1996, Vol. 1, No. 4, p. 652, 664.

26 Commission of the European Communities. Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation [online]. *EUR-Lex*. Published on 15 January 2003, p. 22 [cit. 27. 10. 2019]. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0654&from=en ("Green Paper on the conversion of the Rome Convention").

Whilst Art. 3 of the Rome Convention itself is silent on a clear definition of the "*law*" chosen by parties, reading of the Rome Convention in a whole in lieu of Art. 1 (1) presumes no ambiguity when promulgating that rules of the Rome Convention involve a choice between the laws of countries.[27]

Lastly, reflecting the above-mentioned, the official report aligning the Rome Convention is silent on an express clarification of law within the Art. 3,[28] merely the importance and existence of the core principle of party autonomy in choice of law is debated. It is only when the question of non-state law is raised, while the European Commission considered modernising the Rome Convention, to which the Green Paper provides explicit rejection of such.[29]

2.2 Novation through the Proposal for Rome I Regulation

While the European community followed the positive law embodied in the Rome Convention, 11 years after the Rome Convention entered into effect, the European Commission took a stand on the modernisation of the Rome Convention. This stand included captivation of the opportunity to go beyond imaginative borders of the nations. Notably, this effort of European Commission in 2002 took place 34 years after the first work on the Rome Convention, therefore rendering the immaturity of the *new lex mercatoria* moderately outdated.

With admission of the resonance of non-state law proponents, the European Commission issued the Proposal for a regulation of the European Parliament and the Council on the law applicable to contractual obligations[30] ("Proposal for Rome I Regulation"), which embodied alteration toward to "*further boost the impact of the parties' will, a key principle of the Convention*"[31] reflected

27 "*The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.*" See Art. 1 Rome Convention.

28 Council Report on the Convention on the law applicable to contractual obligations by Mario Giuliano and Paul Lagarde. In: Official Journal No C 282/1 of 31 October 1980.

29 Green Paper on the conversion of the Rome Convention, p. 22.

30 Commission of the European Communities. Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I) [online]. *EUR-Lex*. Published on 15 December 2005 [cit. 12. 2. 2019]. http://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com(2005)0650_/com_com(2005)0650_en.pdf

31 Ibid., p. 6.

in Art. 3. Henceforth the European Commission took partial stand, on one hand allowing non-state law to be elected as governing law with reference to UNIDROIT Principles, Principles of European Contract Law ("PECL") or a possible future Community instrument,[32] whilst one the other hand in lieu of Rome Convention *excluding lex mercatoria* or private codifications without recognition of the international community.

While this stance might have been greeted by the trade industry itself, many commentators took the liberty to argue impossibility to uphold certainty in results or inadequacy in the identification of threshold for recognition of the international community.[33]

Ultimately, presented modernisation has had become purely great exercise of opinion raising. Some argued that this question is in its nature more academic than practical,[34] the rest simply dismissed the idea.

Although Art. 3 as presented in the Proposal for Rome I Regulation has not been embodied into the Rome I Regulation, the legislator was able to extrude two Recitals into the final wording. Recital 13 of the Rome I Regulation solely facilitates what is by many allowed, incorporation of any non-state instrument within the scope of mandatory rules of governing law. Albeit being a step further to pronouncing core principles, Recital 13 may be deemed redundant as such is common practice and could be easily supplanted by black lettering of all non-state law provisions into a contract and later subsuming them under the mandatory test of governing law.

What must be of paramount interest is the Recital 14[35] opening the window of opportunity to set a threshold for non-state law possessing the ability to be governing law of contract. The only requirement of such is the legislative procedure on EU level and express permission to abide as *lex electa* within

32 Ibid.

33 Garcimartín Alférez F. J. The Rome I Regulation: Much ado about nothing? *The European Legal forum*. 2008, Vol. 1, No. 2, pp. 62–68.

34 Magnus, U., Mankowski, P. Joint Response to the Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation COM (2002) 654 final. 2003, p. 14; Tang, Z. S. Non-state law in party autonomy – a European perspective. *International Journal of Private Law*. 2012, Vol. 5, No. 1, p. 26.

35 "*Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.*" See Recital 14 Rome I Regulation.

the instrument itself. Should any instrument be enacted on the EU level, the contractual parties would adhere the ability to opt in[36] to it, thus rendering the application primacy of the particular instrument over Rome I Regulation. Consequently, such is in line with the Art. 26 of the Rome I Regulation.

2.3 Result of the Rome I Regulation

Rome I Regulation as a successor of the Rome Convention may be seen as an example, in which the European Commission tried to exercise its right of initiative and failed to carry out the result due to the effect of EU members converging into a rejection of non-state law. While this is true, consequently the European Commission was able to emplace the promulgation of acceptance of non-state law, should it be its own in nature and agreed upon on the regional level. This dichotomy might be contributed to the nature of EU legislature being in fact beyond a state in process of creation, but ultimately being considered of the same legal force as national laws nevertheless with applicable priority.

While such instrument per Recital 14 is nowhere to be discussed, the European Commission was able to withstand the proposition to allow further deliberation on such topic. In this case, the non-cooperative game of member states grasped the *Nash equilibrium*[37] and in accordance with Art. 26 allowed the forthcoming contracting of such instrument to be subsumed under the *Crettez and Deloche complex model of the convergence of legal rules in the European union.*[38] Question, whether this is to be followed, will mainly be answered by the internal market itself[39] with importance stressed on the behaviour of superior EU member states.[40]

36 Tang, Z. S. Non-state law in party autonomy – a European perspective. *International Journal of Private Law*. 2012, Vol. 5, No. 1, p. 27.

37 Nash, J. Non-Cooperative Games [online]. *The Annals of Mathematics*. Vol. 54, No. 2. Published in September 1951 [cit. 15. 9. 2019]. https://www.jstor.org/stable/1969529?seq=1

38 Crettez, B., Deloche, R. On the unification of legal rules in the European Union. *European Journal of Law and Economics*. 2006, Vol. 21, No. 3, pp. 206–214.

39 Smith, J. M. How to predict the differences in uniformity between different areas of a future European private law? An evolutionary approach. In: Marciano, A., Josselin, J.-M. *The economics of harmonizing European law*. Cheltenham: Edward Elgar Publishing, 2002, p. 60.

40 Crettez, B., Deloche, R. On the unification of legal rules in the European Union. *European Journal of Law and Economics*. 2006, Vol. 21, No. 3, p. 204.

The development in the area of party autonomy throughout the pre-Rome Convention era to the Rome I Regulation era in choice of law illustrates that more freedom has been given to the contractual parties,[41] although one restriction is always present, being the inability to choose any law but law of sovereign country.[42] One could even argue that such would mean that we should deem the non-state law in litigation to be dead-end and pursue another topic of private international law. Though this would be very sceptical point of view exercised by the most rigorous positive law supporters, jurisprudence regulated by positive law, which cannot diverge from the letter of law even if the argumentation of such would be impregnable must be separated from the doctrinal approach.

Firstly, the European Commission itself, being the main proponent of non-state law as part of EU law, is not silent on this topic. Secondly, actual usage of non-state law is already indirectly permitted, and lastly, any definitive rejection of non-state law would contradict the *Savigny* approach on harmonisation and unification as presented by *Lando.*[43]

3 Hague Principles as a model law

Principles on Choice of Law in International Commercial Contracts of 19 March 2015 ("Hague Principles") have been adopted by the Hague Conference on Private International Law ("HCCH") on 19 March 2015, after 9 years of preparatory work.[44] Following the wording of its preamble, Hague Principles are soft model law without any real applicability unless transposed into positive law.[45] The Hague Principles are "*deliberately and*

41 Nygh, P. E. *Autonomy in international contracts*. Oxford: Oxford University Press, 1999, pp. 3–14.

42 Grodl, L. International Perspective on Party Autonomy in Contractual Choice of Law [online]. *Masaryk University, Faculty of Law*. Published in 2019, pp. 37–49 [cit. 3. 11. 2019]. https://is.muni.cz/auth/th/dzcwx/Grodl_diploma_thesis.pdf

43 Lando, O. Some Features of the Law of Contract in the Third Millennium. *Scandinavian Studies in Law 2000*. 2000, p. 360.

44 Grodl, L. International Perspective on Party Autonomy in Contractual Choice of Law [online]. *Masaryk University, Faculty of Law*. Published in 2019, pp. 51–58 [cit. 3. 11. 2019]. https://is.muni.cz/auth/th/dzcwx/Grodl_diploma_thesis.pdf

45 Until this day, only one country, Paraguay, followed to transpose the Hague Principles in full to the national law. See Law No. 5393 on the Law Applicable to International Contracts (Paraguay).

consciously drafted as soft law"[46] and a non-binding instrument, "*precisely in order to avoid any risk of conflict of standards with regional binding instruments.*"[47]

The mere existence of Hague Principles expressly conveys the continuous presence of deliberation whether subjects to private international law ought to deserve their autonomy extended. Throughout the preparatory work, question whether stance on non-state law in litigation should be presented in the Hague Principles or not, in order to retain status quo,[48] arose and has been collectively settled by accepting the final wording of adoption non-state law regardless of the dispute resolution method. Pursuant the contracting, anticipated phrasing[49] has been accompanied by a further clarification[50] in order to satisfy commentaries on its vague nature.

The European Commission acting as a representative of the EU to the HCCH upheld the pronounced view of EU member states when argued that vague phrasing would potentially lead to a reduction of legal certainty as well as the possibility of application of an unfair set of rules forced on the weaker contracting party.[51] The distress of allowance any rules to be applicable, being the *new lex mercatoria* or religious law, has been thoroughly discussed prior to utilization of two qualifiers and three criterions in the final phrasing of Art. 3 of the Hague Principles.[52]

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46 Purnhagen, K., Rott, P., Micklitz, H.-W. et al. Varieties of European economic law and regulation: liber amicorum for Hans Micklitz. *Studies in European economic law and regulation*. 2014, Vol. 3, p. 66.

47 Magnus, U., Mankowski, P. et al. *Rome I Regulation – Commentary (Magnus/Mankowski, European Commentaries on Private International Law)*. Köln: Sellier European Law Publishers, 2017, p. 209.

48 Girsberger, D., Cohen, N. B. Key Features of the Hague Principles on Choice of Law in International Commercial Contracts. *Uniform Law Review*. 2017, Vol. 22, No. 2, p. 325.

49 "*A contract is governed by the law chosen by the parties. In these Principles a reference to law includes rules of law*" See Permanent Bureau of the Hague Conference on Private International Law. Consolidated version of the preparatory work leading to the draft Hague Principles on the choice of law in international contracts [online]. *Hague Conference on Private International Law*. 2012, p. 13. Published in October 2012 [cit. 7. 10. 2019]. https://assets.hcch.net/docs/9436c200-bc46-40b7-817e-ae8f9232d306.pdf

50 "*The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.*" Art. 3 Hague Principles.

51 Girsberger, D., Cohen, N. B. Key Features of the Hague Principles on Choice of Law in International Commercial Contracts. *Uniform Law Review*. 2017, Vol. 22, No. 2, p. 326.

52 Mankowski, P. Article 3 of the Hague Principles: the final breakthrough for the choice of non-State law? *Uniform Law Review*. 2017, Vol. 22, No. 2, p. 4.

The Hague Principles calculate with the eligibility of any rules of law, being generally accepted on an a-national level,[53] balanced, and neutral. The Hague Principles have been adopted in a form of commented edition, commentary forming an inseparable part of the principles itself. The commentary provides that all requirements are specifically satisfied by United Nations Convention of 11 April 1980 on contracts for the international sale of goods ("CISG"), PECL or UNIDROIT Principles, thus such could be used as a sole governing law to the contract.

While the commentary itself is silent on whether the *new lex mercatoria* could be elected as prescribed rules of law, designation of PECL as one of the examples might suggest that as long as comprehensiveness is achieved, *European lex mercatoria*[54] might be eligible.

Conclusion on PECL might be that, whilst it is not pronounced to be the sought instrument in lieu of Recital 14, such may change in the future.[55]

What is on the other hand certain is that the Hague Principles are burdened with the same problem as has been advocated while discussing the Proposal for Rome I Regulation. Hague Principles fail to deliver comprehensive designation of the arbitrary body to decide whether selected rules of law satisfy presented threshold, nor present any lead on how should be such achieved.

Some authors question whether regional acceptance can exist based on the hypothesis that "*genuine non-State law is, per definitionem, outside the realm of State law*"[56] which is predominantly false, as non-state law can exist by virtue of acceptance of legal instruments adopted by public international law bodies, CISG being prime example.

53 Conférence De La Haye De Droit International Privé. *Principles on choice of law in international commercial contracts*. The Hague, The Netherlands: The Hague Conference on Private International Law Permanent Bureau, 2015, p. 40.

54 Lando, O. Some Features of the Law of Contract in the Third Millennium. *Scandinavian Studies in Law 2000*. 2000, pp. 344–401.

55 Calster, G. V. *European private international law*. Oxford: Hart Publishing, 2016, p. 214.

56 Mankowski, P. Article 3 of the Hague Principles: the final breakthrough for the choice of non-State law? *Uniform Law Review*. 2017, Vol. 22, No. 2, p. 7.

4 Dichotomy in non-state law

Referring back to the predominant argument of most to reject non-state law on the grounds of its existence outside the realm of state, a dichotomy of applicability of non-national systems of law certainly exist.

While CISG, being a convention in its nature, thus non-state law, might be indisputably invoked to be incorporated into any contract by reference, original non-state law provisions can be invoked as part of the applicable law of a particular country which adopted CISG.[57] As a matter of fact, should the parties be to reject the application of those provisions that originated as a non-state law, they must so pronounce in accordance with Art. 6 of the CISG.

Interestingly, the parties may derogate or vary the effect of selected provisions of the CISG in lieu of Art. 6 in accord with Art. 12. This brings the possibility to exclude some provisions of the CISG, a possibility only given by the adopted non-state law itself, as long as the state did not replace its domestic regime by CISG in its entirety. In contrast, the same cannot be done with national law. Throughout this possibility, CISG manifests its non-mandatory character.[58]

Therefore, while stating that CISG, if adopted, forms integrated part of national law, it itself still provides options to its subjects to handle such law differently than the true national law. One could still reject default rules but cannot opt-out from whole set of rules, to say preference that an act will not apply. On the other hand, that is what parties may do so with the CISG.

Whether we perceive CIGS to be part of the state law or to be merely adopted non-state law, one thing is undisputed, legal certainty and the principle of party autonomy is constantly under attack.

In *Ostroznik Savo v. La Faraona*[59] the Italian court took the courage to promulgate CISG being "*convention on uniform substantive law, and not of international private law as is sometime erroneously said*" therefore being *lex specialis* to the

57 Stone, P., Farah, Y. *Research Handbook on EU Private International Law*. Cheltenham: Edward Elgar Publishing Ltd, 2017, pp. 232–233.

58 Kröll, S. et al. *UN Convention on Contracts for the International Sale of Goods (CISG): a commentary*. München: C. H. Beck, 2018, p. 135.

59 Judgment of District Court Padova of 11 January 2005, CLOUT Case No. 651.

law of a state which adopted CISG. Should, therefore, be all suppositional national laws be of contracting states to CISG, CISG applies with prevailing force over all national laws.[60] The court ascertained that CISG applies directly to avoid the superfluous step in the application of private international law rules – the investigation of applicable law on conflict-of-rules as a connecting factor and thereafter application of CISG.[61]

Remarkably, while the court declaring CISG being the applicable law (to which gaps are then filled with otherwise applicable national law), should the parties elect CISG to be the applicable law, the court would have to deny such.[62]

"*In light of the foregoing, it is at least a little anachronistic that under the Rome I Regulation contract parties can choose to apply the CISG because it is part of the law of a particular country, whose law is the applicable law, but not independently in its own right as 'a non-State body of law'.* "[63]

This brings the exact opposite effect to what the European harmonisation should convey, one union, identity in contract, identity in contracting parties, but two different approaches to the applicability of widely approbated instrument. Arguably, this scenario presents the problem of dichotomy, which would be solved by the proposed wording of the Rome I Regulation[64] as nobody can claim that CISG is not recognised in the community.

Consequently, by adopting CISG, countries such as the Czech Republic, with a strong doctrinal position on rejection of the *new lex mercatoria*, allow backdoor to be opened for cross-border contracts governed by their domestic law, subjected to interpretation and supplementation of the *new lex marcatoria* where no general principles of CISG itself can be found.[65]

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60 The applicability of the CISG requires several conditions to be met, e.g. sales contract, international character, ratione materiae of CISG. See ibid.

61 Ibid.

62 See ibid. "*[…] the same would have happened if the parties opted for the lex mercatoria, the Unidroit Principles or for the same UN Convention [CISG] in the event it would have not been applicable.*".

63 Stone, P., Farah, Y. *Research Handbook on EU Private International Law*. Cheltenham: Edward Elgar Publishing Ltd, 2017, p. 234.

64 "*Parties shall be allowed to choose as the applicable law the principles and rules recognised internationally or in the community.*" Art. 3 Proposal for Rome I Regulation.

65 Viscasillas, P. P. Interpretation and gap-filling under the CISG: contrast and convergence with the UNIDROIT Principles. *Uniform Law Review*. 2017, Vol. 22, No. 1, pp. 19–21.

5 Conclusion

The question discussed by this article is one of whether the discussion on non-state law being the law applicable to the cross-border contract is still viable, not the one whether it is nowadays permitted. It has been offered that while the stance of European nations has been solely positivistic, the European Commission made a bold move in its Proposal for Rome I Regulation to overcome this narrow exercise of party autonomy in choice of law.

The ability of non-state law is still heavily discussed,[66] and its peak has arisen in the time of Rome I Regulation and Hague Principles contracting.

While Czech doctrine, following the stance taken by *Viktor Knapp* and *Pavel Kalenský*, refuses to recognize any non-state law as a spontaneously created law of transnational character.[67] This stance has been taken in order to object to the promulgation of the *new lex mercatoria* by *C. M. Smitthoff* at first symposium of International Law Association in 1962 in London.[68] To this day, the Czech doctrine refuses to accept stance as has been proposed in Proposal for Rome I Regulation, thus to accept non-state law or the *new lex mercatoria* to be a law in sense of legal system applicable in conflict-of-law. Rather than that, it is ought to be pragmatically perceived as legal norms which are possible to be incorporated to the contractual relationship, either expressly stipulated or by usage. Hence, the doctrine allows choice of non-state law in line of substantive law, not in line of conflict-of-law. This approach is inconsistent with the proposed wording of Art. 3 (2) in Proposal for Rome I Regulation, but agreeable throughout EU countries[69].

Czech doctrinal stance remained consistent with above-written throughout history and *lex mercatoria* is refused to be a real *lex* due to the fact that any law to be a real law applicable to contract must be a state law.[70] Subsequently,

66 Rozehnalová, N. *Instituty českého mezinárodního práva soukromého.* Praha: Wolters Kluwer, 2016, p. 230.
67 Ibid., pp. 234–235.
68 Rozehnalová, N., Střelec, K. Zásady mezinárodních smluv UNIDROIT, lex mercatoria a odvaha k aplikaci. *Časopis pro právní vědu a praxi.* 2004, Vol. 12, No. 1, p. 48.
69 Kučera, Z., Pauknerová, M., Růžička, K. et al. *Mezinárodní právo soukromé.* Plzeň-Brno: Aleš Čeněk – Doplněk, 2015, pp. 90–91, 94.
70 Ibid., p. 214.

Czech doctrine refuses to recognize the will of contracting parties itself to be outside the realm of any law, therefore itself being the sole legal basis for the subsistence of the contract and legal relationship ascending out of it.[71] Self-regulating concept of contracts is thus refused.[72]

Applicability of any non-state law is, therefore, in the judgment of Czech doctrine, allowed as long as it is selected to be incorporated within the contract or if it forms part of usage, nevertheless never as conflict-of-law but rather as a choice of substantial rules within limits of cogent norms of otherwise applicable state law. Substantive freedom of will is hence the only permitted solution furnished to the contracting parties.

Rozehnalová states that even such discussion on Art. 3 of the Proposal for Rome I Regulation or Hague Principles changes nothing in the discourse of Czech doctrine.[73] Although this cannot be disputed, this article, pursuant the question raised in its introduction, intends to answer whether the discussion of mere possibility of allowing non-state law to be the law applicable to contract is dead or viable. The answer to this question should be without any doubt that such discussion is still viable and present.

Even *Rozehnalová*, while affirming that no current discussion on this topic can change the Czech doctrinal approach, promulgates that she belongs to a group of exponents of existence of lex mercatoria as to some extent comprehensive rules of law, originating outside the state realm, being able to serve as *lex contractus*.[74] Consequently, considers herself to be forced to remain positivist and etatist, due to state court being bound by positive law. She gives the answer to the question that prior to Rome I Regulation effectiveness, thus in the time of Proposal for Rome I Regulation, the discussion has been well alive. She states, that direct election of lex mercatoria as the law applicable to contract has been proposed novum in the Proposal for Rome I Regulation, not a restatement of the existing matter of fact.[75]

71 Ibid., p. 215.
72 Rozehnalová, N. *Instituty českého mezinárodního práva soukromého*. Praha: Wolters Kluwer, 2016, p. 235.
73 Ibid., p. 236.
74 Rozehnalová, N., Střelec, K. Zásady mezinárodních smluv UNIDROIT, lex mercatoria a odvaha k aplikaci. *Časopis pro právní vědu a praxi*. 2004, Vol. 12, No. 1, p. 49.
75 Ibid., p. 52.

Such novum would serve as a breakout from state monopoly on positive law, not from positive etatism as a whole.[76]

The Hague Principles and its rich contracting discussion supports that, even 10 years after the Proposal for Rome I Regulation, the idea of non-state law is not exhausted. Many EU member states, as well as the EU through the European Commission, have taken their stand, raised opinions and pronounced their approval of the final wording of the Hague Principles, including the provision on allowing to choose non-state law as the law applicable to contract. Ultimately, Hague Principles being merely soft law with many unresolved issues serves as no more than a discussion point, rather than actual permission of non-state law, nor it could be used as an argument during court proceedings. Yet this article's scope is not of actual permission, rather of the vitality of discussion, which considering above-mentioned must be alive.

Ultima ratio argument for maintaining the discussion alive is the *Savigny* approach to harmonization, being in nature developed through fruitful discussions in universities, articles and books.[77] The *Savigny* approach, as presented by *Klaus Peter Berger*[78] envisions that by discussing, new ideas slowly emerge and grow, ultimately establishing common practices. These new ideas then may be passed to students who take upon to reform them to practice.[79] The restrictions imposed by our legal order set that no court can be freed from letters of the law laid down in the codes, acts or precedents.[80] Admittedly, this restriction does not allow to exercise conflict-of-law choice of non-state law nowadays, yet it may "*creep*" into any future legislation progress.

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Challenges for the Future Development of the European Private International Labour Law[1]

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Abstract

The paper addresses the evolution of the rules of the European private international labour law and identifies three key challenges that will shape the future development of this field of law and that will have to be addressed by the judiciary and/or the legislators. These challenges include: (i) the operation of the connecting factor engaging place of business, (ii) the interpretation of the escape clause and (iii) challenges resulting from the fourth industrial revolution and emergence of new working arrangements.

Keywords

Conflict of Laws; Private International Labour Law; Escape Clause; Employment Contract; Platform Work; Engaging Place of Business; Rome I Regulation; Rome Convention; Schlecker; Voogsgeerd.

1 Introduction

The area of the European private international labour law has gone through quite a remarkable development in relatively short time. When the Brussels Convention[2] was adopted in 1968, it did not contain any provisions concerning employment contracts despite the fact that the original draft incorporated employment contracts under rules on exclusive jurisdiction and designated the courts of the habitual place of work or domicile of the employer

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2 Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

as compulsory forum for matters concerning employment contracts.[3] This was primarily due to the fact that work was already in progress on an instrument unifying rules for determining the law applicable to cross-border contracts, which was eventually adopted in June 1980 as the Rome Convention.[4] Authors of the Brussels Convention wanted to make sure that disputes over contracts of employment will as far as possible be brought before the courts of the state whose law governs the contract and in an attempt to avoid discrepancies between the rules on jurisdiction and rules on the law applicable that will be enshrined in a later convention, they decided to exclude any rules concerning employment contracts from the Brussels Convention altogether.[5] Employment contracts were thus subjected to general regime and the jurisdiction was determined either by the general rule based on domicile of the defendant or special rule concerning contractual matters, which conferred jurisdiction to the courts of the place of performance of the obligation in question. Brussels regulation also enabled prorogation of jurisdiction with respect to employment contracts and in the case of proceedings based on a tort committed at work, jurisdiction was given to the courts for the place where the harmful event occurred.

The Rome Convention in 1980 developed a complex mechanism for determining the law applicable to employment contracts and enshrined special protective rules in its Art. 6. It introduced habitual place of work as a principal connecting factor and the engaging place of business as a subsidiary connecting factor.[6] Moreover it instituted an escape clause, which provided that both the principal and subsidiary connecting factors could be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country. Controversial rule, limiting

3 Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters by Mr P. Jenard. In: Official Journal No C 59/1 of 27 September 1968, p. 24 ("Jenard Report").

4 Convention of 19 June 1980 on the law applicable to contractual obligations.

5 Jenard Report, p. 24.

6 According to Art. 6 para. 2 letter b) Rome Convention: if the employee does not habitually carry out his work in any one country, a contract of employment shall be governed (in the absence of choice) by the law of the country in which the place of business through which he was engaged is situated.

the freedom of choice by parties to the employment contract was introduced as well. Under this rule, a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him/her by the mandatory rules of the law which would be applicable according to the principal or subsidiary connecting factor in the absence of choice.

Following the adoption of the Lugano I Convention,[7] which reflected on the adoption of the Rome Convention and introduced special rules for employment contracts, the Brussels Convention was amended in 1989 to incorporate special provisions as well. As envisaged by the Jenard Report, rules on jurisdiction were synchronised with conflict rules established by the Rome Convention. Thus, the jurisdiction was principally conferred to the courts for the habitual place of work. Secondary rule of the engaging place of business was introduced as well, while the employee could still initiate proceeding also in the courts of the state where of employer's domicile. Special protective rules concerning prorogation of jurisdiction were introduced as well.

Following the adoption of the Treaty of Amsterdam, which enabled the European Union ("EU") (then European Community) to adopt acts of secondary legislation in the field of private international law, the abovementioned rules were transferred into regulations with only minor amendments and remain in force up to now. After witnessing practical operation of these rules for several decades, the time is ripe for articulating key challenges for the future development of the European private international law. Some of the challenges are a consequence of globalisation, digitalisation and other technological changes, known as the fourth industrial revolution, which affect the way in which work is performed. Other issues are brought about by the very design of the rules of the European private international labour law and from the interpretation of these rules provided by the Court of Justice of the EU ("CJEU also EU Court of Justice, alternatively Court of Justice"). This paper will address three distinct challenges: (i) operation of the connecting factor engaging place of business, (ii) interpretation of the escape clause and finally (iii) challenges resulting from digitalisation and emergence of new working arrangements.

7 Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (Lugano I Convention) which applies between EU member states and EFTA countries, replaced in 2007 by Lugano II Convention.

2 Operation of the connecting factor engaging place of business

The European private international labour law prescribes several connecting factors for determining the law applicable to individual employment contracts, while imposing a strict hierarchy between them. The principal rule, enshrined in Art. 6 para. 2 (a) of the Rome Convention (Art. 8 para. 2 of the Rome I Regulation[8]) states that individual employment contract shall be governed by the law of the country in which (or from which)[9] the employee habitually carries out his/her work in performance of the contract, even if the employee is temporarily employed in another country. The primary connecting factor is thus the habitual place of work of the employee. The secondary rule contained in Art. 6 para. 2 (b) of the Rome Convention (Art. 8 para. 3 of the Rome I Regulation) refers to the application of the law of the country where the place of business through which the employee was engaged is situated. According to the Rome Convention, this subsidiary connecting factor of the engaging place of business was to be utilised "*if the employee does not habitually carry out his work in any one country.*"[10] The Rome I Regulation did not adopt the same wording and instead calls for the use of the subsidiary connecting factor in situations "where the law applicable cannot be determined pursuant to para. 2" (i.e. by means of the principal connecting factor of the habitual place of work). The new wording in the Rome I Regulations is the result of the extraordinary way in the CJEU interpreted provisions of Art. 6 of the Rome Convention. The phrasing of the Rome Convention suggested relatively wide scope of application for the secondary connecting factor of the engaging place of business, since it envisaged its application to all situations when the employee does not habitually carry out his/her work in any one country, thus covering e.g. all workers engaged in international transport. However, CJEU took different

8 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

9 Following established case law of the Court of Justice of the EU, Rome I Regulation extended definition of the connecting factor of habitual place of work to include not just country *in which*, but also *from which* the employee habitually carries out his/her work in performance of the contract.

10 Art. 6 para. 2 letter b) of the Rome Convention.

path and severely restricted options for invoking the subsidiary connecting factor of the engaging place of business, primarily by giving extremely broad interpretation to the concept of habitual place of work. Thus, the habitual place of works covers (i) the place from which the employee predominantly fulfils his/her obligations towards the employer;[11] (ii) the place where the employee has established the effective centre of his/her working activities;[12] and in the absence of office space, also (iii) the place where the employee carries out the majority of his/her work.[13]

Citing the objective of Art. 6 of the Rome Convention, which is to guarantee adequate protection to the employee, in *Koelzsch*[14] the CJEU reiterated that the principal connecting factor of habitual place of work set out in Art. 6 (2)(a) of the Rome Convention, must be given a broad interpretation, while the subsidiary connecting factor of the engaging place of business in Art. 6 (2)(b) thereof, can apply only if the court seized is not in a position to determine the country in which the work is habitually carried out. If employee carries out his/her work in more than one state, the primary connecting factor of habitual place of work should nonetheless be applied when it is possible for the court to determine the state with which the work has a significant connection.[15] In such a case, the factor of the country in which the work is habitually carried out must be understood as referring to the place in which or from which the employee actually carries out his working activities and, if there is no centre of activities, to the place where he carries out the majority of his activities.[16]

The EU Court of Justice made it abundantly clear, that even employment contracts in international transport sector will fall within the scope of the principal connecting factor of the habitual place of work.

11 Judgment of the Court of Justice of 13 July 1993, Case C-125/92, para. 21–23.
12 Judgment of the Court of Justice (Sixth Chamber) of 9 January 1997, Case C-383/95, para. 23.
13 Judgment of the Court of Justice (Sixth Chamber) of 27 February 2002, Case C-37/00, para. 42.
14 Judgment of the Court of Justice (Grand Chamber) of 15 March 2011, Case C-29/10, para. 43.
15 Ibid., para. 44.
16 Ibid., para. 45.

In *Voogsgeerd*[17] CJEU provided some guidance for interpretation of the subsidiary connecting factor of the engaging place of business. First of all it stated that the concept of engaging place of business must be understood as referring exclusively to the place of business which engaged the employee (where the employment contract was concluded or where the *de facto* employment relationship was created) and not to that with which the employee is connected by his actual employment.[18] In this context national courts should take into consideration indicators such as the place of business which published the recruitment notice and that which carried out the recruitment interview. As regards formal requirements for the engaging place of business, CJEU expressly ruled out the requirement for the business unit to have legal personality. It must however, amount to a stable structure of an undertaking. Consequently, not only the subsidiaries and branches but also other units, such as the offices of an undertaking, could constitute places of business within the meaning of Art. 6 (2)(b) of the Rome Convention, even though they do not have legal personality.[19] Such a business unit must however, in principle, belong to the undertaking which engages the employee, that is to say, form an integral part of its structure.[20] This is significant, as it would most probably exclude staffing agencies from being regarded as engaging place of business.[21]

Another requirement formulated by the Court is a certain degree of permanence of the business unit. The Court explicitly warns that purely transitory presence in a state of an agent of an undertaking from another state for the purpose of engaging employees cannot be regarded as constituting a place of business which connects the contract to that state. If, however, the same agent travels to a country in which the employer maintains a permanent establishment of his undertaking, it would be perfectly reasonable to suppose that that establishment constitutes an engaging place of business.

17 Judgment of the Court of Justice (Fourth Chamber) of 15 December 2011, Case C-384/10.

18 Ibid., para. 46, 52.

19 Ibid., para. 54.

20 Ibid., para. 57.

21 See also Grušić, U. Should the connecting factor of the "engaging place of business" be abolished in European private international law? *International & Comparative Law Quarterly*. 2013, Vol. 62, No. 1, p. 187.

Finally, CJEU pronounced, that even the place of business of an undertaking other than that which is formally referred to as the employer, with which that undertaking has connections, may be classified as a place of business if objective factors make it possible to establish that there exists a real situation different from that which appears from the terms of the employment contract, even though the authority of the employer has not been formally transferred to that other undertaking.[22]

Case law of the Court of Justice significantly reduced the scope of application of the subsidiary connecting factor, while failing to provide clear enough interpretation of the concept of the engaging place of business. Broad interpretation of the habitual place of work means that in almost all imaginable scenarios, including employment in international transport, it will be possible to establish habitual place of work of an employee. Thus, the subsidiary connecting factor of the engaging place of business would come into play principally in cases where the employee does not work on the territory of any state entity (e.g. employees working on high seas, in Antarctica or even in space).[23] Another possible scenarios mentioned by *Grušić* include situations when employee does not have one permanent basis, but maintains two or more bases with equal distribution of his/her working time between them or a case in which employee does not have any permanent base and even analysis of the distribution of his/her working time and the intention of the parties do not lead to a conclusion enabling to establish a habitual place of work. Final alternative could be a situation when employee does have a base in some country, but the connection with that base is not strong enough.[24]

All in all, scenarios in which the subsidiary connecting factor of the engaging place of business could be invoked are rare and the provision is thus stripped

22 Judgment of the Court of Justice (Fourth Chamber) of 15 December 2011, Case C-384/10, para. 65.

23 See also Kadlecová, T. *Evropské mezinárodní právo soukromé v kontextu pracovního práva*. Praha: Wolters Kluwer ČR, 2013, p. 127; Grušić, U. Should the connecting factor of the "engaging place of business" be abolished in European private international law? *International & Comparative Law Quarterly*. 2013, Vol. 62, No. 1, pp. 181–182.

24 Grušić, U. Should the connecting factor of the "engaging place of business" be abolished in European private international law? *International & Comparative Law Quarterly*. 2013, Vol. 62, No. 1, pp. 181–182.

of any reasonable practical value. Considering the objective of the rules determining the law applicable to employment contracts,[25] i.e. protection of employees as a weaker party, as well as the general aim of legal certainty and predictability, keeping the subsidiary connecting factor of the engaging place of business in the regulation does not contribute to fulfilment of these objectives. As CJEU made clear in *Voogsgeerd*, the concept of the engaging place of business refers exclusively to the place of business where the employment contract was concluded (or where the *de facto* employment relationship was created) and not to that with which the employee is connected by his actual employment.[26] Such a constructions does not provide strong enough connection with the actual performance of the contract and gives rise to the risk of manufacturing artificial connections, since determining the country in which the place of business through which the employee was engaged will be situated is completely at the discretion of the employer.[27] This might even be one of the reasons why CJEU is so wary of conferring any more significance to this connecting factor.[28] Complex structure of the subsidiary connecting factor as well as its complicated relation with the principal connecting factor make it increasingly susceptible to incorrect interpretation by national courts.[29] Should the subsidiary connecting factor be replaced, situations falling within its current scope could be easily remedied by applications of the principle of the closest connection. It would streamline the structure of Art. 8 of the Rome I Regulation and thus making it less prone to inaccurate interpretation and application. Employing directly the principle of the closest connection would also contribute to the attainment of the objective of employee protection, as it would lead to application of law that has adequate connection with the performance of the employment contract

25 Preamble Rome I Regulation, para. 23, 35.

26 Judgment of the Court of Justice (Fourth Chamber) of 15 December 2011, Case C-384/10, para. 46, 52.

27 Grušić, U. Should the connecting factor of the "engaging place of business" be abolished in European private international law? *International & Comparative Law Quarterly*. 2013, Vol. 62, No. 1, p. 188.

28 Compare Kadlecová, T. *Evropské mezinárodní právo soukromé v kontextu pracovního práva*. Praha: Wolters Kluwer ČR, 2013, p. 127.

29 Grušić, U. Should the connecting factor of the "engaging place of business" be abolished in European private international law? *International & Comparative Law Quarterly*. 2013, Vol. 62, No. 1, p. 190.

itself, as opposed to the law of a country in which the contract was merely concluded. Finally, it would also limit the scope for speculation and evasion of protective legislation by employers, which is the case with respect to the engaging place of business, which could be unilaterally determined by the employer. Moreover, as *Grušić* points out, the location of the engaging place of business would remain relevant for the purpose of determining the closest connection as one of the factors that need to be taken into consideration.[30] It will be interesting to observe how the case law of the EU Court of Justice as well as academic discussions in the future will tackle this issue.

3 Interpretation of the escape clause

The escape clause contained in Art. 6 para. 2 of the Rome Convention (resp. Art. 8 para. 4 of the Rome I Regulation) represents a very significant tool, which enables the competent court to effectively set aside generally applicable connecting factors of the habitual place of work or the engaging place of business and to proclaim as applicable the law of the state with which the employment contract is more closely connected, as appearing from the circumstances of the case as a whole.

However, the formulation of the escape clause itself is very concise and as such opens a wide room for various interpretations. It therefore might come as a surprise, that CJEU so far did not have ample opportunities to provide guidance for application and interpretation of the escape clause.

It is worth noting in this context that the escape clause enshrined in Art. 6 of the Rome Convention (Art. 8 of the Rome I Regulation) is not a special instrument, developed exclusively for the purpose of determining the law applicable to individual contracts of employment. Similar mechanism is laid down also in Art. 4 para. 5 of the Rome Convention (Art. 4 para. 3 of the Rome I Regulation), which sets out general rules determining the law applicable to contractual obligations in the absence of choice by parties.

Such situation naturally invites temptation to consider possible convergence between these two provisions and especially creates the questions to what extent the case law interpreting the general escape clause in Art. 4 may

30 Ibid.

be utilised with respect to the escape clause applicable to employment contracts.[31] After CJEU provided interpretation of the general escape clause contained in the Rome Convention in the case *Intercontainer Interfrigo*,[32] several serious questions were raised as to potential impact of this judgment on the application and interpretation of the escape clause concerning employment contracts. In *Intercontainer Interfrigo* CJEU rejected strict interpretation of the escape clause, applied e.g. by Dutch and Scottish courts, according to which the escape clause is subsidiary to the general and specific presumptions contained in Art. 4 para. (2) to (4).[33] The Court of Justice instead opted for more flexible interpretation and stated that it is not the case that national court may only refrain from applying the presumptions in Art. 4 para. (2) to (4) of the Rome Convention where they do not have any genuine connecting value, but they may also be disregarded in a situation where the court finds that the contract is more closely connected with another country.

Van Den Eeckhout alerts to the fact that when interpreting Art. 6 of the Rome Convention (Art. 8 of the Rome I Regulation) account has to be taken of the objective of the particular provision, which is to protect or even favour the employee as a weaker party to the contract.[34] Referring to the Green paper on Rome I Regulation[35] which describes the escape clause as a tool for avoiding the harmful consequences for the worker of rigid connection

31 Both the general escape clause enshrined in Art. 4 para. 5 and the escape clause concerning employment contracts in Art. 6 para. 2 Rome Convention were transferred into the Rome I Regulation. Whereas the escape clause regarding the employment contracts (Art. 8 para. 4) remained fundamentally unchanged, the general escape clause (Art. 4 para. 3) was altered so that it now requires not just "more close connection," but "manifestly more close connection." It is not without interest that the Dutch language version of the regulation contains the reference to "manifestly more close connection" in both Art. 8 para. 4 and Art. 4 para. 3, which is not the case in the English, Slovak, Czech, German or French versions of the regulation.

32 Judgment of the Court of Justice (Grand Chamber) of 6 October 2009, Case C-133/08.

33 Ibid., para. 63. See also Opinion of Advocate General Bot of 19 May 2009, Case C-133/08, para. 71–79.

34 Van Den Eeckhout, V. Navigeren door artikel 6 EVO-Verdrag c.q. artikel 8 Rome I-Verordening: mogelijkheden tot sturing van toepasselijk arbeidsrecht. Een analyse vanuit de vraag naar de betekenis voor het internationaal arbeidsrecht van de zaak Intercontainer Interfrigo (C-133/08). *Arbeidsrechtelijke Annotaties*. 2010, Vol. 9, No. 1, pp. 54–57.

35 Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation. COM/2002/0654 final, p. 35 ("Green paper on Rome I Regulation").

of the employment contract to the law of the place of performance, she saw this as a window for interpretation of the escape clause in Art. 6 (2) in a way, which would enable to proclaim as the law applicable the most protective i.e. substantively most favourable law for the employee.[36]

CJEU finally addressed the escape clause contained in Art. 6 (2) of the Rome Convention in *Schlecker* case.[37] The court stated that in so far as the objective of Art. 6 of the Rome Convention is to guarantee adequate protection for the employee, that provision must ensure that the law applied to the employment contract is the law of the country with which that contract is most closely connected.[38] However, at the same time the court adopted deliberations of the Advocate General, who pointed out in point 36 of his Opinion, that interpretation must not automatically result in the application, in all cases and regardless of the nature of the dispute, of the law most favourable to the worker. The Advocate General further recalled earlier cases *Koelzsch*[39] and *Voogsgeerd*,[40] emphasising that it was with a clearly expressed concern for "adequate", and not necessarily optimal or "favourable", protection for the employee and guided by considerations which had already been identified by the court in interpreting the rules of jurisdiction laid down by the Brussels Convention,[41] that the court held that 'compliance with the employment protection rules provided for by the law of that country must, so far as is possible, be guaranteed'.[42] A different interpretation would, according to the Advocate General, significantly undermine legal certainty and the predictability of the approaches adopted in the context of the mechanism for determining the law applicable to an individual employment contract, in that, depending on the nature of the dispute and

36 Green paper on Rome I Regulation, p. 56.
37 Judgment of the Court of Justice (Third Chamber) of 12 September 2013, Case C-64/12.
38 Ibid., para. 34.
39 Judgment of the Court of Justice (Grand Chamber) of 15 March 2011, Case C-29/10, para. 41–42.
40 Judgment of the Court of Justice (Fourth Chamber) of 15 December 2011, Case C-384/10.
41 Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters
42 Opinion of Advocate General Wahl of 16 April 2013, Case C-64/12, para. 36.

the time at which the court is required to give a ruling, the law regarded as the most favourable will not necessarily always be the same.[43]

Furthermore, the Court of Justice stated that national court must take account of all the elements which define the employment relationship and single out one or more as being, in its view, the most significant. Nevertheless, the court cannot automatically conclude that the rule laid down in Art. 6 (2)(a) of the Rome Convention must be disregarded solely because, by dint of their number, the other relevant circumstances – apart from the actual place of work – would result in the selection of another country.[44] The court further proceeded to provide some examples of significant factors suggestive of a connection with a particular country that should be considered by national courts in each case. These include the country in which the employee pays taxes on the income from his activity and the country in which he is covered by a social security scheme and pension, sickness insurance and invalidity schemes. In addition, the national court must also take account of all the circumstances of the case, such as the parameters relating to salary determination and other working conditions.[45]

In *Schlecker* CJEU followed its approach defined in *Intercontainer Interfrigo* in favour of more flexible interpretation of the escape clause. Thus the connecting factor habitual place of work, referred to in Art. 6 (2)(a) of the Rome Convention may be disregarded not only where that factor is not genuinely indicative of a connection, but even where an employee carries out the work in performance of the employment contract habitually, for a lengthy period and without interruption in the same country, the national court may disregard the law applicable in that country, if it appears from the circumstances as a whole that the contract is more closely connected with another country.[46]

Despite this ruling, many questions concerning the operation of the escape clause still persist. Besides the concern for protection of employee as a weaker party to the employment contract, there are other factor that

43 Ibid., para. 37.
44 Ibid., para. 40.
45 Ibid., para. 41.
46 Opinion of Advocate General Wahl of 16 April 2013, Case C-64/12, para. 42.

need to be taken into account when interpreting the escape clause. After rulings in cases *Laval*[47] and *Viking*[48] it became abundantly clear that the Court of Justice will not shy away from enforcing market freedoms, such as free movement of services at the cost of protection of employees. This could find reflection also in the interpretation of the escape clause. As *Van Den Eeckhout* points out, in the context of posting of workers the escape clause may be interpreted either from the perspective of enforcing the aim of protecting employees and thus proclaiming the law of the host state as being more closely connected to the case or on the other hand, declaring the domestic law of the posting employer as more closely connected as a result of protecting the free movement of services within the internal market of the EU.[49] Such considerations would surface if the Court of Justice was confronted with a case involving connections to both new and old member states and not just Germany and the Netherlands, as in the *Schlecker* case discussed above. Since the Court of Justice opened door for flexible interpretation of the escape clause by national courts, it is easily possible to assume that courts of new member states might be inclined to promote the principle of free movement of services whilst the courts of old member states may favour protection of employees as a way of combating the phenomenon of social dumping. It will be particularly interesting to see how the case law will deal with the issue of materialisation of conflicts law and how the limits to this occurrence will be set. Since many of the "material considerations" are stemming from sources of EU law, such as the principles of free movement of workers and services or fundamental rights enshrined e.g. in the Charter of Fundamental Rights of the European Union, this may even lead to a situation of divergence in interpretation of sources

47 Judgment of the Court of Justice (Grand Chamber) of 18 December 2007, Case C-341/05.

48 Judgment of the Court of Justice (Grand Chamber) of 11 December 2007, Case C-438/05; See also cases Judgment of the Court of Justice (Second Chamber) of 13 April 2008, Case C-346/06; Judgment of the Court of Justice (First Chamber) of 19 June 2008, Case C-319/06.

49 Van Den Eeckhout, V. Navigeren door artikel 6 EVO-Verdrag c.q. artikel 8 Rome I-Verordening: mogelijkheden tot sturing van toepasselijk arbeidsrecht. Een analyse vanuit de vraag naar de betekenis voor het internationaal arbeidsrecht van de zaak Intercontainer Interfrigo (C-133/08). *Arbeidsrechtelijke Annotaties*. 2010, Vol. 9, No. 1, p. 59.

of EU private international law depending on whether the particular case involves intra-EU situation or extra-EU situation.[50]

4 Challenges resulting from a shift towards on-demand economy

Besides the notorious trend of globalisation, recent years have been characterised by a considerable expansion of new forms of working arrangements known as crowdwork or platform work, brought about by the fourth industrial revolution. There is quite a confusion between various terms in this respect, hence as suggested by *Todolí-Signes*, for the purpose of this article we will use the term "on-demand economy" as an umbrella term covering several types of working arrangements, which have in common the use of an online platform to match supply and demand.[51] The term thus encompasses three different business models: (i) the sharing economy, implying an online platform, such as AirBnB or BlaBlaCar, through which independent "micro-entrepreneurs" exploit their underused goods and put it on the market; (ii) online crowdsourcing, which involves outsourcing a job traditionally performed by an employee to an undefined group of individuals in the form of an open call, whereby the work could be performed virtually, without any physical work by the service provider (SpinWrite, Elance or Amazon Mechanical Turk) and finally (iii) offline crowdsourcing, which differs from online crowdsourcing in the sense that it requires local and physical performance by the service provider, typical example being Uber.[52]

These new types of working arrangements pose a series of serious questions not only for labour law, but also for private international law. From the labour law perspective, on-demand economy invigorates the crucial debate over the scope of labour law and definition of the crucial term of dependent

50 See more in Ibid., pp. 61–64; Van Den Eeckhout, V. Alle wegen leiden naar Rome (I), alle wegen vertrekken vanuit Rome (I)!? Mogelijkheden tot opheldering van ipr-onduidelijkheden bij internationale detachering. *Arbeidsrechtelijke Annotaties*. 2009, Vol. 8, No. 2, pp. 10–12.

51 Todolí-Signes, A. The End of the Subordinate Worker? The On-Demand Economy, the Gig Economy, and the Need for Protection for Crowdworkers. *International Journal of Comparative Labour Law and Industrial Relations*. 2017, Vol. 33, No. 2, p. 245.

52 Ibid., pp. 245–254.

work, in particular the notion and role of the criterium of subordination.[53] There are, however, also issues that spill over into the realm of private international law.

The pivotal question from the standpoint of private international law is characterisation of various forms of working arrangements within the on-demand economy. In principle, there are only two options in the European private international law. Either the legal relationship would be considered to constitute individual contract of employment, which will lead to application of protective provisions contained in Art. 8 of the Rome I Regulation or it will not be regarded as employment contract and thereby will be treated as a contract for the provision of services according to Art. 4 para. 1 (b) of the Rome I Regulation. The first scenario would lead to the application of the principal connecting factor of habitual place of work, whilst in the second case the contract would be governed by the law of the country where the service provider (worker) has his/her habitual residence. In both cases the otherwise applicable law may be set aside via the escape clause (see above) if the case exhibited (manifestly) closer connection with another country. Since most workers in various arrangements of on-demand economy would be probably working from home, this dichotomy wouldn't cause major problems in a sense that it would lead to the application of law of a country, which does not have sufficient enough connection to the performance of the work.[54]

The situation is however different when it comes to the choice of law by the parties to the contract. With regard to employment contracts the regulation

53 See e.g. Schoukens, P., Barrio, A. The changing concept of work: When does atypical work become typical? *European Labour Law Journal*. 2017, Vol. 8, No. 4, pp. 306–332; Todolí-Signes, A. The End of the Subordinate Worker? The On-Demand Economy, the Gig Economy, and the Need for Protection for Crowdworkers. *International Journal of Comparative Labour Law and Industrial Relations*. 2017, Vol. 33, No. 2, pp. 241–268; Barancová, H. *Nové technológie v pracovnoprávnych vzťahoch*. Praha: Leges, 2017, pp. 34–54; Švec, M., Olšovská, A. Transformácia pracovného a sociálneho prostredia zamestnancov: Práca 4.0.-24/7? In: Barancová, H., Olšovská, A. (eds.). *Pracovné podmienky zamestnancov v období štvrtej priemyselnej revolúcie*. Praha: Leges, 2018, pp. 74–88.

54 Compare Cherry, M. A. Regulatory options conflicts of law and jurisdictional issues in the on-demand economy. Conditions of Work and Employment Series No. 106 [online]. *International Labour Office*. Published in 2019, p. 21 [cit. 20. 1. 2020]. https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_712523.pdf

provides guarantees preventing the employer from attempting to subordinate the contract to the law of a country with which it does not have sufficient links and which provides as low as possible protection to the employee by forcibly incorporating a choice of law clause into the contract. According to Art. 8 (1) of the Rome I Regulation, choice of law may not have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to para. 2 (habitual place of work), 3 (engaging place of business) and 4 (escape clause) of that Art. No such guarantees, however, are provided in case the contract is characterised as a contract for the provision of services, which makes the door to the race to the bottom wide open.

In the environment of the on-demand economy it is reasonable to assume that in most cases choice of law clauses will be incorporated in standardised online[55] form contracts or terms of service to which the worker has to assent before he/she can even create a user account on the platform.[56] These online forms could have a form of *a click-wrap* contracts, which require the user to manifest his/her consent by clicking "I agree" or a *browse-wrap* contract that requires no clear demonstration of acceptance.[57] Needless to say that any attempt to negotiate would most probably go in vain.[58] As *Cherry* points out, up to this day there is no relevant case law, that would address the issues

55 Art. 25 para. 2 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 ("Brussels I bis Regulation") expressly stipulates that communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing."

56 Cherry, M. A. Regulatory options conflicts of law and jurisdictional issues in the on-demand economy. Conditions of Work and Employment Series No. 106 [online]. *International Labour Office.* Published in 2019, pp. 24–25 [cit. 20. 1. 2020]. https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_712523.pdf

57 Kyselovská, T. *Vybrané otázky vlivu elektronizace na evropské mezinárodní právo soukromé a procesní: (se zaměřením na princip teritoriality a pravidla pro založení mezinárodní příslušnosti soudu ve sporech vyplývajících ze smluvních závazkových vztahů).* Brno: Masarykova univerzita, 2014, pp. 17–18.

58 Cherry, M. A. Regulatory options conflicts of law and jurisdictional issues in the on-demand economy. Conditions of Work and Employment Series No. 106 [online]. *International Labour Office.* Published in 2019, p. 25 [cit. 20. 1. 2020]. https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_712523.pdf

of jurisdiction or law applicable in the sphere of crowdwork platforms not only in the EU, but nor in California or India.[59] Therefore it will be very interesting to see how the Court of Justice will handle the issues of characterisation of various working arrangements in the on-demand economy and especially how will tackle choice of law clauses in online forms, in particular in the form of *browse-wrap* contract in the context of platform work.

Nevertheless, probably the crucial question is the sustainability of the connection to the place of work. As mentioned above, if particular working arrangement is to be characterised as employment contract, the principal connecting factor of habitual place of work would apply, in case the court classified the arrangement as a contract for the provision of services, the law of the country of habitual residence of the service provider would govern the contract. That is obviously not favourable for the online platform, which would need to abide by rules in many different countries around the world.[60] Therefore, the platforms are highly motivated to make use of choice of law clauses. Given the special mechanism in Art. 8 (1) of the Rome I Regulation, such a strategy will not work completely if the legal relation is characterised by the court as an employment contract. It will, however, most likely work if particular working arrangement is deemed to constitute a service contract. Unless CJEU provides a clear guidance concerning characterisation of working arrangements in the on-demand economy for the purposes of EU private international law instruments, legal uncertainty over the issue of the law applicable would prevail, since national courts seem to have very different approaches towards classification of on-demand work. Moreover, even in the absence of choice, the default connecting factors linking the contract with the place of work performance/habitual residence of the service provider may not be the best solution for the workers/service providers either. Admittedly the contract probably still will have sufficiently close connection with the law determined by these connecting factors (assuming the service provider works from his/her home), but we have to take into account the very special character of these types of relations, which are usually triangular, consisting of the worker (services provider), the platform

59 Ibid., p. 27.
60 Ibid., p. 25.

(intermediary) and the client, each of whom might be located in a different country. It this sense the arrangement reminds the triangular structure of the posting of workers. And the similarities do not end here, since both on-demand work and posting of workers create incentives for exploiting lower standards of labour protection in certain countries by outsourcing activities to be performed by workers to which these lower standards will apply, leading thus to unfair competition and race to the bottom in labour regulation. Therefore it is not improper to suggest drawing some inspiration from the legal regulation of posting of workers, aimed at targeting the race to the bottom, namely the special construct subjecting the posted workers to certain provisions of the host country's legal regulations while in principle remaining to be covered by the legislation of their country of origin.[61] This mechanism is similar to the one provided for in Art. 8 (1) of the Rome I Regulation.[62] Even though both Art. 8 (1) of the Rome I Regulation and the mechanism of the posting of workers directive were, quite rightly, heavily criticised for their complexity and difficulties connected with their application in practice, it nevertheless may still be the lesser of two evils. On-demand work could thus be subjected to the more favourable of the two options consisting of the law of the country were the work/service is provided and the law of the country in which the platform is headquartered. Even better solution, however, would be adoption of a special international instrument laying down minimum standards for on-demand work, such as the Maritime Labour Convention,[63] as suggested by *Cherry*.[64]

61 Article 3 para. 1 Directive No. 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

62 The same provision is enshrined also in Art. 6 para. 2 Rome I Regulation with respect to consumer contracts.

63 Maritime Labour Convention (MLC) was adopted by the International Labour Organization in 2006 as its convention number 186 and entered into force on 20 August 2013.

64 *C*herry, M. A. Regulatory options conflicts of law and jurisdictional issues in the on-demand economy. Conditions of Work and Employment Series No. 106 [online]. *International Labour Office*. Published in 2019, pp. 30–33 [cit. 20. 1. 2020]. https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_712523.pdf

5 Conclusion

This paper sought to identify crucial challenges for the future development of the private international labour law of the EU. Some of these challenges are stemming from the changing environment and patterns in the world of work, brought about by the fourth industrial revolution. Others are resulting from the very construction of rules of the European private international labour law and from the way CJEU interprets them. Three different issues were discussed above: (i) operation of the connecting factor engaging place of business, (ii) interpretation of the escape clause and finally (iii) challenges resulting from a shift towards on-demand economy.

As regards the connecting factor engaging place of business, CJEU interpreted it in a way, which dramatically undermined the scope of application of this connecting factor, so it now could be engaged only in relatively rare circumstances. Given also the fact that this connecting factor might be difficult to establish and especially the fact that it creates connection to a place where the employment contract was concluded (or where the de facto employment relationship was created) as opposed to a place linked with the actual performance of the employment contract, legitimate question arises as to whether preserving this connecting factor is still justified and appropriate in light of the objectives of the regulation as a whole and in particular objectives of Art. 8 of the Rome I Regulation.

Second challenge addressed in this paper concerns interpretation of the escape clause, enshrined in Art. 8 (4) of the Rome I Regulation. Considering the significance of this clause, which enables to set aside both the principal (Art. 8 para. 2) and subsidiary connecting factors (Art. 8 para. 3) it is surprising that CJEU was not given sufficient opportunity to shed more light on the subject of interpretation of this provision. The case law up to date favours broad interpretation of this clause and even though judgment in the *Schlecker* case provided some useful insight, many questions still remain unresolved. Particularly concerning is the risk of diverging interpretation of this clause by national courts in old and new EU member states within the context of cross-border provision of services. Besides there is also a scope for variability in interpretation of the escape clause depending on whether

particular case has purely intra-union character or not. Common denominator of all these issues is the question of materialisation of conflict law and potential limits thereof.

Finally, the last batch of issues concerns those resulting from digitalisation of the economy and the phenomenon marked as on-demand work. The crucial question in this respect will be that of characterisation, as it determines whether protective provisions concerning employment contracts would apply or not. Another matter in this respect is the dilemma how to prevent the race to the bottom while at the same time preserving legal certainty and predictability and avoiding making the rules too complex and confusing for practice. It will be mainly up to the decision-making practice of national courts and especially CJEU to address these issues in forthcoming years, but academic discourse might be of some help as well, as may be appropriate legislative initiatives on EU level or better even in case of on-demand work, on a global level.

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Development of EU Private International Law Rules for Intellectual Property Rights

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Abstract

The aim of this article is to analyze the development of the EU conflict of law rules for contractual and non-contractual obligations with international element concerning intellectual property rights. The main focus of the analysis is the legislative history of Rome I Regulation and Rome II Regulation and the development of respective conflict of law rules and connecting factors.

Keywords

European Union; Conflict of Law Rules; Intellectual Property Rights; Private International Law; Contractual Obligations; Rome I Regulation; Non-contractual Obligations; Rome II Regulation; Infringement; License Contract.

1 Introduction

This article discusses the relationship between two very interesting, yet challenging, legal areas, i.e. private international law and intellectual property rights ("IPR"), through the lenses of conflict of law rules of the European Union ("EU").

Both of these areas area of law are very important in today's globalized and interconnected world. Private international law deals with private law relationships with international (cross-border) element. Private international law rules answer three main questions: What is the law applicable to the private law relationship with international element (e.g. law applicable to multistate license contract)? Which courts have jurisdiction to hear a case (e.g. in infringement of copyright on the Internet cases)? Under what conditions a foreign judgment can be recognized and enforced in a different

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State than the State of its origin, (e.g. if patent holder is seeking protection granted by a judgment in every jurisdiction for which protection was claimed).[1]

Intellectual property rights give protection to the results of creative intellectual activity (e.g. inventions, technical solutions, industrial designs etc.). IPR are immaterial. They are characterized by their ubiquitous and non-rival nature; IPR can be used anywhere, irrespective of the material object they are expressed on.[2]

Due to electronization, globalization and the wide use of Internet, it is now relatively easy for natural and legal persons to enter into legal relationships with an international (cross-border) element.[3] This is particularly evident in the use of intangible assets protected by intellectual property rights on the Internet. For this reason, it is of an utmost importance to have clear and predictable private international law rules in this area.

This article is focused only on conflict of law rules for determining law applicable contained in directly applicable EU regulations. Due to their interconnectivity, jurisdictional rules and correspondent case law of the Court of Justice of the EU ("CJEU") will be mentioned.

2 Private international law and intellectual property rights

For the relationship between private international law and intellectual property rights, it is necessary to distinguish three main areas of interest. Private international law rules deal with law applicable to subjective (relative) individual rights with international element, such as contractual and non-contractual obligations.[4] Private international law rules do not deal with the IPR as such, i.e. their content, validity or registration. This area

1 Rozehnalová, N., Valdhans, J., Drličková, K., Kyselovská, T. *Úvod do mezinárodního práva soukromého*. Praha: Wolters Kluwer ČR, 2017, p. 20.

2 Kučera, Z., Pauknerová, M., Růžička, K. et al. *Mezinárodní právo soukromé*. Plzeň-Brno: Aleš Čeněk-Doplněk, 2015, p. 271.

3 Kyselovská, T. Působnost práva na internetu. In: Polčák, R. et al. *Právo informačních technologií*. Praha: Wolters Kluwer ČR, 2018, p. 32.

4 Rozehnalová, N., Valdhans, J., Drličková, K., Kyselovská, T. *Úvod do mezinárodního práva soukromého*. Praha: Wolters Kluwer ČR, 2017, p. 216.

is regulated by, mainly, international conventions or EU regulations containing direct, substantive, rules.

It is necessary to mention, that both private international law and intellectual property rights are deeply rooted in the principle of territoriality. IPR are subject to territorial limitations and are protected only in a State that this right recognizes and protects.[5] This leads to the challenges for rules dealing with law applicable to contractual and non-contractual aspects of the IPR with international element, especially for online relationships on the Internet.[6]

These challenges lead to development of a number of *soft law* instruments that contain conflict of law rules and jurisdictional rules for the contractual and non-contractual aspect of IPR (on the Internet). These *soft law* instruments are represented by CLIP Principles,[7] ALI Principles,[8] Transparency Principles,[9] KOPILA Principles[10] and Joint JK Principles.[11]

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5 Kučera, Z., Pauknerová, M., Růžička, K. et al. *Mezinárodní právo soukromé*. Plzeň-Brno: Aleš Čeněk-Doplněk, 2015, p. 271.

6 Christie, A. F. Private international law principles for ubiquitous intellectual property infringement – a solution in search of a problem? *Journal of Private International Law*. 2017, Vol. 13, No. 1, pp. 152–163.

7 European Max Planck Group on Conflict of Laws in Intellectual Property. Basedow, J. (ed.). *Conflict of Laws in Intellectual Property. The CLIP Principles and Commentary*. Oxford: Oxford University Press, 2013, p. 507.

8 The American Law Institute (ALI). Dreyfus, R. et al. *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes*. Philadelphia: The American Law Institute Publishers, 2008, 219 p.

9 Kono, T. et al. Transparency Proposal on Jurisdiction, Choice of Law, Recognition and Enforcement of Foreign Judgments in Intellectual Property. In: Basedow, J., Kono, T., Metzger, A. *Intellectual property in the Global Arena: Jurisdiction, Applicable law, and the Recognition of Judgments in Europe, Japan and the US*. Tübingen: Mohr Siebeck, 2010, pp. 394–402.

10 "*Principles on International Intellectual Property Litigation*" approved by Korean Private International Law Association on 26 March 2010. In: Miguel Asensio, P. A. De. The Law Governing International Intellectual Property Licensing Agreements (A Conflict of Laws Analysis) [online]. *Research Handbook on Intellectual Property Licensing*. Published in 2013 [cit. 15. 11. 2019]. https://eprints.ucm.es/18063/1/pdemiguelasensio-IP_Licensing_2013.pdf

11 *Principles of Private International Law on Intellectual Property Rights (Joint Proposal Drafted by Members of the Private International Law Association of Korea and Japan*. In: Commentary on Principles of Private International Law on Intellectual Property Rights (Joint Proposal Drafted by Members of the Private International Law Association of Korea and Japan [online]. *Waseda University Global COE Project*. Published in October 2010 [cit. 15. 11. 2019]. http://www.win-cls.sakura.ne.jp/pdf/28/08.pdf

As *Kono* and *Jurčys* stated, "*[…] without special PIL rules, ubiquitous IP infringement will require courts to consider the infringement of IP rights in each state separately and apply the law of each state for which protection is sought […] leading to a mosaic application of a multitude of laws […] [which] increases procedural costs.*"[12] These soft law instruments are not legally binding. They aim to increase the efficiency of dispute resolution with an international (cross-border) element by reducing the costs and uncertainty of the parties. These objectives should be safeguarded by rules whereby court proceedings would be held in a single forum and the dispute would be governed by a single law, even in a case of a multi-state infringement. These soft law instruments, however, are interesting also in the context of the EU private international law, because some of the CJEU Advocates Generals refer to them in their legal opinions relating to online infringement of IPR on the Internet.[13]

3 EU Conflict of law rules for contractual aspects of IPR

This part is focused on the relationship between EU conflict of law rules for determining law applicable to contractual and non-contractual obligations contained in EU regulations. The road to creation uniform EU conflict of law rules was not always straightforward.

3.1 Rome I Regulation

Conflict of law rules for derermining law applicable for contractual obligations with international (cross-border) element are provided for in Rome I Regulation.[14] However, Rome I Regulation does not contain any specific rules for contracts related to IPR, such as licence contracts or contracts on transfer of IPR.

The history of creating uniform (jurisdictional) rules in the area of contractual obligations goes back to the adoption of the Brussels Convention

12 Kono, T., Jurčys, P. General Report. In: Kono, T. (ed.). *Intellectual Property and Private International Law: Comparative Perspectives*. Oxford: Hart Publishing, 2012, p. 153.

13 See Opinion of Advocate General P. Cruz Villalón of 11 September 2014, Case C-441/13, para. 4; or Opinion of Advocate General Jääskinen of 13 June 2013, Case C-170/12, para. 59.

14 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

in 1968.[15] However, the direct predecessor of Rome I Regulation was Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 ("Rome Convention").[16] Therefore, the EU legislator had an "template" for creating new set of rules, and the text of Rome Convention was transformed (with minor changes) into the text of Rome I Regulation.[17]

Rome Convention entered into force on 1 April 1991. It was an international convention (treaty) that was legally binding only for (then) European Community ("EC") member states. Rome Convention was one of the first multilateral international conventions containing conflict of law rules for contractual obligations with international element. Rome Convention was the representation of conflict of laws ideas of its time. It was based on three main principles common to the European conflict of laws doctrine: principle of party autonomy; principle of the closest connection; and principle of protection of weaker party. In 2002, the process of transformation of Rome Convention into more suitable form of EU regulation had begun.[18]

Rome Convention did not contain any specific conflict of law rules for contracts related to IPR. Therefore, there were discussions whether these issues are within its scope of application and could be transferred into the Rome I Regulation. According to the Giuliano-Lagarde Report,[19] Rome Convention was applicable to contracts related to IPR, however, non-contractual obligations and IPR as such were governed by *lex loci protectionis*.[20]

15 Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

16 Convention of 19 June 1980 on the law applicable to contractual obligations.

17 Rozehnalová, N., Valdhans, J., Drličková, K., Kyselovská, T. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer ČR, 2018, pp. 52–53.

18 "*Suitable*" in the sense of directly applicable and legally binding EU secondary act. For the transformation of Rome Convention into Rome I Regulation see Rozehnalová, N., Valdhans, J., Drličková, K., Kyselovská, T. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer ČR, 2018, p. 52 et seq.

19 Council Report on the Convention on the law applicable to contractual obligations by Mario Giuliano and Paul Lagarde. In: Official Journal No C 282/1 of 31 October 1980.

20 According to the Giuliano-Lagarde Report, para. 2, Scope of Application: "*First, since the Convention is concerned only with the law applicable to contractual obligations, property rights and intellectual property are not covered by these provisions. An Article in the original preliminary draft had expressly so provided. However, the Group considered that such a provision would be superfluous in the present text, especially as this would have involved the need to recapitulate the differences existing as between the various legal system of the Member States of the Community.*"

First draft of the Rome I Regulation from 2005 ("Proposal for Rome I Regulation")[21] contained a specific conflict of law rule in Art. 4 para. 1 letter f). According to this rule, "*[…] a contract relating to intellectual or industrial property rights shall be governed by the law of the country in which the person who transfers or assigns the rights has his habitual residence.*" The Rome I Regulation draft was based on the connecting factor of the habitual residence of the person who transfers or assigns the IPR.

This preliminary rule, however, was not incorporated into the final version of the Rome I Regulation. This rule was criticized as "*too simple and undifferentiated*",[22] especially for publishing contracts. Under the proposed rule, the law applicable to publishing contracts would be the law of the author as the person who assigns or transfers the rights. This result was deemed to be unjust for publishers, who bear the investment risks connected to publishing of any work. According to the critics of the proposed rule, it is the publishers who are the party performing characteristic performance under the publishing contract.[23] The proposed rule also raised questions whether the IPR might be, in fact, transferred or assigned under a contract.[24]

According to the main critics of the proposed rule, it did not stressed the importance of legal classification and the relationship and scope

21 Commission of the European Communities. Proposal for a Regulation of the European Parliament and of the Council on the law Applicable to Contractual Obligations (Rome I) [online]. *EUR-Lex*. Published on 15 December 2005 [cit. 21. 10. 2019]. http://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com(2005)0650_/com_com(2005)0650_en.pdf

22 Magnus, U. Article 4 Rome I Regulation. In: Magnus, U., Mankowski, P. *European Commentaries on Private International Law (ECPIL). Commentary. Vol. II. Rome I Regulation*. Köln: Verlag Dr. Otto Schmidt KG, 2017, p. 421.

23 Thorn, K. Art. 4 Rom I-VO. In: Rauscher, T. *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Kommentar. Band III. Rom I-VO, Rom II-VO*. Köln: Otto Schmidt, 2016, p. 247.

24 Bělohlávek, A. J. Římská úmluva a nařízení Řím I. Komentář v širších souvislostech evropského a mezinárodního práva soukromého. *1. díl.* Praha: C. H. Beck, 2009, p. 931.

of application of *lex causae*, resp. *lex loci protectionis*.[25] The critics argued that there is no unified and clear definition of "*contracts relating to the IPR*" and that "*the wide variety of contracts relating to intellectual property rights also calls for a differentiated solution instead of one strict, clear-cut rule.*"[26]

Another critical argument against any specific rule was based on the fact, that other contractual types, namely franchise contracts [Art. 4 para. 1 letter e)] or distribution contracts [Art. 4 para. 1 letter f)], might also contain IPR aspects. In this regard, there could be overlap between conflict of law rules for these types of contracts and contracts related to the IPR. There could have also been potentially a conflict between the proposed rule and conflict of law rule contained in Art. 4 para. 2 Rome I Regulation, based on characteristic performance. As *Torremans* pointed out, "*plenty of franchise and distribution contracts contain strong intellectual property components and there would have been a conflict between the various rules in Art. 4 (1) as a result of the overlap. The rules would then also have clashed, as in an intellectual property context the franchisee, for example, would have been the licensee rather than the licensor. Under the mechanism I Art. 4 (2) the rules would then have cancelled each other out, but this would have defeated the whole idea of having a special rule for intellectual property contracts.*"[27]

25 "*Which aspects of a contract relating to intellectual property rights are contractual by nature and thus fall under the scope of the lex contractus? Which issues are on the other hand governed by the law that governs the intellectual property right itself and are these issues still outside the scope of the instrument? These questions are of particular importance when it comes to issues which concern the intellectual property right itself but which are closely linked to the respective contracts like the transferability of the right, the conditions under which licenses can be granted and whether the transfer of license can be invoked against third parties. These issues do not fall under the lex contractus; they are governed by the law that governs the intellectual property right. Courts should be careful in considering these questions of characterization.*" In: European Max-Planck Group for Conflict of Laws in Intellectual Property (CLIP). Comments on the European Commission's Proposal for a Regulation on the Law Applicable to Contractual Obligations ("Rome I") of 15 December 2005 and the European Parliament Committee on Legal Affairs Draft Report on the Proposal of August 22, 2006 [online]. *Max-Planck Institut*. Published on 4 January 2007, p. 2 [cit. 10. 10. 2019]. https://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/comments-contractualobligations_01.pdf

26 "*Even though the application of the law of the assignor or transferor of the intellectual property right might be appropriate in simple contracts which resemble an outright sale – such as an assignment or license for consideration in the form of a lump sum payment –, this does not hold true as a general rule. More complex intellectual property transactions often include an explicit or implicit duty of the licensee to exploit the intellectual property right, sometimes supplemented by clauses indicating quantities of production or modalities of use, while the licensor does not accept any commitment beyond the toleration of use of his rights. This casts doubt on the proposition that it is the licensor who effects the performance characteristic of the contract (as it is the licensee who accepts the commercial risks linked to the exploitation).*" In: Ibid.

27 Torremans, P. Licenses and Assignments of Intellectual Property Rights under the Rome I Regulation. *Journal of Private International Law*. 2008, Vol. 4, No. 3, p. 403.

For these reasons, the final version of the Rome I Regulation does not contain any specific rule for contracts relating to IPR.

3.2 Contracts relating to IPR in Rome I Regulation

Due to increased internationalization of contracts relating to IPR,[28] it is highly advisable for the contractual parties to include a choice of law clause in their respective contract. Choice of law (*lex electa*) is contained in Art. 3 Rome I Regulation.

However, if there is no choice of law, it is necessary to apply Art. 4 Rome I Regulation. Art. 4 para. 1 Rome I Regulation contains a list of the most frequently used types of contracts. It is necessary to correctly classify (qualify) a particular contract. According to the CJEU case law,[29] license contracts shall not be interpreted as a contract for the provision of services [Art. 4 para. 1 letter b) Rome I Regulation].[30]

Although some contracts, e.g. franchise contracts [Art. 4 para. 1 letter e)] Rome I Regulation or distribution contracts [Art. 4 para. 1 letter f)], might contain intellectual property aspects, it is necessary to turn to Art. 4 para. 2 Rome I Regulation. This provision is based on the connecting factor "*habitual residence of the party required to effect the characteristic performance*". There is an ongoing discussion which party of a transfer contract or license contract effects the characteristic performance; licensee or licensor; assignee or assignor.[31]

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28 "*Moreover, even the trend to draft very detailed contracts, including the use of model agreements, the incorporation by reference of certain rules or the use of standard terms and conditions do not exclude in practice the need to consider the conflict of laws implications of international IP license.*" In: Miguel Asensio, P. A. De. The Law Governing International Intellectual Property Licensing Agreements (A Conflict of Laws Analysis) [online]. *Research Handbook on Intellectual Property Licensing*. Published in 2013, pp. 312–313 [cit. 5. 8. 2019]. https://eprints.ucm.es/18063/1/pdemiguelasensio-IP_Licensing_2013.pdf

29 Judgment of the Court of Justice (Fourth Chamber) of 23 April 2009, Case C-533/07.

30 "*(…) a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration is not a contract for the provision of services within the meaning of that provision.*" In: Judgment of the Court of Justice (Fourth Chamber) of 23 April 2009, Case C-533/07, para. 44.

31 For different opinions and more in depth analysis see in particular Kyselovská, T., Koukal, P. *Mezinárodní právo soukromé a právo duševního vlastnictví – kolizní otázky*. Brno: Masarykova univerzita, 2019, p. 189 et seq.

For "simple" contracts relating to IPR, it is the licensor (assignor); this is the party that that created the protected asset; the licensee (assignee) only pays lump-sum money for the use of protected asset and has no other obligations.[32] In case of more "complex" contracts, it could be the licensee (assignee) who effects the characteristic performance, because he could have more obligations arising out of a contract, e.g. payment of royalties, obligation to manufacture respective goods or to take part in the development process.[33]

In any contract and in IPR contracts especially, it is necessary to take into consideration mandatory rules under Art. 9 Rome I Regulation. In the area of IPR, it could be rules concerning competition law and antitrust law.[34]

4 Conflict of law rules for non-contractual aspects of IPR

4.1 Rome II Regulation

Conflict of law rules for law applicable for non-contractual obligations with an international element are contained in Rome II Regulation.[35]

Rome II Regulation did not have, as opposite to Rome I Regulation, its predecessor. The EU legislator, therefore, did not have any "model law" on which to rely on in the course of adoption of conflict of law rules for non-contractual obligations for infringements of intellectual property rights. However, this did not pose any significant challenge for the EU legislator. This was due to the fact that national legislations of the EU member states in the area of IPR usually reflected the principle of territoriality and

32 Magnus, U. Article 4 Rome I Regulation. In: Magnus, U., Mankowski, P. *European Commentaries on Private International Law (ECPIL). Commentary. Vol. II. Rome I Regulation*. Köln: Verlag Dr. Otto Schmidt KG, 2017, p. 425; Martiny. In: Hein, J. V. *Internationales Privatrecht II: Internationales Wirtschaftsrecht, Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 50-253)*. 2018, p. 203 et seq. The license contract or contract on assignment could be approximated to a sales contract in this respect.

33 Kyselovská, T., Koukal, P. *Mezinárodní právo soukromé a právo duševního vlastnictví – kolizní otázky*. Brno: Masarykova univerzita, 2019, p. 303 et seq.

34 Ibid., p. 326; Fawcett, J. J., Torremans, P. *Intellectual Property and Private International Law*. Oxford: Oxford University Press, 2011, p. 783.

35 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

lex loci protectionis. Moreover, all EU member states were contractual parties to important international conventions on IPR, such as Berne Convention[36] or Paris Convention,[37] and were member states of relevant international organizations, such as WIPO[38] or WTO and its TRIPS Agreement.[39]

It is interesting, however, that the first draft of the Rome II Regulation from 2002 did not contain any conflict of law rule for infringements of IPR.[40] At the same time, this area was not expressly excluded from the scope of the Rome II Regulation, and would therefore be governed by the proposed general rule under Art. 5 containing connecting factor *lex loci damni infecti*. This could mean, for instance, that if an infringer and the IPR holder were domiciled in state A, but the intellectual property right was protected in state B, the law of state A would be applicable to the infringement.[41]

The absence of any specific conflict of law rule was criticized, especially by the Hamburg Group for Private International Law ("the Hamburg Group").[42] The Hamburg Group created its own proposal for conflict of law rules for infringements of IPR ("Hamburg Proposal").[43]

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36 Berne Convention for the Protection of Literary and Artistic Works amended on 28 September 1979 [online]. *WIPO* [cit. 18. 11. 2019]. https://www.wipo.int/treaties/en/ip/berne/

37 Paris Convention for the Protection of Industrial Property amended on 28 September 1979 [online]. *WIPO* [cit. 18. 11. 2019]. https://www.wipo.int/treaties/en/ip/paris/

38 WIPO, World Intellectual Property Organization. For list of member states of WIPO, see https://www.wipo.int/members/en/#5 [cit. 18. 11. 2019].

39 WTO, World Trade Organization. For list of member states of WTO, see https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm [cit. 18. 11. 2019]; TRIPS, Trade-Related Aspects of Intellectual Property Rights, see https://www.wto.org/english/tratop_e/trips_e/trips_e.htm [cit. 18. 11. 2019].

40 Illmer, M. Article 8. In: Huber, P. *Rome II Regulation. Pocket Commentary*. Munich: Sellier, European Law Publishers, 2011, p. 227.

41 Kur, A., Maunsbach, U. Choice of Law and Intellectual Property Rights [online]. *Oslo Law Review*. 2019, Vol. 6, No. 1, p. 52 [cit. 8. 8. 2019]. https://portal.research.lu.se/portal/files/65823815/choice_of_law_and_intellectual_property_rights.pdf.

42 Hamburg Group consisted of academics working and the Max Planck Institute for Foreign Private and Private International Law, namely Jürgen Basedow, Felix Blobel, Jana Essebier, Jan von Hein, Axel Metzger Ralf Michaels, Hans-Jürgen Puttfarken, Jürgen Samtleben, Judith Schnier and Simon Schwarz. Part of the group was the Seminar of Foreign Private and Private International Law at the Faculty of Law at the University of Hamburg – Ulrich Magnus, Peter Mankowski.

43 Hamburg Group for Private International Law. Comments on the European Commission's Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations [online]. *law.duke.edu* [cit. 17. 11 .2019]. https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1987&context=faculty_scholarship

The Hamburg Proposal contained in Art. 6a conflict of law rules for infringements of industrial and intellectual property rights: it distinguished between national intellectual property rights (Art. 6a para. 1) and Community industrial property rights (Art. 6a para. 2). For the national IPR, the *lex loci protectionis* connecting factor was proposed;[44] for Community industrial property rights "*the law of the Member State in which the breach has consequences for the protected right*" was proposed.[45]

This rule was partially adopted into the Commission's amended proposal for the Rome II Regulation in 2002.[46] Unlike the Hamburg Proposal, the Commission had chosen the *lex loci delicti commissi* connecting factor for Community IPR under Art. 8 para. 2. Also, the wording of Art. 8 para. 1 had a different wording. The Commission initially proposed "law of the country for which protection is sought"; in the final version of the Rome II Regulation, the wording "*law of the country for which protection is claimed*" was adopted.[47] The replacement of the term "claimed" with "sought" was justified by the fact that the term "claimed" better corresponds to the wording of Art. 5 para. 2 of the Berne Convention.

The proposed conflict of law rule was not criticized or amended by the member states and, therefore, after further negotiations, this provision was incorporated in the final version of the Rome II Regulation, without any further justification or reasoning.[48]

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44 Art. 6a para. 1 Hamburg Proposal*:* "*The law applicable to a non-contractual obligation arising from an infringement of a copyright or a registered industrial property right shall be the law of the country for which protection is claimed.*"

45 Art. 6a para. 2 Hamburg Proposal: "*A non-contractual obligation arising from an infringement of a Community industrial property right with a unitary character shall be governed by the law of the Member State where the infringement affects the right.*"

46 Commission of the European Communities. Amended proposal for a European Parliament and Council Regulation on the law applicable to non-contractual obligations ("Rome II") (presented by the Commission pursuant to Art. 250 para. 2) of the EC Treaty) [online]. *EUR-Lex*. Published in 2006 [cit. 13. 11. 2019]. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52006PC0083&from=CS

47 Council of the European Union. Common position adopted by the Council with a view to the adoption of a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II") [online]. *consilium.europa.eu*. Published on 11 August 2006 [cit. 25. 10. 2019]. https://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209751%202006%20INIT

48 De La Durantaye, K. Article 8 Rome II. In: Callies, G.-P. *Rome Regulations: Commentary*. Alphen aan den Rijn: Kluwer Law International, 2015, p. 629.

The Hamburg Proposal also excluded in Art. 11 choice of law in case of infringement of IPR, referring to the public interest and territorial limitations of these rights.[49] The exclusion of choice of law was already contained in the Commission's proposal, but without any further justification.[50]

This approach had been criticized by the European Parliament, which, in its own comments on the Rome II Regulation proposal, has, on the contrary, allowed the choice of law: "*In addition, there seems to be no reason why parties in an arms-length commercial relationship should not be able to agree on the law applicable to any claim in tort/delict before any such claim arises. This may be convenient to businesses wishing to regulate all potential aspects of their relationship from the outset. […]. There also seems to be no reason why such agreements cannot be concluded in relation to intellectual property.*"[51] The European Parliament's proposal on the choice of law was not (again without any explanation) adopted in the final text of the Rome II Regulation.[52] Therefore, final version of the Rome II Regulation does not contain choice of law for infringements of IPR.

4.2 Conflict of law rules in Rome II Regulation

Conflict of law rules for infringement of IPR are contained in Art. 8 Rome II Regulation. This provision is *lex specialis* to Art. 4, therefore it is not possible apply connecting factors *lex loci damni infecti* or *lex loci delicti communis* or escape clause based on close connection. Art. 8 could overlap with Art. 6, especially in the area of know how or trade secrets.[53]

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49 Art. 11 Hamburg Proposal: "*Except for the cases covered by articles 6, 6a* [infringements of IPR] *and 8, the parties may choose the law applicable to a non-contractual obligation.*"

50 "*Freedom of will is not accepted, however, for intellectual property, where it would not be appropriate.*" In: Commission of the European Communities. Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-contractual Obligations (Rome II) [online]. *EUR-Lex*. Published on 22 July 2003, p. 22 [cit. 2. 11. 2019]. https://ec.europa.eu/transparency/regdoc/rep/1/2003/EN/1-2003-427-EN-F1-1.Pdf

51 European Parliament. Report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II) [online]. *EUR-Lex*. Published in 2005, p. 25 [cit. 15.11.2019]. http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2005-0211&language=EN

52 Illmer, M. Article 8. In: Huber, P. *Rome II Regulation. Pocket Commentary*. Munich: Sellier, European Law Publishers, 2011, p. 228.

53 Ibid., p. 235.

Art. 8 para. 1 Rome II Regulation is based on the principle of territoriality of IPR, which manifests itself by connecting factor *lex loci protectionis*: "*The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.*" This provision is applicable to all types of IPR. It is important to note that Rome II Regulation does not contain an autonomous definition of IPR. However, according to the Preamble to the Regulation, "*the term 'intellectual property rights' should be interpreted as meaning, for instance, copyright, related rights, the sui generis right for the protection of databases and industrial property rights.*" [54]

Art. 8 para. 2 Rome II Regulation is applicable to non-contractual obligations arising from and infringement of a unitary EU IPR. In this case, the relevant connecting factor is *lex loci delicti commissi* (the law of the country in which the act of infringement was committed).

As stated above, Art. 8 para. 3 Rome II Regulation excludes choice of law for infringements of intellectual property rights made by the parties.

Art. 8 Rome II Regulation is relatively unproblematic in cases of infringements of IPR in a single state. In this case, it is necessary to apply law of the State, "for which protection is claimed" (Art. 8 para. 1) or the relevant EU instrument (regulation) containing substantive rules (Art. 8 para. 2). However, due to the Internet, it is common for infringements of IPR to take place in several States in the same time. Unfortunately, Art. 8 Rome II Regulation does not regulate spillover effects[55] or *de minimis* rule.[56] In a multistate infringement, it is therefore possible to apply all legal orders that give protection to the relevant IPR.[57]

54 Preamble Rome II Regulation, para. 26.

55 Illmer, M. Article 8. In: Huber, P. *Rome II Regulation. Pocket Commentary*. Munich: Sellier, European Law Publishers, 2011, p. 244.

56 Judgment of the Court of Justice (Third Chamber) of 18 October 2012, Case C173/11, para. 31–33. De minimis rule is contained in Art. 3:602 CLIP Principles: "*1) A court applying the law or laws determined by Article 3:601 shall only find for infringement if a) the defendant has acted to initiate or further the infringement in the State or the States for the protection is sought, or b) the activity by which the right is claimed to be infringed has substantial effet within, or is directed to the State or the States for which protection is sought. 2) The court may exceptionally derogate from that general rule when reasonable under the circumstances of the case.*"

57 For more in depth discussion see Kyselovská, T., Koukal, P. *Mezinárodní právo soukromé a právo duševního vlastnictví – kolizní otázky*. Brno: Masarykova univerzita, 2019, p. 233 et seq.

5 Conclusion

Protection of intellectual property rights is a very important part of digital economy and EU internal market. The society in 21st century is based on knowledge and information. Due to globalization, electronization and the Internet, the IPR could be used (and infringed) worldwide. For this reason, it is relatively easy to enter into relationship with international element. To find law applicable, it is necessary to apply conflict of law rules.

Conflict of law rules for contractual obligations with international element are provided for in Rome I Regulation. In the absence of choice of law, it is necessary to apply alternative connecting factor based on the law of the State of the party providing "characteristic" performance. This could be difficult in case of more complex contracts relating to IPR, where both parties could provide the characteristic performance. Thus, choice of law is advisable.

Conflict of law rules for non-contractual obligations with international element are provided for in Rome II Regulation. The provision in Art. 8 is rooted in the principle of territoriality and *lex loci protectionis* connecting factor.

The EU conflict of law rules do not provide answers for every possible case scenario relating to IPR, nonetheless respect the complexity and unique characteristics of both private international law and intellectual property rights.

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Development of Rules for Determining Applicable Law for the Third-party Effects of Assignment of Claims

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Abstract

Due to the lack of legal certainty in determining the law applicable to third-party effects of the assignment of claims and, consequently, determining the law applicable to the owner of the claim after a cross-border transaction, the European Commission proposed a new regulation aimed at increasing cross-border transactions investment and market integration. The aim of the new regulation is clear and the reasons for its proposal are understandable. Nevertheless, we wonder what impact the new regulation will have on cross-border transactions if it is adopted as it is right now. Will these uniform rules reduce legal risks and bring significant added value to financial markets?

Keywords

Assignment of Claims; Cross-border Transactions; Third-party.

1 Introduction

Cross-border transactions, the mobility of companies within the European Union ("EU") and the exercise of freedom of establishment are among the most debated topics in the European Commission in the 21st century. The reason is that a well-established legal framework for cross-border operations, that are already needed, is a driving force for economic growth, the proper functioning of the EU economy and the strengthening of the single internal market. For some time, the EU has been adopting instruments to achieve the proper functioning of the single market by removing various

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legal barriers. These barriers hinder the development of trade, contractual relations and reduce legal certainty between entities from different member states, thus slowing down business development within the EU.

The area of assignment of claims contributes to global economic growth by strengthening cross-border investment and thus facilitating access to business finance. Claims are assets of economic value that are easy to transfer and good short-term source of finance for the assignor. Given the existence of an international element in these contractual relations, legal certainty and predictability between them are being undermined. The uncertainty stems from unclear rules governing the effects of the assignment of a claim to a third-party. In this respect, the EU has proposed a separate uniform rule on conflict of laws rules in the Proposal for a regulation of the European Parliament and of the Council on the law applicable to the third-party effects of the assignments of claims on 12 March 2018 ("Draft Regulation, alternatively Proposal for the regulation on the law applicable to the third-party effects"). From that date on the EU as well as the National Legislative Councils discuss the contribution of the new proposal that should ensure predictability and legal certainty in determining the ownership of a receivable that has been transferred to a third foreign party.

The conflict of laws rules governing the proprietary aspects of the assignment of a claim are currently regulated at member state level and are therefore based on different connecting factors. The current legislation is therefore inconsistent.[1] Which law determines the conditions that must be fulfilled to transfer a claim from ownership of an assignor to ownership of an assignee so it would have third-party effects? This question should be answered by the proposal for new regulation of the European Commission that was introduced in March 2018 and provides a two-tiered system of connecting factors for the determination of applicable law to third-party effects.

1 The inconsistency in the determination of the law applicable to the effects of the assignment of claims results from the explanatory memorandum of the European Commission on the proposal for a Regulation of the European Parliament and of the Council on the law applicable to the effects of assignment to third parties on 12 March 2018. E.g. Poland is based on the law of the assigned claim, Belgium and France are based on the law of the assignor's habitual residence, and the conflict of laws rules of the Netherlands are based on the law of the assignment.

How does the adoption of the proposal for a regulation change the overall legal regulation of assignment? The Draft Regulation deals solely with the conflict of laws on the effects of the assignment of a claim. On the other hand, the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I Regulation") contains a conflict of laws rule for determining the law applicable to the relationship between the assignor and the assignee, which will remain in force even after the adoption of the Draft Regulation. The question, therefore, arises as to whether the legal certainty of the parties to the relationship arising from the assignment of a claim will be enhanced by introducing a uniform conflict of laws rules at Union level but thereby creating a duplicate legal regime for the assignment of a claim.

Against this background, this article is divided into 5 chapters starting with the analyzation of the legal development in the area of third-party effects of the assignment of claims that has an impact on the member states and the EU. Then the revision of the current Art. 14 of the Rome I Regulation that plays a significant role in the determination of applicable law on the assignment as a whole will be made. Continuing with the analysis of the European Commission Report on the question of the effectiveness of an assignment and Proposal for the regulation on the law applicable to the third-party effects and finally, a conclusion will be drawn.

2 The legal development

The transactions in claims are considered to be the backbone of financial markets since it allows many financial transactions and is therefore important for funding business all over the globe. Even though the assignment of claims is an important mechanism used by companies and financial institutions across borders, it is still not easy for credit providers, investors or other entities involved to identify which national law applies to the determination of the ownership of the claim concerned.

Because the assignment of claims is not restricted by a particular territory, the cross-border assignments are a common practice in the area of financial operations. There are no physical but legal obstacles that must be resolved. Companies and credit institutions involved in such process require legal

certainty to finance its business activities by using claims and provide for such services. Nonetheless, the concept of the assignment of claims differs between jurisdictions of members states.[2]

Consequently, the different national rules regulating the third-party effects of such assignments bring the legal uncertainty about who is the owner of the claim among the parties of the assignment transaction itself as well as the market participants who are not the party to such transactions but somehow interact with the parties and therefore need to have the certainty who has the right to the claim in question.[3] Yet, the unification of the substantive law among all members states cannot be achieved, because of the unique approach of each state. The most appropriate solution is a common conflict of laws rules in all member states that would determine the applicable law regardless of which court has to decide.

The topic of the determination of the applicable law on third-party effects of assignment of claims has been discussed on different national forums. The United Nations Convention on the Assignment of Receivables in International Trade, adopted in 2001 ("UN Convention"), sets an objective to "*establish principles and to adopt rules relating to the assignment of receivables that would create certainty and transparency and promotee the modernization of the law relating to assignments of receivables, while protecting existing assignment practices and facilitating the development of new practices*."[4] However, it has not entered into force so far. One of the most important parts of the UN Convention deals with the impact of assignment on third parties. The UN Convention addresses the issue in Art. 22–24 through the conflict of laws rules: "*the law of the State in which the assignor is located governs the priority of the right of an assignee*

2 See the country reports of the British Institute of International and Comparative Law. Study on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person – final report [online]. *edz.bib.uni.* Published in 2018 [cit. 20. 1. 2020]. http://edz.bib.uni-mannheim.de/daten/edz-k/gdj/12/report_assignment_en.pdf

3 See the Commission Directorate General for Justice and Consumers and Directorate General for Financial Stability, Financial Services and Capital Markets Union. Inception Impact Assessment [online]. *European Commission*. Published on 28 February 2017 [cit. 20. 1. 2020]. https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-1073039_en

4 See Preamble of UN Convention.

in the assigned receivable over the right of a competing claimant."[5] The rule specifies that the assignor's location shall determine the applicable law since the "location" means the place of central administration and therefore it will always refer to one easily determinable jurisdiction.

The same conflict of laws rule specified in the UN Convention was proposed by the European Commission in 2005 as a part of the Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligation[6] ("Proposal for Rome I Regulation") in Art. 13 para. 3.[7] Unfortunately, the views of the co-legislators of the Rome I Regulation was different. They requested further studies to determine the applicable law and therefore the question of third-party effects of claims itself was not addressed in the Rome I Regulation. Despite that the Art. 27 para. 2 of the Rome I Regulation expressly required the European Commission to submit a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person by 2010.[8]

3 What the assignment of claims means

An assignment of claim entails three parties' relationship between an original creditor, an assignor, who has a claim against a debtor and who is in need of cash, therefore, assigns the claim to a new creditor, an assignee. Moreover, the effectiveness of the assignment is relevant for creditors of the assignor, other assignees or other third parties.

As mentioned above, the assignment of claims allows both simple transactions, transfers of a single claim from assignor to the assignee, as well as complex financial transactions such as financial collateral arrangements

5 Ibid., Art. 22.

6 Commission of the European Communities. Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I) [online]. *EUR-Lex*. Published on 15 December 2005 [cit. 12. 1. 2020]. http://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com(2005)0650_/com_com(2005)0650_en.pdf

7 See Art. 13 para. 3 Proposal for Rome I Regulation.

8 Ibid., Art. 27 para. 2.

and factoring, that are used by companies to obtain liquidity and have access to credit, and securitization as a tool used to optimize the use of capital. The whole procedure of the assignment is based on the transfer by the assignor, who is in the position of a creditor, its claim against a debtor to an assignee.[9] However, taking into account the cross-border element that typically occurs in international trade, the situation may get more complicated.

In the case of factoring, company A has claims in the form of invoices past due against different clients from the several member states in the amount of EUR 5 000. Company A finds a factoring company F to which company A assigns all invoices for discount price in the amount of EUR 4 700. However, company A needs to know:

1. whether under the applicable law on the aspects of the assignment are all the invoices assignable, or
2. whether the assignment will be effective against a third-party in case of company A's insolvency.

The answers on this question may however differ. Applying different national conflict of laws rules and consequently different national substantive rule **on one same assignment of bulk of claims**, may result into the following: some of the claims included in the assigned bulk of claims may be assignable without any special requirements, other national regulations may require conditions to be met, such as the duty to inform the debtors, or some, in the end, may totally prohibit the assignment of claims in question. There is a high legal uncertainty that results in a legal risk when it comes to the outcomes of disputes depending on the law applied by national courts of member states.

To avoid the legal risk, one of the main topics for discussion in the European Commission since 2005 was to secure the legal certainty through

9 European Commission. Report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over the right of another person [online]. *EUR-Lex*. Published in 2016 [cit. 20. 1. 2020]. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016DC0626 ("Report on the question of the effectiveness of an assignment").

the adoption of harmonized rules at the EU level on the law applicable to the third-party effects of assignments of claims.

3.1 What are the third-party effects of the assignment?

The third-party effects are understood as aspects of the assignment that are excluded from the application of Art. 14 of the Rome I Regulation. Generally, and in the meaning of the subject of this article, the third-party effects of the assignment of claims are (i) the effectiveness of an assignment of claims against third parties and (ii) the determination of priority of claims in case of competing assignments.[10] Both categories are connected to the aspects regarding the passing of the right or the title to the claim on another third person. Therefore, the related question that must be answered is who the third-party concerning the assignment of claims is. As *Labonté* analyzed in his article, the third-party are (i) creditors of the assignor, (ii) competing assignees, if there are any, and (iii) creditors of the assignee.[11]

4 The Rome I Regulation and its Article 14

The Art. 14 para. 1 of the Rome I Regulation currently determines the applicable law to the contractual obligation between the parties of the assignment – assignor and assignee.[12] The law between the assignor and the assignee that is of a contractual claim is determined either according to the Art. 3 para. 1 of the Rome I Regulation by the parties' choice of law or according to Art. 4–8 by objective connecting factors, or if the claim is non-contractual it is determined by Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

Para. 2 of the Art. 14 determines the applicable law regarding "*assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have*

10 See Art. 27 para. 2 Rome I Regulation that requires the European Commission to submit a Report on the question of the effectiveness of an assignment.

11 See Labonté, H. Third-Party effects of the assignment of claims: new momentum from the Commission's Capital Markets Union Action Plan and the Commission's 2018 Proposal. *Journal of Private International Law*. 2018, Vol. 14, No. 2, p. 328.

12 Art. 14 Rome I Regulation.

been discharged."[13], that is the debtor protection rules. The law of the assigned claim governs (i) the conditions of the notification of the debtor about the assignment, (ii) obligations of the debtor after receipt of notification of the assignment, (iii) the conditions of set-off or pay-off of the claim, or (iv) the regime of other defenses of the debtor.[14] According to the wording, the law of the underlying assigned claim applies on above-mentioned issues that cannot be subject to the disposition of the parties because it could compromise the protection and legal certainty of the debtor.

The Rome I Regulation, therefore, covers the area of assignment of claims between the parties interested in such relationship and should not apply to any aspects outside the circle. The member states aimed to exclude the third-party effects of assignment from the scope of the Art. 14 and it was caused by a disagreement among the member states. The disagreement resulted from different approaches that were taken by the member states in this matter. Consequently, the Rome I Regulation was adopted without determination of applicable on the matter in question since its exclusion was the only way how to save the whole legal instrument.[15]

As a result, Art. 27 para. 2 of the Rome I Regulation specifies the obligation to submit a Report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person.

It must be noted that confusion regarding the scope of application of the Art. 14 still exists because of wrong clarification of the issue that is further analyzed in Recital 38 of the Rome I Regulation: "*In the context of voluntary assignment, the term 'relationship' should make it clear that Article 14 (1) also applies to the property aspects of an assignment (…).*"[16] Some scholars argue that

13 Ibid., Art. 14 para. 2.

14 Garcimartín Alférez, F. J. Assignment of claims in the Rome I Regulation: Article 14. In: Ferrari, F., Leible, S. (eds.). *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*. Munich: European Law Publishers, 2009, pp. 231–232.

15 Mankowski, P. The race is on: Germ reference to the CJEU on the interpretation of Art. 14 Rome I Regulation concerning third-party effects of assignments [online]. *Conflict of laws.net*. Published in September 2018 [cit. 10. 10. 2019]. http://conflictoflaws.net/2018/the-race-is-on-german-reference-to-the-cjeu-on-the-interpretation-of-art-14-rome-i-regulation-with-regard-to-third-party-effects-of-assignments/?print=pdf

16 See Recital 38 Rome I Regulation.

such wording suggests that the Art. 14 covers even the passing of title that has third-party effects.[17] However, such a conclusion is not correct and as *Labonté* mentioned in his article, the main argument against such meaning of the Art. 14 and Recital 38 is, that this Recital had been included in the Rome I Regulation already in Proposal of the Rome I Regulation that counted with an explicit provision for the determination of the applicable law for the third-party effects of the assignment before it was rejected by the member states. This implies that Art. 14 of the Rome I Regulation applies solely to the relationships between the assignor and assignee and the debtor. The Recital 38 cannot be invoked against this conclusion.

5 The first steps taken by the European Commission

The European Commission delivered its Report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over the right of another person[18] ("Report on the question of the effectiveness of an assignment") 6 years later than expected. The Report included a deeper examination of the current problems and the proposal of possible solutions.

First problems that occur concerning the determination of the applicable law to the third-party aspects of the assignment are (1) **the current divergence of substantive rules** in the member states of the EU as well as (2) **different conflict of laws rules that were adopted by the member states** on this matter. The conflict of laws rules of each member states are inconsistent because they are based on different connecting factors that determine the applicable law.[19]

The European Commission examined the laws of member states and brought to a light different conflict rules from each member state. E.g. in the Netherlands the law of the contract between assignor and assignee governs all aspects of the assignment. On the other the hand, in Belgium the law

17 Labonté, H. Third-Party effects of the assignment of claims: new momentum from the Commission's Capital Markets Union Action Plan and the Commission's 2018 Proposal. *Journal of Private International Law*. 2018, Vol. 14, No. 2, pp. 329–330.

18 Rome I Regulation.

19 See Report on the question of the effectiveness of an assignment, p. 4.

of the assignor's habitual residence shall apply. Different approach was taken by Sweden where the *lex rei sitae* shall apply.[20]

The divergence in the conflict rules is more than obvious and it causes the second current problem, **the legal uncertainty that results from complexity**. Firstly, the relationship between assignor, assignee and the debtor and different understanding of the concept of the assignment among jurisdictions is already a complex and only on the substantive national law level. Such complexity transferred on the conflict of laws level results in even more confusion and adds to the growth of uncertainty. Moreover, the legal uncertainty is supported by overlapping rules of regulations adopted in the EU that may be applied at the same time. Such conflict may, for example, occur in case of an insolvency of an assignor. Firstly, Art. 14 of the Rome I Regulation clarifies the applicable law between the assignor and the assignee, however, in the event of insolvency of the assignor, the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings ("Insolvency Regulation Recast") may cause a bigger uncertainty. In such case, the law of the state where the insolvency proceedings are commenced against the assignor determines even aspects related to the assignment of claims to third-party.[21]

Taking into account the current problems examined in the Report on the question of the effectiveness of an assignment, the European Commission came forward with three possible approaches: (i) the law applicable to the assigned claim, (ii) the law of the contract between assignor and assignee, or (iii) the law of the assignor habitual residence. However, considering the existing conflict of laws rules in Art. 14 of the Rome I Regulation, some of the options that were proposed by the European Commission in the Report on the question of the effectiveness of an assignment will not help to lower the complexity but on the contrary.

Let's imagine that assignor A, with his habitual residence in Slovakia, assigns a claim against the debtor B to the assignee C. The law governing the claim itself is the Czech Law and the law governing the assignment between A and C is the Austrian Law. Currently, the assignee must deal with

20 Ibid., pp. 6–7.
21 Ibid., p. 8.

2 laws – the Austrian Law and the Czech Law. The law applicable to the third-party effects would be:

1. in case of the first approach, the Czech Law;
2. in case of the second approach, the Austrian Law; or
3. in case of the third approach, the Slovakian Law.

5.1 The law applicable to the assigned claim

The law of the assigned claim is already applicable according to the Art. 14 para. 1 of the Rome I Regulation to the debtor protection rules. What if the law of the assigned claim would apply even on the third-party effects? The assignor and the assignee must consider the law of the assigned claim if they choose to transfer such claim for example in question of assignability of the claim. The claim may become non-assignable because of the protection rules of the debtor that come into the game.[22] There are more prerequisites for transfer of claim that are regulated by the law of the assigned claim and should, therefore, regulate also third-party effects of the assignment.[23] Another issue that supports this approach is the debtor position in case of a set-off. The original creditor, the assignor, rightfully assigned the claim to an assignee who chose as the applicable law to the assignment German law. However, the debtor wants to determine whether it can still exercise the set-off against the assignor. In such case, he will have to refer to the law other than the one under which his obligation arose to determine whether it is still possible to set off its debt with the original creditor, the assignor.[24] To avoid the complexity of applicable laws that apply to the whole process of the assignment, the law of the assigned claim should apply even to third-party effects.

The European Commission in its Report on the question of the effectiveness of an assignment suggests that the law applicable between the assignor and the debtor against whom the assignor has its debt would also apply

22 Such case can occur for example when a debtor assigned his salary to pay off his debt but then he becomes penniless. Some of the national laws forbid the assignment of salary as a protection for the employee.

23 Labonté, H. Third-Party effects of the assignment of claims: new momentum from the Commission's Capital Markets Union Action Plan and the Commission's 2018 Proposal. *Journal of Private International Law*. 2018, Vol. 14, No. 2, p. 335.

24 Ibid., p. 336.

on the aspects of the assignment in respect of the third-party. In case the law applicable to the assigned claim could not be determined, the "supportive" rule pointing to the law of the state of the assignor's habitual residence would have to apply.[25] The law of the assignor's habitual residence will be further analyzed in chapter 5.3.

5.2 The law of the contract between assignor and assignee

The law of the contract between the assignor and the assignee which is the law of the assignment may represent a better option in case of bulk assignments of claims. The assignor may decide to transfer more than one claim to a single assignee. However, not all the transferred claims could be created under the same law. If we would apply the approach specified in previous chapter 5.1 on third-party effects, it would lead to a mess that would not strengthen the legal certainty.

On the other hand, applying the law of the assignment, which means the law that was chosen by the assignor and the assignee or otherwise determined, would lead to a single applicable law regulating the transfer of claims on third parties. But we still cannot forget to the possibility of applying the law of the assigned claim under the Art. 14 para. 2 of the Rome I Regulation in case of protection of the debtor even in case of the assignment.[26]

Quite good deterrent example of this approach was further analyzed in the BIICL report.[27] There may arise a situation when the assignor assigns the claim to more than one assignee in quite short time lapse. If the law of the assignment would also apply to third-party effects than the priority problem occurs because both of the assignees legally and in a good faith obtained the claim and are entitled to it. And since the law of assignment would apply

25 See Report on the question of the effectiveness of an assignment, p. 11.

26 Labonté, H. Third-Party effects of the assignment of claims: new momentum from the Commission's Capital Markets Union Action Plan and the Commission's 2018 Proposal. *Journal of Private International Law*. 2018, Vol. 14, No. 2, p. 337.

27 See the country reports of the British Institute of International and Comparative Law. Study on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person – final report [online]. *edz.bib.uni.* Published in 2018, p. 401 [cit. 20. 1. 2020]. http://edz.bib.uni-mannheim.de/daten/edz-k/gdj/12/report_assignment_en.pdf

also to third-party effects, which in this case means laws of two states, the meta conflict of laws would be necessary to decide which of the transfers has the priority.[28]

5.3 The law of the assignor's habitual residence

The third option that was considered in the Report on the question of the effectiveness of an assignment as the law applicable to third-party effects was the law of the assignor's habitual residence. Considering that the assignment of claim is a package of legal acts and transactions by adding a third connecting factor to the determine the law applicable to some aspects of the whole process does not simplify the assignment. However, this approach has some advantages. Besides the ones mentioned in chapter 5.2 regarding the law of the assignment, there are more.

It is based on an objective connecting factor that provides the creditors and other third parties with certainty since it would regulate the information obligations of the assignor and would function as "information center" for the creditors.[29]

Another argument in favor of this solution is its harmonization with the Insolvency Regulation Recast. According to the Report on the question of the effectiveness of an assignment, such a solution would solve the above-mentioned problems occurring concerning insolvency proceedings. The law of the assignor's habitual residence is easier to determine and it is most likely to be the place in which the main insolvency proceedings concerning the assignor will be commenced.[30] This may be the most supportive argument to apply this approach because the main concern of an assignee is the recognition of his rights over the claim in the event of insolvency of the assignor.[31]

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28 Labonté, H. Third-Party effects of the assignment of claims: new momentum from the Commission's Capital Markets Union Action Plan and the Commission's 2018 Proposal. *Journal of Private International Law*. 2018, Vol. 14, No. 2, p. 338.

29 Garcimartín Alférez, F. J. Assignment of claims in the Rome I Regulation: Article 14. In: Ferrari, F., Leible, S. (eds.). *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*. Munich: European Law Publishers, 2009, p. 239.

30 See Report on the question of the effectiveness of an assignment, p. 11.

31 Garcimartín Alférez, F. J. Assignment of claims in the Rome I Regulation: Article 14. In: Ferrari, F., Leible, S. (eds.). *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*. Munich: European Law Publishers, 2009, p. 240.

Furthermore, the third parties that will be affected by the transaction, the creditors of either the assignor or the assignee, usually do not have an option to determine the applicable law to the claim or the assignment. This option should act as protection for third parties when analyzing whether the transfer of claims was effective against them.[32]

Even though there are supportive arguments for such an approach, its applicability would bring complications into some business transactions, since there would be three different laws that would have to be considered by the assignee.

6 The proposal for the regulation on the law applicable to the third-party effects of the European Commission

The expected result of the Report on the question of the effectiveness of an assignment, delivered by the Commission was a single general rule that would apply to all aspects of an assignment in all sectors and for all types of assignments without any exception. Did the European Commission fulfil its obligation and brought a light into the determination of the applicable law of the third-party effects of assignment of claims?

Removing barriers to cross-border transactions in claims and investment is the main objective set by the EU to be achieved by the new Proposal for the regulation on the law applicable to the third-party effects of assignments of claims ("Proposal for the regulation on the law applicable to the third-party effects").[33] Nevertheless, there are still doubts whether the Proposal actually eliminates the legal uncertainty or just adds more of it.[34]

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32 Labonté, H. Third-Party effects of the assignment of claims: new momentum from the Commission's Capital Markets Union Action Plan and the Commission's 2018 Proposal. *Journal of Private International Law*. 2018, Vol. 14, No. 2, pp. 339–340.

33 See European Commission. Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims [online]. *EUR-Lex*. Published in March 2018, p. 1 [cit. 20. 1. 2020]. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018PC0096&from=EN

34 Labonté, H. Third-Party effects of the assignment of claims: new momentum from the Commission's Capital Markets Union Action Plan and the Commission's 2018 Proposal. *Journal of Private International Law*. 2018, Vol. 14, No. 2, p. 323.

As mentioned in chapter 1, the different set of national conflict rules that regulates the issue in question causes the legal uncertainty about who has the legal title to the assigned claim, what happens if third parties claim legal title over the same claim, or which member state's authority is entitled to resolve dispute related to such transaction. Consequently, this lack of certainty creates a legal risk in cross-border assignments of claims resulting in loss of legal title, higher transaction costs or complete waive of the business opportunity.[35]

6.1 The structure of the Proposal for the regulation on the law applicable to the third-party effects

The Proposal for the regulation on the law applicable to the third-party effects is parallel to the Rome I Regulation regarding the basic provision on the scope of the regulation that is taking into account all existing regulations of the EU including the Rome I Regulation. The Proposal for the regulation on the law applicable to the third-party effects consists of the provision on universal application resulting in the possible application of a law of a third state, overriding mandatory provisions and public policy of the forum e.g. in case of mandatory obligation to register the assignment of claim in public register, the exclusion of renvoi and finally the relationship with other provisions of the EU and existing international conventions. The Proposal for the regulation on the law applicable to the third-party effects includes special new provisions regarding the applicable law and its scope.

6.2 The applicable law on third-party effects of the assignment of claims

The Proposal for the regulation on the law applicable to the third-party effects came with uniform conflict of laws rules in respect of the third-party effects of the assignment of claims defined in Art. 4. According to its Recital 15, the conflict of laws rules shall govern proprietary effects of assignments of claims between all parties involved as well as in respect of third parties.[36] The scope of the Art. 4 of the Proposal for the regulation

35 See Proposal for the regulation on the law applicable to the third-party effects, pp. 4–5.
36 See Recital 15 Proposal for the regulation on the law applicable to the third-party effects.

on the law applicable to the third-party effects includes the proprietary rights not only of the third parties e.g. creditors. This provision shall apply also between the assignor and the assignee and the assignee and the debtor. However, some scholars[37] consider the wording of recital 15 in connection with Art. 4 of the Proposal for the regulation on the law applicable to the third-party effects inconsistent with current legal rules provided by the Art. 14 of the Rome I Regulation. According to their opinion, Art. 14 of the Rome I Regulation implicitly covers even the proprietary rights between assignor the assignee as this conclusion results from the Recital 38 of the Rome I Regulation. Reasons, why such an opinion must be rejected, are further analyzed in chapter 4.

The Proposal for the regulation on the law applicable to the third-party effects laid down a general rule for the determination of the applicable law based on the assignor's habitual residence. In the meaning of the Proposal for the regulation on the law applicable to the third-party effects, the "*habitual residence*" "*means, for companies and other bodies, corporate or unincorporated, the place of central administration; for a natural person acting in the course of his business activity, his principal place of business.*"[38] The definition is partially transposed from the Rome I Regulation, specifically its Art. 19.[39] The European Commission decided to exclude from the scope of the definition of the "habitual residence" the branches, because of a possible uncertainty if the same claim would be assigned by the branch as well as by the central administration.[40]

However, there is a problem linked to the habitual residence of assignor that the Proposal for the regulation on the law applicable to the third-party effects envisaged – the potential change of assignor's central administration between individual assignments of a single claim. The rule on the conflict mobile establishes as the applicable law the law of the assignor's habitual residence that was applicable at the time when one of the assignments became effective against third parties.[41]

37 See for example Kronke, H. Assignment of Claims and Proprietary Effects: Overview of Doctrinal Debate and the EU Commission's Proposal. *Oslo Law Review*. 2019, Vol. 6, No. 1, p. 12.

38 Art. 2 letter f) Proposal for the regulation on the law applicable to the third-party effects.

39 Art. 19 Rome I Regulation.

40 See Proposal for the regulation on the law applicable to the third-party effects, p. 18.

41 Art. 4 Rome I Regulation.

For fulfilment of needs of the market participants, there are two exceptions from the general rule specified in the Art. 4 para. 2 that provides the applicability of the law of the assigned claims between the assignor, the original creditor, and the debtor.

Firstly, the law of the assigned claim is applicable in case of the assignment of cash by the creditor credited to an account in the credit institution such as a bank.[42] The first contract that assigns claim is concluded between the assignor and the debtor, the bank. Such regulation strengthens the legal certainty since in many cases, the applicable law of the assigned claim will be the law of the state where the bank is located. If there are further assignments of the same claim, the applicable law on the third-party effects of such assignment will be determined according to the law of the contract between the assignor, and the first debtor, the bank.

The second exception is the assignment of claims arising from financial instruments.[43] The Proposal for the regulation on the law applicable to the third-party effects uses the derivative contract that is used mostly by investors as risk protection, as an example of the financial instruments in question. Again, the legal certainty is quite high in this case, because the law applicable to the assignment of claim is either chosen by the parties or determined in accordance with non-discretionary rules applicable to the relevant financial market.[44]

Moreover, the Proposal for the regulation on the law applicable to the third-party effects allows an alternative for the parties given the applicable law on the third-party effects of the assignment of the claim in respect of the securitization. The parties, meaning the assignor and the assignee, may choose for the third-party effects the law applicable to the assigned claim or remain subject to the general rule, the law of the assignor's habitual residence.[45] The Proposal for the regulation on the law applicable to the third-party effects itself provides with an explanation of why the alternative in respect of securitization and no other financial transactions exist. The current practice of some credit institutions is the application of the law

42 Ibid., Art. 4 para. 2 letter a).
43 Ibid., Art. 4 para. 2 letter b).
44 See Proposal for the regulation on the law applicable to the third-party effects, p. 19.
45 Art. 4 para. 3 Rome I Regulation.

of the assigned claim because then all claims in question are regardless of their assignors' habitual residence subjected to the same law.[46]

It is common that one single claim was assigned more than once and that the parties of each assignment chose a different applicable law to the third-party effects. In case of such conflict of different legal systems, the Proposal for the regulation on the law applicable to the third-party effects determines the clear rule. Based on an objective factor that is the time aspect of the efficiency of the claim against a third-party.[47] This rule copies the rule used for the conflict mobile. And as well as in case of conflict mobile, the rule is responding to the purpose of the Proposal that concerns the third-party effects.

6.3 What it means in practice

The regime for the applicable law to third-party effects of the assignment of claims chosen by the European Commission reflects the previous negotiations between the member states that were linked to the preparation of the Rome I Regulation. In that time there were two approaches supported by the member states: the application of (i) the law of the habitual residence of the assignor and (ii) the law of the assigned claim. Since both approaches had some drawbacks, a combination of both of them was examined as well. The member states came to the following: the general rule would be the law of the assignor's habitual residence and exceptions for certain types of claims would be introduced.[48] However, the main problem in that time was to draft the exceptions that led to the rejection of including these rules into the Rome I Regulation.

The law of the habitual residence of the assignor as governing law of the third-party effects is considered by many well-known scholars[49]

46 See Proposal for the regulation on the law applicable to the third-party effects, p. 20.

47 Art. 4 para. 4 Rome I Regulation.

48 Garcimartín Alférez, F. J. Assignment of claims in the Rome I Regulation: Article 14. In: Ferrari, F., Leible, S. (eds.). *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*. Munich: European Law Publishers, 2009, p. 246.

49 See Walsh, C. Receivables Financing and the Conflict of Laws: The UNCITRAL Draft Convention on the Assignment of Receivables in International Trade. *Dickinson Law Review*. 2001, Vol. 106, p. 174. Or Goode, R. The Assignment of Pure Intangibles in the Conflict of Laws. In: Gullifer, L., Vogenauer, S. (eds.). *English and European Perspectives on Contract and Commercial Law. Essays in Honour of Hugh Beale*. Oxford: Hart Publishing Ltd, 2014, pp. 353, 375.

to be the best and logical option. It is said that this approach is a practical solution for many forms of assignment, especially in case of assignment of future or bulk claims, the most predictable and easily ascertained by any third-party and also consistent with the Insolvency Regulation Recast and the UN Convention.[50]

Taking into account that there are 2 main industries covered by the Proposal for the regulation on the law applicable to the third-party effects – factoring and securitization, the European Commission had to even, in this case, introduce exceptions.

In case of factoring when a company assigns a bulk of claims, usually future receivables, to an assignee it is the most convenient to apply the general rule – the law of the assignor's habitual residence. The bulk of receivables consists of more than one future claim that may be governed by different laws. If we would apply the law of the assigned claim on the third-party effects that would mean that for each claim the assignee would have to consider different national rules.

On the other hand, the Proposal for the regulation on the law applicable to the third-party effects offers the assignor and the assignee flexibility in relation to a securitization. When an assignor, such as a bank, does not want to be exposed to the risk that the loans it has provided will not be repaid, it assignees the claims to the assignee, that is called the "special purpose vehicle", that then issues the securities and sells it to investors. In the case of large securitization transactions, the assignors are located in different states. This means that the assignee (the special purpose vehicle) will need to comply with the requirements laid down in the law that governs the assigned claims (that is, the contract between the assignor and the debtor) to ensure that it acquires legal title over the assigned claims. The law of the assigned claim corresponds to the current market practice involving large banks by applying the law of the assigned claim to the third-party effects where the assigned claims are all subject to the same law but the assignors are located in various states.

50 Kronke, H. Assignment of Claims and Proprietary Effects: Overview of Doctrinal Debate and the EU Commission's Proposal. *Oslo Law Review*. 2019, Vol. 6, No. 1, p. 15.

7 Conclusion

The very existence of general rules governing the law applicable to the effects of the assignment of claims to third parties entails a certain shift in certainty in the context of financial operations in the EU. Thus, the parties affected by these transactions can predict the rules that will regulate the proprietary aspects of the transfer of claims to third parties.

The fact that the European Commission has taken into account the overall development of the rules in this area in the Proposal for the regulation on the law applicable to the third-party effects and, at the same time, the previous positions of the member states which were manifested in the Proposal for Rome I Regulation is positive. Furthermore, the European Commission has taken into account the practice that is typical for the different types of financial transactions covered by the Proposal for the regulation on the law applicable to the third-party effects, which promotes continuity and does not imply any interference with the operation to date.

In addition, the Proposal for the regulation on the law applicable to the third-party effects clarifies the scope of Art. 14 para. 1 of the Rome I Regulation in relation to Recital 38 regarding the proprietary aspects of the assignment of claims to third parties. In that regard, it must be said that the Rome I Regulation and the Proposal are complementary since the Rome I Regulation applies exclusively to the relationship between the assignor, the assignee and the debtor. On the other hand, the conflict of laws rules in the Draft Regulation will regulate exclusively the effects of the assignment of claims on third parties. The adoption of the general rule of applicable law, which is the law of the assignor's habitual residence, reflects current Union law, thus avoiding any conflict at this level. The Proposal for the regulation on the law applicable to the third-party effects thus complements and concludes the legal framework for the regulation of issues relating to the assignment of claims, reinforces the legal certainty of actors in this area and thus fulfils the objectives set by the European Commission in its Report on the question of the effectiveness of an assignment.

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United in Diversity – Regional Unification of the Conflict-of-law Rules in Matters of Matrimonial Property Regimes

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Abstract

The unification of the conflict-of-law rules in matters of matrimonial property regimes at EU level seeks to mitigate differences in substantive law in particular legal systems. The aim of this contribution is to analyse the doctrine of overriding mandatory provisions and consider the applicability of the public policy exception, which limit the application of the law otherwise applicable determined in compliance with the unified conflict-of-law rules. The question author addresses in this paper is whether these institutes of the general part of private international law provide for sufficient safeguards to protect the fundamental values and public interests of the forum law in matters of matrimonial property regimes.

Keywords

Diversity of Substantive Law; Matrimonial Property Regimes; Matrimonial Property Regulation; Overriding Mandatory Provisions; Public Policy Exception; Regional Unification of the Conflict-of-law Rules.

1 Introduction

Ongoing globalization, progress in transport, communication and information technologies are factors that contribute to internationalization of legal relationships. One of the cornerstones affecting this social and legal phenomenon is the increasing migration of people.[1] In Europe, the mobility

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1 Similarly Diago Diago, M. d. P. The Matrimonial Property Regime in Private International Law. In: Šarčević, P., Volken, P. (eds.). *Yearbook of Private International Law 2000*. Vol. II. The Hague: Kluwer Law International, 2000, p. 180; For more details see Rozehnalová, N. Několik slov k mezinárodnímu právu soukromému a jeho vývoji. In: Rozehnalová, N., Kyselovská, T. et al. *K některým vývojovým otázkám mezinárodního práva soukromého*. Brno: Masarykova univerzita, 2013, pp. 15–18.

of people is enhanced by the creation of a regional economic integration organisation in the form of the European Union ("EU").[2] As a result, a number of marriages having cross-border implication is increasing as well. These include not only marriages of persons of different nationality, or couples who live in a state other than that of their nationality, but also situations where the spouses acquire property (e. g. immovable property or bank accounts) located in more than one country.[3] Consequently, the courts of EU Member States have to increasingly deal with the cases, in which it is necessary to dissolve the matrimonial property regime having cross-border implication; in particular, as a result of the divorce or the death of one of the spouses.[4] In these situations, the determination of the law applicable to the matrimonial property regime is of utmost importance.

The problem is that there are considerable disparities between the applicable rules governing the property effects of marriage, both in substantive law and in private international law.[5] While the continental European legal systems prefer regimes of community of property, in the common law countries marriage has no effect upon the property rights of spouses; therefore, system of separation of property applies.[6] Besides, there is also a variety of so-called hybrid regimes[7], such as German and Greek community of accrued gains

2 Similarly Župan, M., Pujlko, V. Shaping European Private International Family Law. *Slovenian Law Review*. 2010, No. 1-2, p. 24.

3 Diago Diago, M. d. P. The Matrimonial Property Regime in Private International Law. In: Šarčević, P., Volken, P. (eds.). *Yearbook of Private International Law 2000*. Vol. II. The Hague: Kluwer Law International, 2000, p. 180; Viarengo, I. The EU Proposal on Matrimonial Property Regimes – Some General Remarks. In: Šarčević, P., Volken, P., Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2011*. Vol. XIII. Munich: Sellier. European Law Publishers, 2011, p. 200.

4 Similarly Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [online]. *EUR-Lex*. Published on 2 March 2016 [cit. 1. 8. 2019]. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011PC0126

5 Ibid.

6 Scoles, E. F. Choice of Law in Family Property Transactions. In: *Recueil des Cours 1988 – II*. Vol. 209. Dordrecht: Martinus Nijhoff Publishers, 1989, pp. 17–18. More to the matrimonial property regimes in European legal systems see Pintens, W. Matrimonial Property Law in Europe. In: Boele-Woelki, K., Miles, J., Scherpe, J. M. (eds.). *The Future of Family Property in Europe*. Cambridge: Intersentia, 2011, pp. 19–46. Scherpe, J. M. (ed.). *Marital Agreements and Private Autonomy in Comparative Perspective*. Oxford-Portland: Hart Publishing, 2012, 518 p.

7 Dvořák, J., Spáčil, J. *Společné jmění manželů v teorii a v judikatuře*. Praha: Wolters Kluwer ČR, 2011, p. 15.

or Swiss participation in acquests[8]. Existence of this mosaic of matrimonial property regimes is a consequence of historical development, which reflects national, legal, economic, and cultural traditions in particular legal systems.[9] There are also differences in the conflict-of-law rules. The objective connecting factors that national legal systems use for the determination of the law applicable to the matrimonial property regime traditionally cover nationality of the spouses, domicile of the spouses or habitual residence of the spouses.[10] The outlined diversity in matrimonial property law in Europe forms the background for the potential unification.

Although the EU legislator has succeeded in adopting unified conflict-of-law rules in matters of matrimonial property regimes, the instruments of the general part of private international law that serve to protect the public interest considerations of forum law – namely the overriding mandatory provisions and the public policy exception – are still preserved. The aim of this contribution is to analyse the doctrine of overriding mandatory provisions and consider the applicability of the public policy exception, which limit the application of the law otherwise applicable determined in compliance with the unified conflict-of-law rules. The question the author would like to address in this paper is whether these institutes provide for sufficient safeguards to protect the fundamental values and public interests of the forum law in matters of matrimonial property regimes.

In order to set the topic of this contribution into a broader context, key milestones in the legislative development at EU level will briefly be outlined and the fundamental principles and characteristics of the unified conflict-of-laws regulation in matters of matrimonial property regimes will be identified. The crucial part will be devoted to the analysis of the instruments of overriding mandatory provisions and the public policy exception. In the concluding part, the author will summarize her findings and provide an assessment.

8 Pintens, W. Matrimonial Property Law in Europe. In: Boele-Woelki, K., Miles, J., Scherpe, J. M. (eds.). *The Future of Family Property in Europe*. Cambridge: Intersentia, 2011, pp. 29–32.

9 Dvořák, J., Spáčil, J. *Společné jmění manželů v teorii a v judikatuře*. Praha: Wolters Kluwer ČR, 2011, p. 6, 12.

10 Similarly Scoles, E. F. Choice of Law in Family Property Transactions. In: *Recueil des Cours 1988 – II*. Vol. 209. Dordrecht: Martinus Nijhoff Publishers, 1989, pp. 23–26.

2 Legislative background and fundamental principles of the conflict-of-laws regulation

It has been twenty years since the EU acquired the competence to adopt secondary legislation in the field of judicial cooperation in civil (including family) matters having cross-border implications. It was introduced with the Treaty of Amsterdam[11], which entered into force in 1999[12]. It is however important to note that the unification of the substantive family law rules remains outside the competence of the EU, and belongs to the exclusive competence of the Member States.[13] Therefore, the legislative competence of the EU is only limited to private international family law measures.[14]

Even the adoption of the EU legislation on matrimonial property regimes was among the priorities identified in the 1998 Vienna Action Plan[15], Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes ("Matrimonial Property Regulation") was adopted in June 2016, i. e. 18 years later. Rather than providing for the unified substantive matrimonial property regime, the Matrimonial Property Regulation preserves the particularities stemming from the national legal systems and contains the unified rules on jurisdiction, applicable law and recognition and enforcement in matters of matrimonial property regimes.

The Matrimonial Property Regulation is applicable to legal proceedings instituted on or after 29 January 2019. With regard to the determination

11 Art. 65 Treaty establishing the European Community.

12 Rozehnalová, N. Evropský justiční prostor ve věcech civilních. In: Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer ČR, 2018, p. 26.

13 Art. 3 Treaty on the Functioning of the European Union ("TFEU"), *a contrario*. See Fiorini, A. Which Legal Basis for Family Law? The Way Forward [online]. *European Parliament*. Published in 2012 [cit. 22. 6. 2019]. http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462498/IPOL-JURI_NT(2012)462498_EN.pdf; More to the competence of the EU see Martiny, D. European Family Law (PIL). In: Basedow, J., Hopt, K. J., Zimmermann, R., Stier, A. (eds.). *The Max Planck Encyclopedia of European Private Law: Vol. I*. Oxford: Oxford University Press, 2012, pp. 596–597.

14 Art. 4 para. 2 letter j), Art. 67 para. 4, Art. 81 TFEU.

15 Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice [online]. *EUR-Lex*. Published on 3 December 1998 [cit. 22. 6. 2019]. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31999Y0123%2801%29

of the law applicable to the matrimonial property regime, the unified conflict-of-law rules shall apply to spouses who marry or choose the law applicable to their matrimonial property regime on or after 29 January 2019.[16] In terms of territorial scope of application, the Matrimonial Property Regulation is only applicable in 18 EU Member States (including the Czech Republic), which decided to participate in enhanced cooperation (so-called participating Member States).[17] Enhanced cooperation is a result of the fact that the EU Member States were unable to reach unanimity, which was required for the adoption of the proposal for the regulation.[18]

The objective of the Matrimonial Property Regulation is to provide spouses "*with legal certainty as to their property and offer them a degree of predictability*"[19] and to achieve an ultimate goal of removing the obstacles to the free movement of persons[20]. The Matrimonial Property Regulation has universal character in the determination of the applicable law. Therefore, it enables either the law of a Member State or the law of a third state to be applicable to the matrimonial property regime.[21] The Matrimonial Property Regulation is also based on the unity of the applicable law, i. e. the law determined in compliance with the unified conflict-of-law rules applies to both movable and

16 Art. 69 para. 2, Art. 70 Matrimonial Property Regulation. Corrigendum to Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, as of 29 April 2017.

17 Matrimonial Property Regulation is binding and directly applicable in Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain, and Sweden. However, subject to the fulfilment of the prescribed conditions of participation, enhanced cooperation is at any time open to all EU Member States. See recitals 11, 13 Preamble to the Matrimonial Property Regulation, Art. 70 Matrimonial Property Regulation.

18 Recital 10 Preamble to the Matrimonial Property Regulation. See Art. 81 para. 3 TFEU, according to which measures concerning family law having cross-border implications shall be adopted in accordance with a special legislative procedure, i. e. unanimously by the Council after consulting the European Parliament. More to the legislative process see Marino, S. The Role of Party Autonomy in Matrimonial Property Regime and Partnership Property Regime Regulations. In: Hrnčiříková, M. *Řešení přeshraničních sporů – pravomoc a autonomie vůle*. Praha: Leges, 2017, pp. 111–114.

19 Recital 15 Preamble to the Matrimonial Property Regulation.

20 Ibid., Recital 1.

21 Recital 44 Preamble to the Matrimonial Property Regulation, Art. 20 Matrimonial Property Regulation. It should be noted that the term "the law of a Member State" only refers to the legal systems of participating Member States. The law of an EU Member State, which is not participating in enhanced cooperation on the regulation, is considered as the law of a third state.

immovable property of the spouses and regardless of whether the assets are located in another Member State or in a third state.[22]

Last but not least, the determination of the law applicable to the matrimonial property regime is based on the principle of proximity (i. e. closest connection).[23] As a starting point, the spouses (or future spouses) are allowed to agree on the law applicable to their matrimonial property regime. They may choose among the laws with which they have close links. It can be either the law of the state of the habitual residence of at least one of the (future) spouses, or the law of a state of nationality of at least one of the (future) spouses. For this purpose, the criteria of habitual residence and nationality are to be assessed at the time the agreement on a choice of applicable law is concluded.[24] In the absence of choice, the law applicable to the matrimonial property regime shall be determined based on a cascade (or scale) of three objective connecting factors, namely the spouses' first common habitual residence after the conclusion of the marriage, the spouses' common nationality at the time of their marriage, or the criteria of the closest connection at the time of the conclusion of the marriage.[25] Upon the fulfilment of the prescribed conditions, escape clause in favour

22 Recital 43 Preamble to the Matrimonial Property Regulation, Art. 21 Matrimonial Property Regulation. See Hein, J. von. Conflicts between International Property, Family and Succession Law – Interfaces and Regulatory Techniques. *European Property Law Journal*. 2017, No. 2, pp. 146–147.

23 Similarly Marino, S. Strengthening the European Civil Judicial Cooperation: The Patrimonial Effects of Family Relationships. *Cuadernos de Derecho Transnacional*. 2017, No. 1, pp. 278, 280, 282; Marino, S. The Role of Party Autonomy in Matrimonial Property Regime and Partnership Property Regime Regulations. In: Hrnčiříková, M. *Řešení přeshraničních sporů – pravomoc a autonomie vůle*. Praha: Leges, 2017, p. 116.

24 Recital 45 Preamble to the Matrimonial Property Regulation, Art. 22 Matrimonial Property Regulation. More to the choice of the applicable law see Marino, S. Strengthening the European Civil Judicial Cooperation: The Patrimonial Effects of Family Relationships. *Cuadernos de Derecho Transnacional*. 2017, No. 1, pp. 277–278; Marino, S. The Role of Party Autonomy in Matrimonial Property Regime and Partnership Property Regime Regulations. In: Hrnčiříková, M. *Řešení přeshraničních sporů – pravomoc a autonomie vůle*. Praha: Leges, 2017, pp. 114–127.

25 Recital 49 Preamble to the Matrimonial Property Regulation, Art. 26 para. 1 Matrimonial Property Regulation. More to the determination of the law applicable in the absence of choice of the applicable law see Marino, S. Strengthening the European Civil Judicial Cooperation: The Patrimonial Effects of Family Relationships. *Cuadernos de Derecho Transnacional*. 2017, No. 1, pp. 279–281.

of the application of the law of a state, in which the spouses have their last common habitual residence, may be utilized as well.[26]

3 United in diversity

It should be noted that the application of the unified conflict-of-law rules contained in the Matrimonial Property Regulation might not exceptionally lead to the determination of the foreign law as the law applicable to the matrimonial property regime. In which case, not only the law of a Member State but also the law of a third state may be applicable.

Term "united in diversity" used in the heading of this article refers to the official motto of the EU, which is one of its symbols. The motto "*signifies how Europeans have come together, in the form of the EU, to work for peace and prosperity, while at the same time being enriched by the continent's many different cultures, traditions and languages*".[27] This is connected with the principle of subsidiarity, according to which "*the Union shall respect the equality of Member States between the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government*".[28] The respect for fundamental rights and the different legal systems and traditions of the Member States is also explicitly emphasised in the context of the creation of an area of freedom, security and justice.[29]

While stressing the need to extend mutual recognition to the field of matrimonial property regimes in 2010 Stockholm Programme, the European Council emphasised that "*Member States' legal systems, including public policy, and national traditions in this area*" should be taken into consideration.[30]

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26 Recital 51 Preamble to the Matrimonial Property Regulation, Art. 26 para. 3 Matrimonial Property Regulation. More to escape clause see Marino, S. Strengthening the European Civil Judicial Cooperation: The Patrimonial Effects of Family Relationships. *Cuadernos de Derecho Transnacional*. 2017, No. 1, pp. 282–283.

27 European Union. *The EU motto* [online]. *Europa.eu*. Published on 13 February 2019 [cit. 23. 8. 2019]. https://europa.eu/european-union/about-eu/symbols/motto_en

28 Art. 4 para. 2 Treaty on European Union. Similarly Corthaut, T. *EU Ordre Public*. Alphen an den Rijn: Kluwer Law International, 2012, pp. 285–286.

29 Art. 67 para. 1 TFEU.

30 Stockholm Programme: An open and secure Europe serving and protecting citizens [online]. *EUR-Lex*. Published on 4 May 2010 [cit. 22. 6. 2019]. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:EN:PDF; Similarly Recital 7 Preamble to the Matrimonial Property Regulation.

Consequently, the Matrimonial Property Regulation provides for two traditional exceptions (or limits) to the otherwise applicable foreign law, which stem from the public policy considerations. These are overriding mandatory provisions and the public policy exception.[31] While overriding mandatory rules are seen as a positive construction of *ordre public*, the public policy exception is considered a negative construction of *ordre public*.[32] Despite these instruments are closely interrelated, it is necessary to distinguish them.

4 Overriding mandatory provisions

Overriding mandatory provisions are rules that "*are applicable to a situation irrespective of the lex causae*"[33]. The Matrimonial Property Regulation contains a provision on overriding mandatory provisions in Art. 30, which reads as follows: "*nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum*"[34]. For the purpose of the Matrimonial Property Regulation, overriding mandatory provisions are defined as "*provisions the respect for which is regarded as crucial by a Member State for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the matrimonial property regime pursuant to this Regulation*"[35]. It is obvious that the definition is similar to the wording of Art. 9 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I Regulation").[36]

31 Art. 30, 31 Matrimonial Property Regulation. Similarly Clavel, S., Jault-Seseke, F. Public Interest Considerations – Changes in Continuity. In: Šarčević, P., Volken, P., Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2017/2018*. Vol. XIX. Köln: Otto Schmidt, 2018, p. 233.

32 *Bogdan* even considers them "*as two sides of the same coin*". See Bogdan, M. Private International Law as Component of the Law of the Forum. General Course on Private International Law. In: *Recueil des Cours 2010*. Vol. 348. Leiden-Boston: Martinus Nijhoff Publishers, 2011, pp. 182, 184. Similarly Rozehnalová, N. *Instituty českého mezinárodního práva soukromého*. Praha: Wolters Kluwer ČR, 2016, pp. 170–171.

33 Wilderspin, M. Overriding mandatory provisions. In: Basedow, J., Rühl, G., Ferrari, F., Miguel Asensio, P. De (eds.). *Encyclopedia of Private International Law: Vol. 2*. Cheltenham: Edward Elgar Publishing, 2017, p. 1330.

34 Art. 30 para. 1 Matrimonial Property Regulation.

35 Ibid., Art. 30 para. 2.

36 See Art. 9 para. 1 Rome I Regulation.

In terms of the characterisation, the concept of "overriding mandatory provisions" should cover rules of imperative nature.[37] The Matrimonial Property Regulation refers to "*provisions the respect for which is regarded as crucial by a Member State for safeguarding its public interests*", which implies that there is a high standard for the characterisation of a rule as overriding mandatory provision.[38] In the recital of the Preamble to the Matrimonial Property Regulation, rules for the protection of the family home are explicitly mentioned as an example of overriding mandatory provisions.[39] *Sonnenberger* considers this approach as reasonable.[40] In addition, the rules regarding solidarity between spouses for the household debts, or the rules applicable to emergency situations may be considered as overriding mandatory provisions.[41] Consequently, a matrimonial property regime according to which the family's debts are not shared between the two spouses or a regime that does not protect the family home may be found in a particular Member State as being contrary to overriding mandatory provisions of the state concerned.[42]

It may however be doubtful, whether some national rules should be qualified as overriding mandatory provisions or rather as rules the purpose of which is protecting both public and private interests. In this context, *Clavel* and *Jault-Seseke* state, "*as long as a rule is crucial for safeguarding public interest, the mere fact that it is also driven by considerations of protection has no impact on its*

37 Recital 53 Preamble to the Matrimonial Property Regulation.

38 Art. 30 para. 2 Matrimonial Property Regulation. See Clavel, S., Jault-Seseke, F. Public Interest Considerations – Changes in Continuity. In: Šarčević, P., Volken, P., Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2017/2018*. Vol. XIX. Köln: Otto Schmidt, 2018, p. 236.

39 Recital 53 Preamble to the Matrimonial Property Regulation. Similarly Hein, J. von. Conflicts between International Property, Family and Succession Law – Interfaces and Regulatory Techniques. *European Property Law Journal*. 2017, No. 2, p. 149.

40 Sonnenberger, H. J. Overriding Mandatory Provisions. In: Leible, S. (ed.). *General Principles of European Private International Law*. Alphen an den Rijn: Kluwer Law International, 2016, p. 122.

41 Clavel, S., Jault-Seseke, F. Public Interest Considerations – Changes in Continuity. In: Šarčević, P., Volken, P., Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2017/2018*. Vol. XIX. Köln: Otto Schmidt, 2018, p. 242.

42 Explanatory Handbook on Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [online]. *Notaries of Europe* [cit. 26. 8. 2019]. https://www.notaires.fr/sites/default/files/Matrimonial-property-handbook-29012019-EN.pdf

classification. This conclusion is important in the field of matrimonial property regimes, where public order of direction and protection are intimately related"[43].

Even though the Matrimonial Property Regulation reflects the wording of Art. 9 of the Rome I Regulation, the scope of Art. 30 of the Matrimonial Property Regulation is only limited to the application of overriding mandatory provisions of the forum. It does not refer (either explicitly or implicitly) to overriding mandatory provisions of any other state.[44] The advantage of the adopted solution (i. e. limitation of the exception to the application of the law otherwise applicable solely to overriding mandatory provisions of the forum law) is that it reduces the legal uncertainty deriving from the application of this exception. On the other hand, given the multiplicity of grounds for determination of jurisdiction of courts[45], it is difficult to foresee overriding mandatory provisions of which state will influence the application of the law otherwise applicable to the matrimonial property regime.[46]

Last but not least, the exception to the application of the law applicable to the matrimonial property regime should be strictly interpreted in order to remain compatible with the general objective of the Matrimonial Property Regulation. Moreover, exception based on overriding mandatory provisions may only be used in exceptional cases.[47]

5 Public policy exception

As has already been stated above, the substantive family law is not unified within the EU. The reason is that family law matters are closely connected to the legal systems of particular states and the EU lacks competence in this area. Therefore, the public policy exception has still its place in family law. The public policy exception remains an instrument which,

43 Clavel, S., Jault-Seseke, F. Public Interest Considerations – Changes in Continuity. In: Šarčević, P., Volken, P., Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2017/2018*. Vol. XIX. Köln: Otto Schmidt, 2018, p. 242.

44 Ibid., pp. 235–236, 243.

45 For more details see Art. 4-11 Matrimonial Property Regulation.

46 Similarly Clavel, S., Jault-Seseke, F. Public Interest Considerations – Changes in Continuity. In: Šarčević, P., Volken, P., Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2017/2018*. Vol. XIX. Köln: Otto Schmidt, 2018, pp. 245–246.

47 Ibid., p. 236.

albeit exceptionally, may be used by the courts of the Member States to protect their fundamental values.[48]

The public policy exception is a corrective necessary for the traditional "value-neutral" approach to private international law that the EU legislator takes.[49] This instrument allows judges to decline the application of a provision of a foreign law to avoid unacceptable results from the forum law perspective.[50] In EU private international law, conflicting interests are however at stake. On the one hand, the use of the public policy exception helps to secure the national values and legal cultures of the Member States. On the other hand, the public policy exception can be seen as an obstacle (or limit) to the objectives that EU private international law aims to create, i. e. legal certainty to enhance free movement of citizens and their trust in the EU legal order.[51] The same is true for matters of matrimonial property regimes.

The Matrimonial Property Regulation contains an *ordre public* clause in its Art. 31. This provision allows courts and other competent authorities dealing with matters of matrimonial property regime in the Member State to refuse the application of a provision of the foreign law determined by the unified conflict-of-law rules, if, in a given case, such application is manifestly incompatible with the public policy (*ordre public*) of the forum.[52]

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48 Similarly Meeusen, J., Pertegás, M., Straetmans, G., Swennen, F. General Report. In: Meeusen, J., Pertegás, M., Straetmans, G., Swennen, F. (eds.). *International Family Law for the European Union*. Antwerp-Oxford: Intersentia, 2007, p. 19. Similarly Wurmnest, W. Ordre Public (Public Policy). In: Leible, S. (ed.). *General Principles of European Private International Law*. Alphen an den Rijn: Kluwer Law International, 2016, p. 310. More to this see Poillot-Peruzzetto, S. The Exception of Public Policy in Family Law within the European Legal System. In: Meeusen, J., Pertegás, M., Straetmans, G., Swennen, F. (eds.). *International Family Law for the European Union*. Antwerp-Oxford: Intersentia, 2007, pp. 279–302.

49 Gössl, S. L. The Public Policy Exception in the European Civil Justice System. *The European Legal Forum. Forum Iuris Communis Europae*. 2016, p. 86. Similarly Vischer, F. General Course on Private International Law. In: *Recueil des Cours 1992*. Vol. 232. Leiden-Boston: Martinus Nijhoff Publishers, 1992, p. 100. Similarly Rozehnalová, N. *Instituty českého mezinárodního práva soukromého*. Praha: Wolters Kluwer ČR, 2016, p. 169.

50 Wurmnest, W. Ordre Public (Public Policy). In: Leible, S. (ed.). *General Principles of European Private International Law*. Alphen an den Rijn: Kluwer Law International, 2016, p. 305, 313.

51 Similarly Gössl, S. L. The Public Policy Exception in the European Civil Justice System. *The European Legal Forum. Forum Iuris Communis Europae*. 2016, p. 92.

52 Recital 54 Preamble to the Matrimonial Property Regulation, Art. 31 Matrimonial Property Regulation.

It should be noted that the provision on the public policy exception underwent some modifications during the legislative process. In the original 2011 proposal for the Matrimonial Property Regulation, the courts were given a possibility to set aside "the foreign law" (or "a rule of the law") as a whole. It was also proposed that the public policy exception should not be used to refuse application of the law of another EU Member State, "*if the application of the public policy exception would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21, which prohibits all forms of discrimination*"[53]. This means that the public policy exception was meant to be restricted to cases, in which the law of a third state applies.

In the final text, however, the Matrimonial Property Regulation only refers to setting aside of "a provision" of the law applicable to the matrimonial property regime. Moreover, it does not distinguish between situations in which the law applicable is the law of another Member State and situations in which the applicable law is the law of a third state.[54]

The wording "in a given case" refers to the assessment *in concreto* of the public policy exception. It is therefore possible to apply a foreign law as the law applicable, which is *in abstracto* against the fundamental values of the *lex fori,* but which, in a given case, leads to an acceptable solution.[55]

53 Recital 25 Preamble, Art. 23 Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [online]. *EUR-Lex*. Published on 16 March 2011 [cit. 1. 8. 2019]. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011PC0126

54 Recital 54 Preamble to the Matrimonial Property Regulation, Art. 31 Matrimonial Property Regulation. Similarly Recital 25 Preamble, Art. 23 Proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes – Political agreement [online]. *Council of the European Union*. Published on 26 November 2015 [cit. 1. 8. 2019]. http://data.consilium.europa.eu/doc/document/ST-14651-2015-INIT/en/pdf; Recital 54 Preamble, Art. 31 Proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [online]. *EUR-Lex*. Published on 2 March 2016 [cit. 1. 8. 2019]. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0106

55 Clavel, S., Jault-Seseke, F. Public Interest Considerations – Changes in Continuity. In: Šarčević, P., Volken, P., Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2017/2018*. Vol. XIX. Köln: Otto Schmidt, 2018, p. 237.

Even though the public policy exception is traditional private international law instrument, it is not interpreted uniformly in all EU Member States.[56] According to the case law of the Court of Justice of the European Union ("CJEU")[57], the concrete content of the public policy is to be determined by the respective national legal systems. The CJEU is only guarding its limits.[58] It is however important to note that the public policy exception "*shall not be used to set aside the lex causae just because its content is not similar to the one of the lex fori*".[59] The existence of different matrimonial property regimes in particular states (ranging from the regimes of community of property to the system of separation of property) should *per se* not be sufficient to breach the public policy of the forum.[60] The public policy exception in matters of matrimonial property regimes will probably be relevant with regard to discriminatory rules (e. g. rules discriminating based on sex). The public policy exception may therefore be used to disregard foreign matrimonial property regime, which is not favourable to wife.[61] For example, if the law applicable only recognizes the husband as possible owner of property or as being the only spouse with the competence to administer or dispose of the assets, or if the law applicable allocates a greater portion to the husband than to the wife in the event of liquidation of the matrimonial property regime.[62] However,

56 Similarly in the context of international conventions see Bogdan, M. Private International Law as Component of the Law of the Forum. General Course on Private International Law. In: *Recueil des Cours 2010. Vol. 348*. Leiden-Boston: Martinus Nijhoff Publishers, 2011, p. 168.

57 See for example Judgment of the Court of Justice of 28 March 2000, Case C-7/98, para. 22, 23; Judgment of the Court of Justice (Grand Chamber) of 28 April 2009, Case C-420/07, para. 56, 57; Judgment of the Court of Justice (First Chamber) of 25 May 2016, Case C-559/14, para. 39, 40.

58 Similarly Gössl, S. L. The Public Policy Exception in the European Civil Justice System. *The European Legal Forum. Forum Iuris Communis Europae*. 2016, p. 87.

59 Clavel, S., Jault-Seseke, F. Public Interest Considerations – Changes in Continuity. In: Šarčević, P., Volken, P., Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2017/2018. Vol. XIX*. Köln: Otto Schmidt, 2018, p. 236.

60 In such a case, adaptation of *lex causae* would be solution that is more suitable. Similarly Clavel, S., Jault-Seseke, F. Public Interest Considerations – Changes in Continuity. In: Šarčević, P., Volken, P., Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2017/2018. Vol. XIX*. Köln: Otto Schmidt, 2018, p. 238.

61 Ibid., pp. 238–239.

62 Explanatory Handbook on Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [online]. *Notaries of Europe* [cit. 26. 8. 2019]. http://www.notaries-of-europe.eu/

further requirements, such as the gravity of the breach, value of the interests involved, or the connection between the case and the forum, have to be considered before the public policy exception can be used.[63]

The public policy exception may only be used in exceptional cases (as an *ultimum remedium*[64]). Moreover, the application of the public policy exception according to the Matrimonial Property Regulation is limited by the principle of non-discrimination, i. e. it is not possible to set aside the foreign law, when doing so would be contrary to the Charter of Fundamental Rights of the European Union, especially its Art. 21 on the principle of non-discrimination.[65] This implies that the primacy of EU law can force a national court to apply the law of another state, which is against its national public policy.[66] For example, a court of the EU Member State, which does not recognize same-sex marriages, may be prevented from using the public policy exception to refuse the application of the law of another state that establishes property rights of same-sex couples, if it would amount to a violation of the principle of non-discrimination.[67]

63 Similarly Gössl, S. L. The Public Policy Exception in the European Civil Justice System. *The European Legal Forum. Forum Iuris Communis Europae*. 2016, p. 90.

64 Boer, T. M. de. Unwelcome Foreign Law: Public Policy and Other Means to Protect the Fundamental Values and Public Interests of the European Community. In: Malatesta, A., Bariatti, S., Pocar, F. (eds.). *The External Dimension of EC Private International Law in Family and Succession Matters*. Padova: Cedam, 2008, p. 296; Bogdan, M. Private International Law as Component of the Law of the Forum. General Course on Private International Law. In: *Recueil des Cours 2010*. Vol. 348. Leiden-Boston: Martinus Nijhoff Publishers, 2011, p. 170.

65 Recitals 54, 73 Preamble to the Matrimonial Property Regulation. For further details see Clavel, S., Jault-Seseke, F. Public Interest Considerations – Changes in Continuity. In: Šarčević, P., Volken, P., Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2017/2018. Vol. XIX*. Köln: Otto Schmidt, 2018, p. 237.

66 Similarly Wurmnest, W. Ordre Public (Public Policy). In: Leible, S. (ed.). *General Principles of European Private International Law*. Alphen an den Rijn: Kluwer Law International, 2016, p. 318.

67 Similarly Clavel, S., Jault-Seseke, F. Public Interest Considerations – Changes in Continuity. In: Šarčević, P., Volken, P., Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2017/2018. Vol. XIX*. Köln: Otto Schmidt, 2018, p. 237. Similarly in the context of inheritance law see Wurmnest, W. Ordre Public (Public Policy). In: Leible, S. (ed.). *General Principles of European Private International Law*. Alphen an den Rijn: Kluwer Law International, 2016, pp. 318–319.

6 Conclusion

Given the diversity in substantive family law in particular legal systems and the absence of EU competences in this area, the unification of substantive family law in Europe is not attainable. This is also true for matrimonial property regimes. Nevertheless, the EU legislator is progressing in unifying private international law rules in family law matters. The rules for the determination of the applicable law to the matrimonial property regime are unified in the Matrimonial Property Regulation, which is applicable in participating EU Member States by way of enhanced cooperation as of January 2019. The objective of the unified conflict-of-law rules in matters of matrimonial property regimes at EU level is to mitigate (or bridge) differences in substantive matrimonial property law in particular legal systems and provide spouses with legal certainty and predictability, the law of which state is applicable to their matrimonial property regime, or as the case may be, its dissolution.

Like the other European conflict-of-law rules, the unified conflict-of-law rules in matters of matrimonial property regimes have universal character in the determination of the applicable law. Therefore, the national courts of the EU Member States may not exceptionally be compelled to apply foreign matrimonial property law in matters of matrimonial property regimes having cross-border implication.

The aim of this contribution was to analyse institutes of overriding mandatory provisions and the public policy exception, which are provided for in the Matrimonial Property Regulations as limits to the application of the law otherwise applicable pursuant to the unified conflict-of-law rules. The question the author was addressing in this paper was whether these instruments of the general part of private international law provide for sufficient safeguard mechanisms to protect the fundamental values and public interests of the forum law in matters of matrimonial property regimes.

Even though the interpretation of the public policy exception may differ in particular EU Member States and lead to divergent results, it is a traditional instrument of private international law, which serves to protect the fundamental values and interests of the forum law. Its application in matters of matrimonial property regimes should therefore not be problematic. The public policy

exception may be used to disregard the application of the law otherwise applicable to the matrimonial property regime. In practice, however, the public policy issues will usually arise in case of recognition and enforcement as a ground for non-recognition of a decision.[68] For this reason, the public policy doctrine has undeniably its place in the Matrimonial Property Regulation.

Nevertheless, it follows from the analysis that legal regulation is not so self-evident and unproblematic as regards the overriding mandatory provisions. Even though overriding mandatory provisions are usually used in the context of contractual obligations[69], overriding mandatory provisions of the *lex fori* are also utilized in the Matrimonial Property Regulation. Unfortunately, it is not clear which rules will be qualified as overriding mandatory provisions for the purpose of the Matrimonial Property Regulation. The Matrimonial Property Regulation itself only refers to the rules for the protection of the family home.

In each case, all exceptions to the application of the otherwise applicable law to the matrimonial property regime should be strictly interpreted, even if they are driven by considerations of public interest.

To conclude, the uniform conflict-of-law rules do not eliminate legal discrepancies in substantive matrimonial property law in particular legal systems. Nevertheless, by unifying the conflict-of-law rules in matters of matrimonial property regimes in the Matrimonial Property Regulation and preserving the possibility to apply the public policy exception, the EU legislator is trying to achieve both unity and diversity of matrimonial property regimes.

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68 See Recital 54 Preamble to the Matrimonial Property Regulation, Art. 37 letter a) Matrimonial Property Regulation.

69 See Art. 9 Rome I Regulation. On the other hand, overriding mandatory provisions are not included in the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations or in the Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

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Current Issues of Deciding Cross-border Succession Matters in the Slovak Republic[1]

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Abstract

The European Regulation no 650/2012 unified the determination of jurisdiction and applicable law in succession matters in the Member States of the European Union. At the same time, it underlined other issues that complicate decision making on cross-border succession in the Slovak Republic. One of the most striking is the resolution of the issue of settling the common property of spouses, which under Slovak procedural law, is exercised by a notary in succession proceedings. The Slovak Republic does not participate at the enhanced cooperation on cross-border matrimonial property regimes, so joining jurisdiction in these cases with succession proceedings is very complicated. The present article deals with this and some other issues which the fragmentation of EU private international law brings.

Keywords

Cross-border Succession; Succession with Cross-border Implication; Regulation No 650/2012; Jurisdiction in Succession Matters; Fragmentation of Private International Law.

1 Introduction

From 17 August 2015[2] the cross-border succession in twenty-five from the twenty seven[3] Member States is regulated by the Regulation (EU)

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2 The Regulation in its entirety applies from 17. August 2015, except for Articles 77 to 81 which applies from the earlier date – see Art. 84.

3 Denmark and Ireland are not bound by the Regulation. So did the United Kingdom while it was a member of the EU. See Recitals 82 and 83 Succession Regulation.

No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition, and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession ("Succession Regulation"). Regulation brings together the issue of determination of jurisdiction, applicable law, the effects of foreign authentic instruments and foreign judgments originating in other Member States. The applicability of the Succession Regulation does not depend on the specific criteria, as it is in the case of Brussels I bis Regulation[4] and neither is allowed the residual application of national law, as in case of Brussels II bis Regulation.[5]

It seems that since the Succession Regulation covers all cross-border aspects of succession (jurisdiction, applicable law, legal effects of foreign judgments and foreign authentic instruments) and its application is not conditional, there is no room for fragmentation, i.e. situation where different aspects of one cross-border case are to be established on the basis of different European Union ("EU") regulations. But is this really true?

The competent authority really does not have to seek an answer to the question of whether it has the jurisdiction to rule on the succession and what law it will apply in several regulations. Nevertheless, there are two situations where it is necessary to look for the rule of jurisdiction in another regulation in order to effectively deal with succession.

The first one arises if the deceased is married at the time of death and it is necessary to solve the question what part of the common property of spouses will be a part of the inheritance.

Jurisdiction and applicable law in matters of matrimonial property rights and property rights related to relationships having comparable effects to marriage is not governed by Succession Regulation, but it is governed

4 Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is applicable only if there is connection between proceedings and the territory of any of the Member states, usually the domicile of defendant in a Member State – see its Art. 6 and Recitals 13 and 14.

5 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 – see its Art. 7 and 14.

by two other Regulations – Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes ("Matrimonial Property Regulation") and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships ("Property Consequences of Registered Partnerships Regulation"). However, since these regulations were adopted under enhanced cooperation, not all Member States are bound by them. The Slovak Republic is one of them.

Second such a situation is if one of the parties to the succession proceedings, usually an heir, is a minor child. The validity of any legal act of minors in succession proceedings often requires the approval by a court or other authority dealing with childcare. Under the Slovak law this is in the competence of the authority (notary) that deals with succession. This is also entitled to appoint a guardian ad litem for a minor child which cannot be represented by a legal representative in the proceedings. For example because his or her interests conflict with those of his/her legal representative. However, this question does not fall within the scope of the Succession Regulation, but within the scope of the Brussels II bis Regulation.

In the following text, we will compare the solution of the two mentioned situations on the example of Slovak legal practice.

2 Notary as a court in succession

The specificity of succession proceedings is the involvement of notaries who in the Member States deals with succession, while the level of their involvement varies in the Member States, from the preparation of documents for a court to independent authoritative decision-making. Succession Regulation reflects this in Art. 3 para. 1. For the purposes of this Regulation, the term 'court' means any judicial authority and all other authorities and legal professionals with competence in matters of succession which exercise judicial functions or act pursuant to a delegation of power by a judicial authority or act under the control of a judicial authority, provided that such other

authorities and legal professionals offer guarantees concerning impartiality and the right of all parties to be heard and provided that their decisions under the law of the Member State in which they operate have a similar force and effect as a decision of a judicial authority on the same matter and may be made the subject of an appeal to or review by a judicial authority.

There are, therefore, a series of criteria relating to the profession of notary itself, to his activity in matters of succession and the nature and effects of his decisions. Although notaries as a legal profession exist in every EU Member State, and even this profession in the civil law countries is based on the same Roman law roots, it cannot be automatically assumed that a notary in a particular Member State fulfils this criteria. This must be assessed upon the examination of the national law.[6]

In the Slovak Republic with effect from 1 July 2016 succession proceedings are fully in the competence of notaries. According to the new legal regulation Act No. 161/2015 Coll. of laws the Civil Non-Contentious Procedure Code ("CNPC"), a notary himself, in his name, upon the authorisation by a court, carries out all procedural acts in succession proceedings, including a final decision. The position of the notary in succession proceedings is compared to the court.[7]

The Constitutional Court of the Slovak Republic confirmed the constitutionality of such a notary's competence in its resolution of 6 February 2019, file number PL. ÚS 12/2019. In the opinion of the Constitutional Court, a notary fulfils the constitutional requirements to be entrusted with the protection of the rights of individuals, as provided for in Art. 46 para. 1 of the Constitution of the Slovak Republic[8] and Art. 6 para. 1 of the 1950 European Convention for Human Rights and Fundamental Freedoms. **Activity of the notary can be considered to be the direct exercise of part of the judicial powers**. In its argumentation, the Constitutional Court also referred to the Succession regulation, pointing out that it presupposes that a notary may be regarded as a court within the meaning of this regulation.

6 See Judgment of the Court of Justice (First Chamebr) of 23 May 2019, Case C-658/17.
7 See Valová, K. Komentár k § 16 [*Commentary to the Section 16*]. In: Smyčková, R. et al. *Civilný mimosporový poriadok. Veľký komentár*. Praha: C. H. Beck, 2017, p. 99.
8 Act No. 460/1992 Coll., Constitution of the Slovak republic.

It is necessary to add that the decision-making of a notary in succession proceedings according to the Slovak procedural law also meets other requirements of Art. 3 para. 2 of the Succession Regulation. As already mentioned, the notary acts upon the authorization by the court. In proceedings, it proceeds in accordance with generally applicable procedural rules for civil non-contentious proceedings[9], according to which the rights of parties to the proceedings, including the right to be heard, are secured. A decision issued by a notary in succession proceedings is binding and has the same legal force and effect as other decisions issued in civil proceedings in the Slovak Republic[10], and may be challenged by an appeal as well as extraordinary remedies available[11].

In the interests of economy of procedure and speeding up succession proceedings, **notaries have been given the competence to decide on two related issues that often arise in succession proceedings, such as the distribution of the common matrimonial property of spouses** if the deceased was married at the time of his death (Section 195 CNPC), **and approving the legal act of a minor heir** (Section 160 CNPC).

While in proceedings without a foreign element, the notary's competence to rule on the above-mentioned related issues is directly determined by national procedural rules, **in the case of succession proceedings with a foreign element there is a need to establish separately the existence of the jurisdiction of notary for this two related issues**, irrespective of the determination of the jurisdiction of notary to act in matters of succession.

3 Approval of a legal act of minor child in succession proceedings

The inapplicability of the Succession Regulation to the jurisdiction of notary to approve a minor's legal act in the context of succession proceedings stems

9 Sections 158 to 219 CNPC.

10 Section 39 para. 2 CNPC, in connection with Sections 236 to 232 of the Act No. 160/2015 Coll., Civil Contentious Procedure Code. See Kotrecová, A. Komentár k § 39 [*Commentary to the Section 39*]. In: Smyčková, R. et al. *Civilný mimosporový poriadok. Veľký komentár*. Praha: C. H. Beck, 2017, p. 182 et seq.

11 Section 59 CNPC.

from the case-law of the Court of Justice of the European Union ("CJEU") in the case *Matoušková* C-404/14[12] and *Saponaro* C-565/16[13].

The question referred for a preliminary ruling in the *Matoušková* case was made in the context of succession proceedings conducted under Czech law, which is ideologically and historically close to the Slovak legal regulation. In the present succession proceedings, the agreement of heirs was concluded between the children of the deceased and the deceased's husband, on the distribution of inheritance. As minor children were parties to the agreement, it was necessary that the legal act of the minor heirs – conclusion of the agreement, was approved by Mr Matoušková, notary dealing with succession.

The CJEU based its argumentation on the fact that the **approval of an agreement on the distribution of an inheritance** is a measure taken in relation to a person's legal capacity, as is clear from previous case law of the Court in the case *Schneider*[14], and, especially on the argument that that question **falls within the material scope of the Brussels II bis Regulation** setting out jurisdiction in matters of parental responsibility.

In its reasoning, the Court also referred to the Explanatory Report to the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children,[15] which to some extent inspired the Brussels II bis Regulation, and part of their jurisdiction provisions as well as their material scope are similarly defined.[16] The Court referred to the interpretation of the provisions on the exclusion of inheritance from the scope of the Convention, stating that the Explanatory Report emphasizes that where the law applicable to the succession provides for the participation of the legal representative of a minor heir, this representative must be designated under

12 Judgment of the Court of Justice (Third Chamber) of 6 October 2015, Case C-404/14.
13 Judgment of the Court of Justice (Sixth Chamber) of 19 April 2018, Case C-565/16.
14 Judgment of the Court of Justice (Third Chamber) of 3 October 2013, Case C-386/12.
15 Lagarde, P. Explanatory Report on the 1996 Hague Child Protection Convention [online]. *HCCH. Explanatory Reports* [cit. 7. 10. 2019]. https://www.hcch.net/en/publications-and-studies/publications2/explanatory-reports
16 See Opinion of Advocate General Kokott of 25 June 2015, Case C-404/14, point 47.

the provisions of the Convention and this falls within the scope of parental responsibility.[17]

The Brussels II bis Regulation is within the meaning of Art. 1 para. 2 letter e) thereof, in conjunction with para. 1 letter b) also applicable to measures relating to the protection of the child relating to the administration, preservation and disposal of the child's property. It can also be mentioned Recital 9 of the Brussels II bis Regulation, which specifies that, as regards the child's property, this Regulation should apply to child protection measures such as the designation and authorization of persons or entities responsible for the child´s property, representing or assisting the child, and to the administration, conservation or disposal of the child's property.

In case *Saponaro* C-565/16[18], the Greek court was going to decide on the approval of the rejection of the inheritance that the parents had done on behalf of their minor child. Succession proceedings was conducted in Greece, while both parents and the child were habitually resident in Italy. The Court confirmed its conclusions in *Matoušková* case that it is a child protection measure linked to the management, maintenance or disposal of the child's property and therefore the jurisdiction of the Greek court in this case is to be assessed under the Brussels II bis Regulation.[19]

Thus, if a jurisdiction of the notary dealing with succession in these matters is to be assessed under the Brussels II bis Regulation, the notary will in principle have jurisdiction if the minor child is habitually resident in the State where the notary operates and in which the succession proceedings are carried out (Art. 8 Brussels II bis Regulation).

However, this may not be the case in any such situation. Due to the migration of the population in the EU, supported by the principle of free movement of persons within the EU, it may happen that the child is not habitually resident in the same Member State as the deceased – this may be the case if the child inherits from an old parent or other relative, or if the child inherits from one of the parents if the parents do not live together.

17 Lagarde, P. Explanatory Report on the 1996 Hague Child Protection Convention [online]. *HCCH. Explanatory Reports*, point 32, p. 551 [cit. 7. 10. 2019]. https://www.hcch.net/en/publications-and-studies/publications2/explanatory-reports

18 Judgment of the Court of Justice (Sixth Chamber) of 19 April 2018, Case C-565/16.

19 Ibid., points 16 -19.

This was a situation in the *Matoušková* case as well as in the *Saponaro* case. In both cases, the Court has confirmed that the choice of jurisdiction clause in Art. 12 para. 3 of the Brussels II bis Regulation can be used.

Art. 12 para. 3 of the Brussels II bis Regulation allows the jurisdiction of a court of a Member State to be established in matters of parental responsibility even if the child is not habitually resident in that State, provided that all parties have accepted the jurisdiction of that court and the child has a substantial connection with this Member State. A substantial connection may be within the meaning of Art. 12 para. 3 letter a) for example the fact that one of the holders of parental responsibility is habitually resident in that State or the child is a national of that Member State.

Thus, the jurisdiction of a notary to approve a legal act of a minor child is subject to the consent of the parties and to the existence of a substantial connection between the child and the Member State concerned. It cannot be therefore deemed to exist automatically. While it is possible to assume that the parties to a succession proceedings will have an interest in resolving the succession, this may not be the case in every case.[20]

Furthermore, even the condition that the exercise of such authority is in the best interests of the child cannot be considered automatically fulfilled. As the Court has pointed out in *Saponaro* judgment, in any proceedings involving the application of Art. 12 para. 3, it must be examined whether the use of the jurisdiction agreement is in accordance with the best interests of the child (points 33 to 39 of the Judgment). This also requires the notary to properly assess whether such exercise of power is in the child's best interest, before determining the jurisdiction.

The new wording of the Brussels II Regulation – Council Regulation (EU) No. 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction ("Brussels II Regulation Recast"), which shall apply from 1. 8. 2022, brings substantial simplification in this respect.

20 The scope of the term "all parties" has been interpreted in the Judgment of the Court of Justice (Sixth Chamber) of 19 April 2018, Case C-565/16, points 26-32. In the present case, it also included a public prosecutor who, under Greek law, had the status of a party to the proceedings.

Art. 16 para. 3 of the Brussels II Regulation Recast explicitly allows a court (notary – if a notary is acting) to approve a legal act of a minor child in succession proceedings, even if it has no jurisdiction in matters of parental responsibility under that Regulation.[21]

For the sake of completeness, it should be added that by the Brussels II bis Regulation or Brussels II Regulation Recast the list of the instruments whose application the notary may encounter in succession proceedings is not exhausted. **If the child is habitually resident in a third country but a Contracting State of the aforementioned 1966 Hague Convention, the rules of that Convention takes precedence over the Brussels II bis Regulation** (Art. 61 letter a)), as well as the Brussels II Regulation Recast (Art. 97 para. 1 letter a)). The notary must be aware of the fact that Denmark is also a non-member state in this situation[22]. There is no doubt that the issue of approving a minor's legal act falls within the scope of the Convention.

In the system of rules of jurisdiction in the Convention, in cases where the legal act of a minor in succession proceedings has to be approved and the minor does not have his habitual residence in the Contracting State where succession proceedings is held, the application of Art. 12 comes into consideration. Art. 12 allows a court of a Contracting State which is not competent in matters of parental responsibility but in whose territory the child or the property of the child is situated to take measures to protect the person or property of the child but with limited applicability only in that territory. Legal acts performed by a minor child in succession proceedings concern his property rights, the condition of applicability of Art. 12 is fulfilled in this respect.

21 Recital 32 Brussels II Regulation Recast: "*If the outcome of proceedings before a court of a Member State not having jurisdiction under this Regulation depends on the determination of an incidental question falling within the scope of this Regulation, the courts of that Member State should not be prevented by this Regulation from determining that question. Therefore, if the object of the proceedings is, for instance, a succession dispute in which the child is involved and a guardian ad litem needs to be appointed to represent the child in those proceedings, the Member State having jurisdiction for the succession dispute should be allowed to appoint the guardian for the pending proceedings, regardless of whether it has jurisdiction for matters of parental responsibility under this Regulation. Any such determination should only produce effects in the proceedings for which it was made.*"

22 See Recital 31 Brussels II bis Regulation, alike Recital 96 Brussels II Regulation Recast. Denmark has been bound by the Convention since 1 October 2011, see https://www.hcch.net/en/instruments/conventions/status-table/?cid=70

Art. 12 para. 3 of the valid Brussels II bis Regulation and for the future Art. 16 para. 3 of the Brussels II Regulation Recast (albeit Art. 12 para. 3 conditionally) provides a solution to situations when it is necessary to approve legal act of a minor in succession proceedings and the child does not have his habitual residence in the Member State where the succession is pending. However, there may be a situation that the child or its statutory representative would wish to make a declaration of acceptance or rejection of the inheritance, or other statement intended to limit the child's liability for debts under the succession in the court or other competent authority of the State in which the child is habitually resident.

Succession Regulation Art. 13 authorizes the court of the Member State in which the person wishing to make a similar declaration is habitually resident to accept such a declaration. However, the Succession Regulation is not applicable as it is a minor's legal act.

The court or competent authority of a Member State will have jurisdiction, since both the Brussels II bis Regulation (Art. 8) and the 1996 Hague Convention (Art. 5) confer in principle, jurisdiction to the court of the Member State in which the child is habitually resident. However, the court of a Member State must be aware that although it is a legal act exclusively for the purpose of succession proceedings,[23] the Succession Regulation must be set aside and a solution must be sought in the Regulation (or Convention) governing parental responsibility.

Similarly to the Slovak court to which a notary from the Czech Republic submitted a motion to approve the rejection of inheritance made by parents on behalf of their minor children, in the succession proceedings conducted by this notary in the Czech Republic. Since the succession proceedings in question were not conducted in Slovakia, the district court quite logically based its jurisdiction on Art. 13 of Succession Regulation. The court reviewed the case and approved the refusal of inheritance on behalf of minor children because the deceased´s estate was indebted and the refusal of estate was in the interest of minors.[24] There would be nothing to criticize on the

23 These are declarations that are specific to succession law – Odersky F. Commentary to Article 13. In: Bergquist et al. *EU Regulation on Succession and Wills. Commentary.* Köln: Verlag Dr. Otto Schmidt, 2015, p. 93.

24 Judgment of the District Court in Liptovský Mikuláš of 19 February 2019, file ref. 1P/104/2018.

procedure of the District Court, but unfortunately the legislation on which the District Court based its jurisdiction should not be applied. Yet the court of the Member State in which the potential heir is habitually resident will always have jurisdiction to approve a similar legal act, but once under the Succession Regulation, another time under the Brussels II bis Regulation or the 1996 Hague Convention.

Let us say that this is an unnecessary complication again. Perhaps if the EU CJEU had already considered, in the *Matoušková* and *Saponaro* judgments, the approving a minor's legal act as an incidental (preliminary) question in succession (cf. Art. 16 para. 3 of the Brussels II bis Regulation), this complicated legislation game would not arise, and it might not even be necessary to adopt specific provisions to deal with such situations.[25] With reference to the case law of the CJEU, the courts of a Member State would be able to resolve the issue by using the standard methods of private international law.[26]

4 Jurisdiction over matrimonial property regimes in succession

The question of the jurisdiction of a notary dealing with succession to settle winding-up the matrimonial property regime of spouses, seems a little easier. A solution offers the Matrimonial Property Regulation.[27]

Pursuant to Art. 4 of the Matrimonial Property Regulation, a court of a Member State which, under the provisions of Succession Regulation, has jurisdiction over a succession, also has jurisdiction over matrimonial property issues connected with this succession. Thus, a court or other competent authority of an EU Member State deciding

25 As is Art. 16 Brussels II Regulation Recast. The current situation in the regulation of cross-border legal relations is slowly approaching what we call hypertrophy of law. This can hardly help the legal certainty of EU citizens. See Júda V. *Teória práva*. Banská Bystrica: Univerzita Mateja Bela Právnická fakulta, 2011, p. 94.

26 Like preliminary questions, see Bogdan, M. *Private international law as component of the law of the forum: general course*. Hague: Hague Academy of International Law, 2012, p. 291 et seq.; Rozehnalová, N. *Instituty českého mezinárodního práva soukromého*. Praha: Wolters Kluwer, 2016, p. 118 et seq.

27 The Property Consequences of Registered Partnerships Regulation offers a similar solution for the cases where the deceased was living in registered partnership at the time of death.

on the succession from one of the spouses also has jurisdiction over the winding-up of the common property regime of the spouses, allowing it to determine which property of the deceased will be the subject of inheritance.[28]

Unfortunately, the Slovak Republic is not bound by the above mentioned regulation. The Matrimonial Property Regulation was adopted as an instrument of enhanced cooperation[29] in which the Slovak Republic does not participate and its courts do not apply the Regulation.[30] On the other hand the abovementioned regulation is applied by the neighbouring states of the Slovak republic, Czech Republic and Austria, as well as for example Germany, a country that is a frequent destination for Slovaks migrating for work or study.

Probably it will not be easy for a legal layman living in one of these countries to foresee that, although jurisdiction in matrimonial property matters is governed by a European regulation, this regulation will apply selectively and is not applicable in the Slovak Republic, and for instance any choice of court agreement entered into under Art. 7 of the Matrimonial Property Regulation will have no effect there. The fact that the EU regulation is not automatically applicable in the Slovak republic has surprised even some legal practitioners in the Slovak republic who have begun to sharing the new Regulation with each other.

In the absence of the Slovak Republic being bound by the Matrimonial Property Regulation, the jurisdiction of the Slovak court as well as the notary dealing with the succession is governed by national law, Act No. 97/1963 Coll., on Private International Law and Rules of International Procedure ("Slovak PILA").[31] Jurisdiction in matters of matrimonial

28 See Recitals 12 and 13 Succession Regulation.

29 Council Decision (EU) No 2016/954 of 9 June 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships.

30 The legal order of the Slovak Republic does not yet contain the concept of registered partnership. Therefore, as regards the Property Consequences of Registered Partnerships Regulation there is not even the theoretical possibility that the Slovak Republic will join this enhanced cooperation in the foreseeable future.

31 In relations to some neighbouring countries, bilateral treaties, which include the regulation of jurisdiction and applicable law in civil and family matters, would prevail. Among the EU Member States Hungary, Poland, Bulgaria, Romania, Slovenia, Croatia. Among the non-EU countries Ukraine, Belarus, the Russian Federation, Serbia and others.

property relations is not expressly provided for by the Act. In that case, the general jurisdiction clause Section 37 should apply. Pursuant to this provision, the Slovak court has jurisdiction if the defendant is domiciled in the Slovak Republic and, in the case the property rights are involved, if he/she has property there.

The application of Section 37 of the Slovak PILA in matters of matrimonial property regimes is supported by the traditional interpretation of the system of jurisdiction under the Slovak PILA.[32] On the other hand, the provision in question was changed in 2003[33], its current form was inspired mainly by Brussels I Regulation. According to the original wording, the international jurisdiction of the Slovak court has been given if its competence has been given under the rules of Slovak procedural law[34]. Competence over matrimonial property relations belonged to the court that decided on the divorce of the marriage.[35] However, if the marriage ceased to exist as a result of the death of the testator, the law entrusted the authority to settle the common property of the spouses to the authority which dealt with the succession.[36]

By a grammatical interpretation of the currently valid wording of Section 37 of the Slovak PILA, we would conclude that a Slovak notary should have the competence to decide only on the common property of spouses in the Slovak Republic.[37] A notary would therefore not have the power to decide on the property of spouses that is abroad. This may not be sufficient, however, because if a notary does not deal with the entire property of the spouses, he or she will not be able to assess the extent and the amount of the estate.

32 The use of Section 37 in matters of matrimonial property is referred to in older Czech-Slovak and newer Slovak literature: see Kučera, Z., Tichý L. *Zákon o mezinárodním právu soukromém a procesním*. Praha: Panorama, 1989, p. 229; Lysina, P. et al. *Medzinárodné právo súkromné*. Bratislava: C. H. Beck, 2016, p. 346.

33 This provision was amended in 2003 by Act No. 589/2003 Coll. amending Act No. 97/1963 Coll., on private and procedural international law, as amended, and amending certain others acts.

34 Act No. 99/1963 Coll., Code of Civil Procedure. With effect from 1 July 2016, this Act has been replaced by three new acts: Act No. 160/2015 Coll., Civil Contentious Procedure Code, Act No. 161/2015 Coll., Civil non-Contentious Procedure Code and Act No. 162/2015 Coll., Administrative Court Procedure Code.

35 Section 88 para. 1 letter b) Act No. 99/1963 Coll., Code of Civil Procedure.

36 Section 175l Act No. 99/1963 Coll. Code of Civil Procedure.

37 Since property rights are involved – jurisdiction is given if the defendant has assets in Slovak republic (however, sound strange to call a deceased husband a "defendant").

There appears another opinion in the Slovak professional literature. According this there is a loophole in the law. Therefore, in the absence of a specific rule, Section 38 of the Slovak PILA on jurisdiction in divorce and marriage annulment proceedings is applicable.[38] Section 38 of the Slovak PILA confers jurisdiction on the Slovak courts primarily if one of the spouses is a Slovak national. If none of the spouses has Slovak nationality, the jurisdiction of the Slovak courts may be given if at least one of the spouses has stayed in the Slovak Republic for a longer period of time or if at least one of the spouses resides in the Slovak Republic.

If, for example, a Slovak notary deals with the estate of the deceased who was habitually resident in the Slovak Republic (jurisdiction over succession established under Art. 4 of the Succession Regulation), the analogous application of Section 38 of the Slovak PILA would give him the opportunity to establish also jurisdiction over matrimonial property regime based on the deceased's residence in the Slovak Republic. In contrast, Section 37 of the Slovak PILA, the probability of using which is higher, provides only a partial solution in such a situation.

A similar situation would arise if the Slovak notary had jurisdiction based on the choice of court granted by the parties to the succession proceedings within the meaning of Art. 5 of the Succession Regulation. The property of the deceased, in whole or in part, would most likely not to be in the territory of the Slovak Republic. The same applies to jurisdiction on succession based on the rule on subsidiary jurisdiction – Art. 10 para. 1 letter a) Succession Regulation. In the case of jurisdiction over succession based on the provision of Art. 10 para. 1 letter b), neither Section 37 nor Section 38 provides a solution for matrimonial property regime. On the contrary, in the case of jurisdiction based on Art. 10 para. 2 of Succession Regulation, only Section 37 of the Slovak PILA provides a solution.

As is apparent from the foregoing, **neither of the provisions of the Slovak PILA cited above provides a solution for each of the situations which may arise in succession proceedings**. Moreover, the application

38 Gregová-Širicová Ľ. Právomoc na rozhodovanie o vzťahoch medzi manželmi. In: Csach K., Gregová Širicová Ľ., Júdová E. Úvod do štúdia medzinárodného práva súkromného a procesného. Bratislava: Wolters Kluwer, 2018, p. 234.

of Section 38 is less likely, not only because of historical interpretation, but also to the conception of the Slovak PILA, as amended by the 2003 Act. In the explanatory memorandum to the 2003 amendment, the legislator clearly declares that Section 37 should be used as a "general" provision for all contentious matters,[39] with the exception of matters expressly dealt with in the special jurisdiction provisions (where Section 38 belongs).[40]

The suitability of Section 37 or Section 38 for determining the jurisdiction of the Slovak court in succession proceedings, but also outside it, could be the subject of professional discussion in Slovakia in the future. For a Slovak notary acting in the succession case facing the question of determining jurisdiction for the settlement of the common property of the spouses, treat this issue as a preliminary question seems to be the most appropriate way, in cases where Section 37 of the Slovak PILA will not suffice.

It should be taken into account that the real estate of the spouses located in the territory of a country other than the Slovak Republic will have to be discussed abroad one way or another. Decisions of the Slovak court in this matter, whose authority is not supported by the Matrimonial Property Regulation, will not be recognized in most EU Member States.

5 Conclusion

As can be seen, the adoption of uniform rules for all aspects of cross-border succession decision-making does not exclude the possibility that the court (notary) dealing with succession does not encounter fragmentation of legislation (even though we have to admit that the likelihood of such a situation has decreased significantly). We have shown this conclusion above in situations where it is necessary to approve a legal act of a minor in succession proceedings or to determine which assets of common property of the spouses is subject to succession proceedings after the deceased husband.

39 The procedures for the splitting-off the matrimonial property regime are considered in Slovak procedural law as "contentious procedures", unlike, for example, the divorce proceedings, which are classified as "non-contentious".

40 Explanatory memorandum to Section 37 Slovak PILA as amended by the Act No 589/2003 Coll. of laws.

In practice, this is not even possible, at least in our opinion, until unified legislation is adopted for family relationships with a foreign element, for example in the form of a summary of all the rules governing jurisdiction, applicable law and recognition and enforcement of foreign decisions into one regulation.

The existence of different rules of jurisdiction for different types of cross-border legal relations is nothing uncommon. Also in the Slovak PILA, jurisdiction in matters of succession (Sections 44 and 45), jurisdiction in matters of parental responsibility (Section 39) and jurisdiction in matters of matrimonial property relations (general jurisdiction, Section 37) are set up independently. Similarly, other national laws. However, their selection is not preceded by the need to determine the regulation dealing with the question. That is why they were not perceived as so complicated by the courts, but also by the parties to the succession and their lawyers.

However, as has been pointed out, one of the solution could be a more active use of existing methods of private international law as is the preliminary question. This might also be beneficial to the current form of the European Private International Law, which is beginning to be rather casuistic and thus less transparent and accessible to the general user.

Internal coherence of European Private International Law cannot also be achieved while part of the European regulation of cross-border relations is adopted in the form of enhanced cooperation. In this regard, the solution could be the national legislators to inspire themselves through provisions of regulations in which a Member State does not participate, but whose basic principles could serve as a model for the modernization of domestic codes (example of the Slovak Republic).

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Centre of Main Interest (otherwise known as COMI) with Regard to the Existing Case-law of the Court of Justice of the European Union (CJEU)

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Abstract

The centre of main interests is the key concept of Regulation (EU) 2015/8 48 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings. Its significance lies in the fact that this concept constitutes the sole determinant for establishing international jurisdiction for the opening of the main insolvency proceedings. The paper deals with the analysis of the concept of COMI, including the presentation of the case-law of the Court of Justice of the European Union.

Keywords

Centre of main interests; Recast Insolvency Regulation; main insolvency proceedings; Court of Justice of the European Union.

1 Introduction

Every year, an average of 200 000 companies in the European Union ("EU") face insolvency, resulting in approximately 1,7 million people losing their jobs.[1] Many of these companies, depending on the scale of their business, operate in the territory of several countries. The EU itself creates

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1 Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [online]. *Publications Office of the EU*. Published in December 2012 [cit. 4. 8. 2019]. https://publications.europa.eu/en/publication-detail/-/publication/3cf7daf5-f82c-4b24-b14eefd36d814f82/language-en

the conditions for such international business. Therefore, it is natural that the EU also seeks a way to prevent the negative effects of cross-border business, since the insolvency of such companies undermines the proper functioning of the EU's internal market.[2]

The close legal and economic relations and links between Member States in the EU enable the migration of legal and natural persons within the internal market in search for the most favourable legal framework. Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings ("Insolvency Regulation") had created a concept of the debtor's centre of main interests, in an attempt to reduce this legal migration. This concept was subsequently revised in Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (hereinafter referred to as the "Insolvency Regulation Recast"). Centre of main interests – by its very name implies that a debtor might have his interests situated in more than one Member State. The fact that the debtors can take advantage of the different legal systems is seen as a natural consequence of the free movement of goods, persons and capital in the EU, as well as a result of the absence of harmonization of substantive insolvency law in the Member States.

The concept of "centre of main interests" is known in international legal practice as COMI ("COMI"). The term COMI itself was specified by the Insolvency Regulation and it is therefore of an autonomous nature and must be interpreted uniformly. Although, the judicial interpretation of the term COMI has been provided by national courts of the Member States, the Court of Justice of the EU ("CJEU") must ensure that the interpretation of this term is consistent and independent of the legislations of the Member States.

2 According to Ibid. – about one-quarter of these bankruptcies contained the cross-border element and was therefore subject to the Insolvency Regulation.

2 Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings

The creation of the EU's internal market is closely linked to the emergence of cross-border insolvency. The free movement of goods, persons, services and capital within the internal market is ensured in accordance with the provisions of the Treaty on the Functioning of the EU ("TFEU") (Art. 26). These four freedoms create the scope for international business which is also associated with the risk of bankruptcy/insolvency. Since these cases of insolvency often occur in several countries, it is not a surprise that adequate attention has to be paid to the regulation of "cross-border insolvency".

In regards of national legislation on the cross-border insolvency proceedings in Slovakia has great significance *Act No 7/2005 Coll. on Bankruptcy and Restructuring (Slovak Republic)* ("Act on Bankruptcy and Restructuring") – specifically its fifth part called, "Cross-border insolvency proceedings". This part of the Act regulates the insolvency proceedings in relation to the (Member) States of the EU.

According to § 172 of Act on Bankruptcy and Restructuring – In the cross-border insolvency proceeding related to the European Member State or any Contracting state of Agreement on the European Economic Area are applied, in accordance with the principle *lex specialis derogat legi generali*, the provisions of special legislation, whereas the provisions of Act on Bankruptcy and Restructuring are applied in a subsidiary manner (i.e. in cases where *a special legislation* does not provide otherwise or does not regulate the issue at all).

This *special legislation* on cross-border insolvency proceedings is the Insolvency Regulation Recast. In general, when there is the primacy of European law over national law there is no need for a reference of standards in the individual laws of Member States. As stated in Art. 288 (1), (2) of TFEU: "*A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.*" §172 of Act on Bankruptcy and Restructuring was included as a reference standard in this Act on Bankruptcy and Restructuring

only for the purpose of drawing attention to the existence of the Insolvency Regulation.

Insolvency Regulation has a similar legal effect as the national laws.[3] Its legal effects are simultaneously, automatically and uniformly binding in all the national legislations of all the Member States of the EU. Regulation automatically establishes rights and obligations in the Member States from the date of its entry into force. Insolvency Regulation Recast has replaced the original Insolvency Regulation. The adoption of the Insolvency Regulation was the result of a long-standing effort within the EU (or European Communities) to coordinate on-going cross-border insolvency proceedings in the Member States.[4] Recital 3 in the preamble to the Insolvency Regulation stated: "*the activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Community law. While the insolvency of such undertakings also affects the proper functioning of the internal market, there is a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor's assets.*"[5]

Although the Insolvency Regulation had been functioning well in general, it was desirable to improve the application of certain of its provisions in order to enhance the effective administration of cross-border insolvency proceedings. In the interest of clarity, it was recast by the new Insolvency

3 According to Art. I-33 para. 1 Treaty establishing a Constitution for Europe, "a regulation" was even to be called "European law".

4 The unification of European insolvency law first began as early as 1963 with the initiative to adopt the European Convention on Insolvency Proceedings. However, Convention did not come into force as a result of the UK's refusal to sign it up seeking to lift the European Communities' embargo on English meat issued on grounds of the mad cow disease. See Carballo, L. 'Brexit' and International Insolvency Beyond the Realm of Mutual Trust: Brexit and International Insolvency. *International Insolvency Review*. 2017, Vol. 26, No. 3, p. 271.

5 Insolvency Regulation and Insolvency Regulation Recast did not harmonise insolvency laws used for national insolvency cases. Regulation applies whenever the debtor has assets or creditors in more than one Member State, irrespective of whether he is a natural or legal person. The Regulation determines which court has jurisdiction to open insolvency proceedings and ensures the recognition and enforcement of the ensuing decision throughout the Union. This Regulation include provisions governing jurisdiction for opening insolvency proceedings and actions which are directly derived from insolvency proceedings and are closely linked with them. This Regulation also contain provisions regarding the recognition and enforcement of judgments issued in such proceedings, and provisions regarding the law applicable to insolvency proceedings.

Regulation.[6] Insolvency Regulation Recast reinforces and extends scope of the recognition and enforcement of judgments and cooperation, established by the original Insolvency Regulation. One of the main aims of the Insolvency Regulation Recast is to improve the efficiency and effectiveness of insolvency proceedings having cross-border effects through coordination of national legislation.[7]

In order to achieve this aim, certain of the Insolvency Regulation's provisions have been amended several times, including the amendment of the COMI concept (Centre of main interests of a debtor). COMI is a central concept of the Insolvency Regulation. It is the sole determinant for establishing international jurisdiction for the opening of the main insolvency proceedings.

3 COMI as a tool to prevent "insolvency forum shopping"

Since substantive Insolvency law is not unified in the EU and the Insolvency Regulation Recast enables the Member States to freely regulate its national legislation on insolvency proceedings a debtor is often tempted to misuse differences in the national legislation in order to achieve the most favourable legal position. In accordance with recital 5 in the preamble to the Insolvency Regulation, it is necessary for the proper functioning of the internal market to avoid incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position to the detriment of the general body of creditors. However, the need thus defined cannot be sufficiently achieved at national level, and applicable law in this area is therefore contained in a Union measure.

The fraudulent or abusive tactics of a debtor in the selection between the courts is being referred to as so-called "forum shopping"[8] in Insolvency

6 Communication from the commission to the European parliament, the Council and the European economic and social Committee, A new European approach to business failure and insolvency [online]. *EUR-Lex*. Published on 12 December 2012 [cit. 4. 8. 2019]. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0742&from=EN

7 Recital 9 Insolvency Regulation Recast.

8 This term was first used in the case-law in the year 1951. See *CoveyGas Oil Co. v. Checketts*, U.S. Court of Appeals for the Ninth Circuit of 26 February 1951 187 F.2d 561 (C.A. 9th Cir. 1951).

Regulation Recast. "Forum shopping" describes the situation where a debtor engages in regulatory arbitrage by modifying certain criteria that allow them to benefit from a different, more favourable insolvency law or jurisdiction.[9] In simpler terms it can be interpreted as a search for the most favourable legal position. Some countries' insolvency laws are more "debtor-friendly" than others, which can motivate the debtors to choose the jurisdiction of such a state.[10] However, "Forum shopping" is generally a legal and legitimate procedural strategy, unless it is subject to specific restrictions under applicable law.

Such a restriction is represented by the COMI concept, which was built in the Insolvency Regulation Recast. A major reform adopted in 2015 has the specific objective of further restricting abusive versions of forum shopping, in particular by introducing a "suspension period" for forum shopping activities carried out shortly before the filing for insolvency/commencement of insolvency proceedings.

Insolvency Regulation Recast distinguishes between two types of proceedings: main insolvency proceedings (main proceedings) and territorial or secondary proceedings. Such a model is based on the principle of controlled universality[11], as the ideal model based on the principle of universality is almost inapplicable.[12] If an insolvency proceeding is opened in the country where a company has its COMI, those insolvency proceedings will be classified as "main" proceedings. On the occasion that the insolvency proceeding is opened elsewhere (for which purpose an "establishment" in that country is required), the insolvency proceedings will be classified as "territorial"

9 Ringe, W. Insolvency Forum Shopping, Revisited. *In Hamburg Law Review*, 2017, p. 38.

10 The evaluation study revealed cases of evident abusive (temporary) relocation of COMI of individuals for the sole purpose to obtain discharge of residual debts. Especially German and Irish debtors tried to take advantage of the discharge opportunities of English law which provides for a debt release within only one year. See Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [online]. *Publications Office of the EU*. Published in December 2012 [cit. 4. 8. 2019]. https://publications.europa.eu/en/publication-detail/-/publication/3cf7daf5-f82c-4b24-b14e-efd36d814f82/language-en

11 Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Art. 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.

12 See Ďurica, M. *Insolvency Law in the Slovak Republic and in the European Union*. Bratislava: EUROKÓDEX, 2012, p. 695.

or "secondary" proceedings. Secondary proceedings can coexist with main proceedings, and is indeed a key aspect of the Insolvency Regulation Recast is the way in which it governs how main proceedings and secondary proceedings operate in conjunction with one another.[13]

COMI is an independent, transnational concept of European law which is not based on national legislation. Specification of the debtor's centre of main interest constitutes an essential aspect for international insolvency proceedings. This concept predetermines the jurisdiction of the court and, consequently, the applicable law in the proceedings, thus restricting forum shopping. Since the national insolvency law differs in the Member States, the determination of COMI can have a major impact on both – the conduct and the outcome of insolvency proceedings.

Art. 7 of the Insolvency Regulation Recast sets out the basic rule for the law applicable to insolvency proceedings. This law then governs all the conditions for the opening, conduct and closure of the insolvency proceedings. According to Art. 7 the law of the Member State of the opening of insolvency proceedings (*lex concursus*) determines all the effects of those proceedings, unless the Insolvency Regulation Recast provides otherwise.[14] The concept of COMI is based on Art. 3 (1) of Insolvency Regulation Recasts, which states: "*The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings'). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.*"[15] This is relevant given that some Member

13 Understanding "Centre of Main Interests" Where Are We? [online]. *Jones Day*. Published in September/October 2017 [cit. 1. 8. 2019]. https://www.jonesday.com/Understanding-Centre-of-Main-Interests-Where-Are-We/

14 The European Insolvency Regulation Recast: a brief summary [online]. *NautaDutilh*. Published on 28 June 2017 [cit. 1. 8. 2019]. https://www.nautadutilh.com/en/information-centre/news/the-european-insolvency-regulation-recast-a-brief-summary

15 To the original draft of the European Convention on Insolvency Proceedings was annexed the report of *Professors Miguel Virgos* and *Etienne Schmit* ("Virgós-Schmit Report") [online]. *Archive of European Integration, University of Pittsburg*. Published on 3 May 1996 [cit. 1. 8. 2019]. http://aei.pitt.edu/952/1/insolvency_report_schmidt_1988.pdf; This Virgós-Schmit Report is considered to be one of the main sources of Insolvency Regulation. Point 75 of the Report stated: "*The concept of 'centre of main interests' must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore as certainable by third parties.*"

States' courts have interpreted COMI as being at the place where the most important decisions concerning the debtor were taken.[16] The original wording of Art. 3 (1) of the Insolvency Regulation read as follows: "*The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.*" COMI has been partially clarified in recital 13 in the preamble to this Insolvency Regulation, which stated: the COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

The definition of COMI is not overly helpful, and there has been much controversy over its precise scope.[17] For this reason, the concept of COMI is also specified in the case-law of the CJEU. We will focus on the case-law of the CJEU in more detail in the following section of this paper.

4 COMI in the existing case-law of the Court of Justice of the European Union

Since Regulation as a source of EU *law creates rights and obligations for all natural and legal persons of the EU*, it must be uniformly applied in all the Member States and have, as far as possible, the same effect throughout its whole territory.[18] As have been already mentioned above, the revised concept of COMI in Insolvency Regulation Recast has been amended in line with the case-law of the CJEU. The case-law of CJEU addressed COMI issues when it has clarified the role played by the courts in determining the debtor's centre of main interests.

The CJEU in its existing case-law emphasizes that the concept of the centre of main interests under EU law has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national

16 See Judgment of High Court of Justice Leeds of 16 May 2003, Case nr. 861-867/03.
17 Ringe, W. Insolvency Forum Shopping, Revisited. *Hamburg Law Review.* 2017, p. 38.
18 Judgment of *Federal Republic of Germany v Commission of the European Communities* of 14 January 1981, Case no. 819/79, para. 10.

legislation.[19] This means that the same definition applies throughout the EU. If the question of COMI appears before the courts of the Slovak Republic, it's important for these courts to be aware of the procedures and judgments of other courts, so they can contribute to the harmonization of European Insolvency law.

Law of the EU exists and is being carried out at two levels – at level of the EU and at national level, therefore both the CJEU and national courts of the Member States monitor compliance with EU law.[20]

National courts of EU countries are required to ensure EU law is properly applied, but courts in different countries might interpret it differently. If a national court is in doubt about the interpretation or validity of an EU law, it can ask the CJEU for clarification. It's therefore the CJEU that ensures and facilitates the smooth application of the Insolvency Regulation Recast, thus ensuring that this Insolvency Regulation Recast would become a functional instrument of European Insolvency law.

Regarding the clarification of COMI is the most significant (and the most cited) Judgment of the CJEU (Grand Chamber) of 2 May 2006 (*Eurofood IFSC Ltd.*) Case C-341/04, in which the CJEU has ruled that: "*Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3 (1) of Regulation No 1346/2000 on Insolvency Proceedings,*[21] *whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its*

19 Judgment of the Court of Justice (Grand Chamber) of 2 May 2006, Case C-341/04, para. 31.

20 Siman, M., Slašťan, M. *Law of the European Union*. Bratislava: EUROIURIS – európske právne centrum, 2012, p. 188.

21 Art. 3 para. 1 Insolvency Regulation Recast has expanded COMI presumption as follows: "*In the case of an individual exercising an independent business or professional activity, the centre of main interests shall be presumed to be that individual's principal place of business in the absence of proof to the contrary.*".

registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the regulation." This ruling resulted from the referral by the Supreme Court of Ireland of five questions of EU law, based on the EU Insolvency Regulation. One of these questions read as follows:

Where,

a) the registered offices of a parent company and its subsidiary are in two different Member States,

b) the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the Member State where its registered office is situated and

c) the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control and does in fact control the policy of the subsidiary, in determining the "centre of main interests", are the governing factors those referred to at (b) above or on the other hand those referred to at (c) above?

CJEU in the ruling highlighted recital 13 in the preamble to the Insolvency Regulation (currently it's part of Art. 3 (1) of Insolvency Regulation Recast), which states that the COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.[22]

Also, worth mentioning is Judgment of the Court of 15 December 2011, C-191/10 *Rastelli Davide e C. Snc v Jean-Charles Hidoux*. The national court decided to stay the proceedings and to refer the judiciary questions to the CJEU for a preliminary ruling. By its first question, the national court is essentially asking whether the Insolvency Regulation is to be interpreted as meaning that a court of a Member State that has opened main insolvency proceedings against a company. On the view that the centre of the debtor's main interests is situated in the territory of that Member State, can, under a rule of its national law, join to those proceedings a second company

22 Judgment of the Court of Justice (Grand Chamber) of 2 May 2006, Case C-341/04, para. 33.

whose registered office is in another Member State solely on the basis that the property of the two companies has been intermixed.

As the answer to this question the CJEU ruled that Insolvency Regulation (specifically its Art. 3 (1) (2)) is to be interpreted as meaning that: "*a court of a Member State that has opened main insolvency proceedings against a company, on the view that the centre of the debtor's main interests is situated in the territory of that Member State, can, under a rule of its national law, join to those proceedings a second company whose registered office is in another Member State only if it is established that the centre of that second company's main interests is situated in the first Member State.*"

The reverse procedure would mean circumventing the system established by the Insolvency Regulation. The CJEU has already ruled in the above-mentioned case *Eurofood IFSC Ltd.* that in the system established by the Insolvency Regulation for determining the competence of the courts of the Member States. Each debtor constituting a distinct legal entity is subject to its own court jurisdiction.[23]

Even though the next Judgment of the CJEU we mention in this paper is not directly linked to Insolvency Regulation Recast or its concept of COMI but considering the nature of the question asked in the preliminary ruling it is closed related to them. In Case C-461/11 of 6 November 2012, the CJEU referred a question for a preliminary ruling, concerning the interpretation of Art. 45 of the TFEU.[24] The reference has been made in proceedings between *Mr Radziejewski*, a Swedish national who has resided and worked in Belgium since 2001, and the Kronofogdemyndigheten in Stockholm (Enforcement Service, Stockholm; "the KFM") concerning an application for the grant of debt relief.

Between 1971 and 1996, with his wife, *Mr Radziejewski* ran a treatment centre in Sweden. In 1996 the treatment centre became the subject of bankruptcy proceedings, resulting in the *Radziejewskis'* insolvency. Since 1997 they have been subject to an earnings attachment order administered by the KFM. In 2011, *Mr Radziejewski* applied to the KFM for debt relief. That application was rejected by decision of 29 June 2011 on the ground that one of the conditions for the grant of such a measure was that the debtor had to be resident

23 Ibid., para. 30.

24 Art. 45 (1) TFEU: "*Freedom of movement for workers shall be secured within the Union.*".

in Sweden. The KFM did not examine whether *Mr Radziejewski* satisfied the other statutory conditions for debt relief eligibility. *Mr Radziejewski* appealed to the Stockholms tingsrätt (Stockholm District Court) against that rejection decision, arguing, inter alia, that the Swedish law is contrary to the freedom of movement for workers in the EU. He requested the Stockholms tingsrätt to refer the case back to the KFM and to instruct it to open a debt relief procedure. According to Stockholms tingsrätt, the debit relief procedure does not fall within the scope of Insolvency Regulation. Consequently, a measure adopted by a Swedish authority pursuant to that procedure cannot, in principle, be executed outside the Kingdom of Sweden. The Stockholms tingsrätt explains that debt relief can be granted only if the debtor resides in Sweden, although there is no Swedish nationality requirement. A person who has emigrated and resides abroad is not therefore eligible for debt relief in Sweden, even if there is a strong connection with that Member State because the debts arose in Sweden and the employer of that person is Swedish. The Stockholms tingsrätt decided to stay the proceedings and to refer the following question to the CJEU for a preliminary ruling: "*Can the requirement for residence in Sweden in Paragraph 4 of the [Law on debt relief] be regarded as being liable to prevent or deter a worker from leaving Sweden to exercise his right to freedom of movement and thus be regarded as running counter to the principle of the freedom of movement for workers within the Union provided for in Article 45 TFEU?*"[25]

At the hearing, the Swedish Government claimed that the condition of residence provided for under the legislation in question is necessary in order to ensure the effective application of Insolvency Regulation. However, The CJEU ruled (referring to Case C-341/04 Eurofood IFSC Ltd. of 2 May 2006, para. 46) that the Swedish debt relief procedure does not entail the divestment of the debtor, with the result that it cannot be classified as an insolvency procedure within the meaning of Art. 1 of Insolvency Regulation. In the light of the foregoing, the answer to the question referred is that Art. 45 TFEU must be interpreted as precluding national legislation,

25 Judgment of the Court of Justice (Third Chamber), 8 November 2012, Case C461/11, para. 22.

such as that at issue in the main proceedings, which makes the grant of debt relief subject to a condition of residence in the Member State concerned.

Finally, we cannot overlook one more Judgment of the CJEU. Although it does not concern directly the interpretation of COMI, it is one of the most cited in this subject of matter. It's Judgment of the Court (Grand Chamber) of 17 January 2006 in Case C-1/04 (*Staubitz-Schreiber*). The importance of this case is that the CJEU defined the moment of location of the COMI which is an essential fact determining the jurisdiction and the law applicable to the insolvency proceedings. A decisive moment of the location of the COMI is the time when the debtor lodges the request to open insolvency proceedings. This means that the transfer of COMI to the territory of another Member State after the request to open insolvency proceedings was already lodged (even if it was done before the opening of the proceedings) wouldn't have any relevance. One of the arguments put forward by CJEU was, that: "*Retaining the jurisdiction of the first court seized ensures greater judicial certainty for creditors who have assessed the risks to be assumed in the event of the debtor's insolvency with regard to the place where the centre of his main interests was situated when they entered into a legal relationship with him*"[26]

In addition to the CJEU, the interpretation of the term COMI is also provided by the national courts. While individual cases must be always considered separately in the light of the specific circumstances of the case, the interpretation of the term COMI should maintain a certain unity from a Union perspective. It can be stated that COMI is not a purely formal category (unlike, "the registered office"). COMI is a concept that represents a real bond between the debtor and the forum before which insolvency proceedings are to be held.

5 Conclusion

A codification of the method of determination of COMI is undoubtedly an important step for European Insolvency law. However, it can be assumed that as long as will exist the different substantive Insolvency

26 Judgment of the Court of Justice (Grand Chamber) of 17 January 2006, Case C-1/04, para. 27.

laws in the Member States of the EU, debtors' incentives to try to transfer their centre of main interests to other countries will remain as well. They will try to achieve a more favorable legal position and better outcome of the proceedings, while harming creditors and mislead third parties and state authorities.

Despite some initial doubts about its effectiveness, Insolvency Regulation has proven to be an effective tool in addressing cross-border insolvencies within the EU, even though the interpretation of the term COMI was uncertain in practice when this Insolvency Regulation came into force. This allowed for a relatively wide range of COMI interpretations, so a judge was (and still is) the main body in this case to determine the centre of the debtor's main interest in a particular case.[27]

The CJEU has played an active role in ensuring the effectiveness of the Insolvency Regulation, particularly by clarifying many of its concepts, including COMI. Insolvency Regulation Recast revised the COMI concept in line with the CJEU previous case-law on related issues. At present, the uncertainties associated with the definition of COMI are also successfully addressed in the decision-making activities of the national courts of the Member States. Nevertheless, the unity of statutory seat and COMI represents the legally most certain situation. In such a case the application of only one legal order is possible – *lex fori concursus* – i.e. the national law of COMI, as the applicable law. Therefore, it is strongly recommended that taking into account legal certainty and predictability, COMI and the statutory seat shouldn't be divided in the course of the business activity.

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Mutual Trust as a Way to an Unconditional Automatic Recognition of Foreign Judgments

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Abstract

The article covers a topic of an unconditional automatic recognition of foreign judgments within the European Union. Thus far, a different method in case of foreign judgments has been used. Certain regulations of the EU require exequatur and contain grounds for refusal of recognition and in certain regulations both the exequatur and grounds for refusal of recognition have been abolished. First, the paper deals with the principle of mutual trust (what mutual trust is and in what to trust). Subsequently, the article points out the differences between the principle of mutual trust and the principle of mutual recognition. Finally, it discusses the notion of automatic recognition in the context of free movement of judgments within the EU.

Keywords

Mutual Trust; Mutual Recognition; Automatic Recognition; Foreign Judgment; Refusal of Recognition; Public Policy; European Union.

1 Introduction

For illustrative purposes, imagine a house with a roof and rooms with doors. The roof represents the European Union ("EU") and its legislative acts concerning the recognition and enforcement of foreign judgments. Rooms act as EU Member States that are legally obliged to respect and implement the legislative acts, the principle of mutual recognition of judgments included. Doors can be either wide open or half-open, or even completely closed. The same applies to mutual recognition of decisions within the EU.

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It depends on whether regulations of the EU require an exequatur and contain grounds for refusal of recognition (and enforcement). If that is the case, doors are closed until the declaration that a judgment is enforceable has been made. However, they can stay closed in case there is a reason for a recognition refusal. This is the strictest form of treatment of a foreign decision among Member States. Less strict are regulations dealing with areas where the exequatur has been abolished but the grounds for refusal of recognition remain. I liken this situation to a half-open door. Finally, the most responsive are regulations where both the exequatur and grounds for refusal of recognition have been abolished. The door is wide open. The last model constitutes an altogether free movement of judgments.[1]

Generally, in the private international law, there are two theoretical concepts related to the issue of recognition and enforcement of judgments – the concept of territoriality and the concept of universality. The former is closely linked with sovereignty of each country, the latter denies such sovereignty and is based on the existence of generally applicable legal rules that are superior to individual states.[2] Nowadays, the concept of territoriality prevails.[3] It means that a foreign judgment has its effects exclusively in a territory of the country of origin and it depends on the individual states (addressed states) how they may treat such foreign decision.[4] Said treatment of a foreign judgment can take three forms – transformation, registration and exequatur.[5] As I described above, the treatment of a foreign decision is much more accommodating among Member States of the EU because the exequatur represents the strictest form.

1 Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial.* The Hague: T. M. C. Asser Press, 2017, p. 57.

2 Steiner, V. Některé teoretické koncepce řešení otázky uznání a výkonu cizího rozhodnutí. *Časopis pro mezinárodní právo.* 1970, p. 241.

3 Valdhans, J. Uznání a výkon cizích rozhodnutí. In: Rozehnalová, N., Drličková, K., Kyselovská T., Valdhans, J. *Úvod do mezinárodního práva soukromého.* Praha: Wolters Kluwer ČR, 2017, p. 268.

4 Heyer, J. Výkon cizozemských rozsudků. *Zprávy advokacie.* 1963, p. 112. Transformation is a method during which a new domestic judgment based on a foreign one is issued. Registration requires a foreign judgment to be registered with a domestic court. Exequatur means a declaration of enforceability in the State of enforcement.

5 Ibid.

However, what is the basis of this treatment of a judgment given by a court of a Member State in another Member State? Is it nowadays essential to recognize foreign decisions or does it suffice to only enforce them? In other words, should be the recognition unconditional? Does it mean that there should be a prevalent concept of universality among the Member States? And lastly, is there a distinction between domestic and foreign decisions of courts?[6]

To answer these questions, first, the following article deals with the principle of mutual trust. I shall answer questions what mutual trust is and in what to trust. Subsequently, I will point out the differences between the principle of mutual trust and the principle of mutual recognition. Finally, I shall discuss the notion of automatic recognition in the context of free movement of judgments within the EU.

2 What is mutual trust? And what to trust in?

Both questions are rather difficult to answer. First, there is no widely accepted definition of mutual trust in the context of the EU law,[7] particularly in civil matters.[8] Second, it cannot be simply stated whether mutual trust is a legal or a political concept. Both approaches are feasible. Arenas García defines mutual trust on the one hand as a legal obligation, on the other hand as a fact. The former means that all authorities of a Member

6 In the past, especially in the first half of the 13th century, there was no such distinction between domestic and foreign decisions. It was a consequence of the concept of universality. Judgments of judicial authorities were derived from the power of the emperor and the Pope. Such judgments had a universal effect in other states. See Steiner, V. Některé teoretické koncepce řešení otázky uznání a výkonu cizího rozhodnutí. *Časopis pro mezinárodní právo*. 1970, p. 240; Valdhans, J. Uznání a výkon cizích rozhodnutí. In: Rozehnalová, N., Drličková, K., Kyselovská T., Valdhans, J. *Úvod do mezinárodního práva soukromého*. Praha: Wolters Kluwer ČR, 2017, p. 267.

7 Kramer, X. Cross-Border Enforcement in the EU: Mutual Trust versus Fair Trial: Towards Principles of European Civil Procedure. *International Journal of Procedural Law*. 2011, Vol. 1, No. 2, p. 218; Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, p. 41.

8 Kramer, X. Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights. *Netherlands International Law Review*. 2013, p. 364.

State trust the authorities of another Member State. The latter refers to the issue of whether Member States genuinely trust each other.[9]

At a general level, to trust someone entails a policy decision by a state in which a judgment's recognition is invoked, not out of comity among states but due to the individual´s right to access to justice.[10] In the case of regional integration, the EU level included, the trust goes even further.[11]

An interesting question is "what to trust in". Mutual trust in the administration of justice in the EU could be seen as the answer because this wording is explicitly mentioned in the recitals of some EU regulations (however, not in all)[12] and in the case law of the Court of Justice of the European Union ("CJEU") that reproduces this wording as well.[13] This answer seems common. The CJEU defined this vague term in some cases, for instance, as a trust in legal systems and judicial institutions.[14] In another case (concerning the Brussels II bis Regulation[15]), the CJEU ruling stated that it is mutual

9 Arenas García, R. Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgments: Too Many Words in the Sea. In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2010*. Vol. XII. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2011, p. 372.

10 Weller, M. Mutual trust: in search of the future of European Union private international law. *Journal of Private International Law*. 2015, Vol. 11, No. 1, p. 70.

11 Ibid. For more information on Recognition and Enforcement of Sister-State judgments see Mehren, A. T. von. Recognition and Enforcement of Foreign Judgements – General Theory and the Role of Jurisdictional Requirements. In: *Recueil des courses 1980*. Vol. 167. Alphen aan den Rijn: Sijthoff & Noordhoff, 1981, p. 90 et seq.

12 Recital 26 Preamble to the 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 ("Brussels I bis Regulation"); Recital 27 Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure ("European Payment Order Regulation"); Recital 18 Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European enforcement order for uncontested claims ("European Enforcement Order Regulation"). Other regulations, which contain the principle of mutual trust in their recitals, do not embody trust in the administration of justice.

13 See for example Judgment of the Court of Justice (Grand Chamber) of 4 May 2010, Case C-533/08, para. 54; Judgment of the Court of Justice (Third Chamber) of 15 November 2012, Case C-456/11, para. 36 and many others.

14 Judgment of the Court of Justice (First Chamber) of 16 July 2015, Case C-681/13, para. 63.

15 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

trust in national legal systems that are able to provide "*an equivalent and effective protection of fundamental rights, recognised at European Union level, in particular, in the Charter of Fundamental Rights.*" [16] The most debated topic remains the relationship between mutual trust and the protection of fundamental rights.[17] Member States should trust that fundamental rights are adequately protected throughout the EU.[18] However, the respect for fundamental rights has not gone unchallenged.[19] The CJEU had to assess the protection of fundamental rights in the EU system based on mutual trust. That is not only the issue of civil law, but also of criminal and asylum law.[20] Mutual recognition which is based on mutual trust, as I will discuss below, cannot breach fundamental rights.[21] Similarly, Weller emphasizes, besides other things, fundamental rights and the values on which the EU was founded as areas built on mutual trust.[22]

The question that could arise is if it is trust in justice or in legislation. It seems, according to the above-mentioned practice of the CJEU, trust in justice is the issue. Available literature comes to a similar conclusion – Member States should trust in legal systems of other Member States and their courts, especially in courts in the application of EU law, not in the application of national law.[23] As Dickinson states (concerning the Brussels I bis

16 Judgment of the Court of Justice (First Chamber) of 22 December 2010, Case C-491/10 PPU, para. 70.

17 Prechal, S. Mutual Trust Before the Court of Justice of the European Union. *European Papers*. 2017, No. 1, p. 81.

18 Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, p. 235.

19 Mitsilegas, V. The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual. *Yearbook of European Law*. 2012, Vol. 31, No. 1, p. 371.

20 Ibid., pp. 35–36 et seq. and the case-law cited therein.

21 Kramer, X. Cross-Border Enforcement in the EU: Mutual Trust versus Fair Trial: Towards Principles of European Civil Procedure. *International Journal of Procedural Law*. 2011, Vol. 1, No. 2, p. 221.

22 Weller, M. Mutual trust: in search of the future of European Union private international law. *Journal of Private International Law*. 2015, Vol. 11, No. 1, p. 74.

23 Dickinson, A. Free Movement of Judgments in the EU: Knock Down the Walls but Mind the Ceiling. In: Lein, E. (ed.). *The Brussels I Review Proposal Uncovered*. London: The British Institute of International and Comparative Law, 2012, pp. 141–142; Kramer, X. Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights. *Netherlands International Law Review*. 2013, pp. 364–365.

Regulation), mutual trust would prevent "*any review of the jurisdiction of the court of origin*" and it would preclude "*any challenge to the judgment based on a failure by the court of origin to apply EU law correctly.*"[24] Nevertheless, mutual trust cannot preclude review on grounds unrelated to EU law (public policy of the addressed Member State).[25] Thus, it is trust in justice, particularly in the national courts that they apply law properly. Mutual trust will reach a higher level than it is if more cases with cross-border elements are decided by unified or harmonised EU law rules.

Perhaps, it might be said that trust in legislation is a prerequisite or an initial stage of trust in justice. The courts of Member States apply rules determined by legislators. There is a shared competence between the EU and the Member States in an area of freedom, security and justice.[26] It means that both the Union and the Member States may legislate and adopt legally binding acts in this area.[27] The European Parliament and the Council adopt regulations, directives and decisions for developing judicial cooperation in civil matters for ensuring the mutual recognition and enforcement of judgments and decisions in extrajudicial cases among the Member States.[28] As a result, we can distinguish between trust in legislation and trust in justice (that applies legislation).

Another question is what the legal effect of mutual trust is. The principle of mutual trust has no legal effect on its own. The principle is applied in relation with provisions of the EU secondary law. It serves as an interpretation of provisions or as a contextual argument for interpretation.[29] The principle of mutual trust is explicitly mentioned in some recitals of the regulations of the European Parliament and of the Council. In the normative part of the regulations (enacting terms), there is not used this principle. Moreover, the principle is not mentioned in all EU regulations that are most relevant to the private international law (its procedural part). See the table below.

24 Dickinson, A. Free Movement of Judgments in the EU: Knock Down the Walls but Mind the Ceiling. In: Lein, E. (ed.). *The Brussels I Review Proposal Uncovered.* London: The British Institute of International and Comparative Law, 2012, pp. 141–142.

25 Ibid., p. 142. More about public policy – see Chapter 4.3.

26 Art. 4 para. 2 letter j) Treaty on the Functioning of the European Union ("TFEU").

27 Art. 2 para. 2 TFEU.

28 Art. 81 para. 1 and 2 TFEU, Art. 289 TFEU.

29 Prechal, S. Mutual Trust Before the Court of Justice of the European Union. *European Papers.* 2017, No. 1, p. 79.

Regulation	Does it contain the principle of mutual trust?
Brussels I bis Regulation	Yes, Recital 26
Brussels II bis Regulation	Yes, Recital 21
European Payment Order Regulation	Yes, Recital 27
European Enforcement Order Regulation	Yes, Recital 18
Small Claims Procedure Regulation	No
Insolvency Regulation Recast	Yes, Recital 65
Maintenance Regulation	No
Matrimonial Property Regulation	No
Property Consequences of Registered Partnerships Regulation	No
Succession Regulation	No

But is it the basis for all EU regulations, or only for regulations in which mutual trust is embodied? Does it mean that mutual trust is the principle just for certain regulations? I will answer these questions in the following chapter (Chapter 3) where I argue why this is not the case.

Finally, the purpose of mutual trust remains to be discussed. If the recitals are perceived as interpretative tools that can be useful in explaining the purpose and intent of the regulations,[30] the principle of mutual trust also has this function. Another function, in my opinion more abstract, is that mutual trust allows for the creation and sustainability of an area without internal borders.[31] Mutual trust (or the level of confidence) is the basis for the area of freedom, security and justice.[32] The goal of that area is to achieve mutual trust on such a level that Member States will accept foreign judgments more willingly.[33]

30 Baratta, R. Complexity of EU law in the domestic implementing process [online]. *19th Quality of Legislation Seminar. 'EU Legislative Drafting: Views from those applying EU law in the Member States'.* Brussels, 3 July 2014 [cit. 20. 10. 2019]. https://ec.europa.eu/dgs/legal_service/seminars/20140703_baratta_speech.pdf

31 Judgment of the Court of Justice (Grand Chamber) of 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, para. 78; repeated Judgment of the Court of Justice (Second Chamber) of 9 March 2017, Case C-551/15, para. 51.

32 Judgment of the Court of Justice (Second Chamber) of 9 March 2017, Case C-551/15, para. 53.

33 Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial.* The Hague: T. M. C. Asser Press, 2017, p. 393.

I would like to emphasize that the paper is about mutual trust within the EU. The paper does not deal with the non-EU countries. The level of mutual trust is lower in relation to third countries (due to non-existence of harmonised or unified procedural rules). The so-called double-exequatur (when a Member State recognizes a judgment of a non-Member State and other Member States recognize that judgment accordingly as said Member State) is not accepted. As Kegel aptly expresses – we trust friends, but not necessarily friends of friends.[34]

In the following chapter, I will discuss the relation between mutual trust and mutual recognition and why the principle of mutual trust is embedded in all EU regulations in the table, despite not being explicitly mentioned.

3 Mutual trust and mutual recognition

Mutual trust is considered a basic principle that is linked with the principle of mutual recognition. Nowadays, we can say that mutual recognition presupposes mutual trust[35], or even that mutual recognition means the practical application of mutual trust.[36] García (refers to Gardeñes Santiago) points out that mutual trust is a factual and political reason for the implementation of mutual recognition.[37] Weller perceives mutual trust differently, as a result of mutual recognition rather than a justification of mutual recognition.[38] In my view, it can be true from the view of the development of the European integration as well.

34 Kegel, G. Exequatur sur exequatur ne vaut. In: Dieckman, A. et al. (eds.). *Festschrift für Wolfram Müller-Freienfels*. 1986, p. 392. Cit. according to: Franzino, P. L'universalisation partielle du régime européen de la compétence en matière civile et commerciale dans le règlement Bruxelles I bis: une mise en perspective. In: Guinchard, E. (ed.). *Le nouveau règlement Bruxelles I bis*. Bruxelles: Bruylant, 2014.

35 Storskrubb, E. Mutual Trust and the Limits of Abolishing Exequatur in Civil Justice. In: Brouwer, E., Gerard, D. (eds.). *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law. EUI Working Paper MWP 2016/13*. San Domenico di Fiesiole: European University Institute, 2016, p. 16.

36 Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, p. 41.

37 Arenas García, R. Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgements: Too Many Words in the Sea. In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2010*. Vol. XII. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2011, p. 361.

38 Weller, M. Mutual trust: in search of the future of European Union private international law. *Journal of Private International Law*. 2015, Vol. 11, No. 1, pp. 74–75.

While mutual trust has been considered since the turn of the millennium, mutual recognition as an important part of private international law can be found in the Treaty establishing the European Economic Community ("TEEC"), signed in 1957, in the Art. 220. The aim of the article was "*the simplification of the formalities governing the reciprocal recognition and execution of judicial decisions and of arbitral awards.*"[39] The first regulation governing the reciprocal recognition among Member States was the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters ("Brussels Convention").[40] The rules for judgment enforcement and recognition had been of a convention nature until the Treaty of Amsterdam was adopted[41] (signed in 1997). The Treaty of Amsterdam established an area of freedom, security and justice and regulated mutual recognition in the Art. 65.[42] The EU was given jurisdiction to adopt regulations and directives in civil matters. This was the moment when the European private international law changed over from treaty law to unilateral universalism because conventions were transformed to regulations and the new regulations in various areas were adopted.[43]

The meeting in Tampere regarding the creation of the area of freedom, security and justice took place in 1999. The European Council endorsed the principle of mutual recognition there. They proposed a further reduction of the intermediate measures in the process of the recognition and enforcement of judgments in civil matters. They also suggested an abolishment of intermediate measures in the area of small consumer or commercial claims and of certain judgments in family law. Last but not least, they

39 Art. 220 TEEC, later as Art. 293 Treaty establishing the European Community ("TEC").

40 See Brussels Convention.

41 Fallon, M., Kruger, T. The Spatial Scope of the EU´s Rules on Jurisdiction and Enforcement of Judgments: From Bilateral Modus to Unilateral Universality? In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2012/2013*. Vol. XIV. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2013, p. 4.

42 Art. 65 TEC ("*improving and simplifying the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases*").

43 Fallon, M., Kruger, T. The Spatial Scope of the EU´s Rules on Jurisdiction and Enforcement of Judgments: From Bilateral Modus to Unilateral Universality? In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2012/2013*. Vol. XIV. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2013, p. 16.

proposed an automatic recognition of judgments. It means that recognition of judgments does not require any intermediate proceedings and the grounds for refusal of enforcement does not exist. However, the minimum standards of civil procedural law must be set.[44] Since the Tampere European Council, the principle of mutual recognition has been regarded the main principle of judicial cooperation and of the area of freedom, security and justice,[45] or it has been viewed as a nuclear argument for the abolition of intermediate measures.[46] Although the principle of mutual trust was not explicitly mentioned in the Presidency Conclusions of the Tampere European Council, it was apparent that it was to play a significant role.

Confidence-building and mutual trust were underlined in The Hague Programme 2004 (the multiannual programme for years 2005–2009). The Council emphasized that both the strengthening of mutual trust and the founding of mutual confidence on access to a judicial system meet high standards of quality. It required an improved mutual understanding between judicial authorities and legal systems.[47]

The Stockholm Programme 2010 (the multiannual programme for years 2010–2014) referred to The Hague Programme 2004, as far as mutual trust was concerned. It laid on the need for the continuation of trust enhancement in legal systems, put emphasis on the horizontal importance of e-Justice, training of judges and the creation of a genuine European law enforcement

44 Presidency Conclusions [online]. *Tampere European Council. 15 and 16 October 1999* [cit. 20. 10. 2019]. https://www.consilium.europa.eu/media/21059/tampere-european-council-presidency-conclusions.pdf

45 Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial.* The Hague: T. M. C. Asser Press, 2017, p. 19; Kramer, X. Cross-Border Enforcement in the EU: Mutual Trust versus Fair Trial: Towards Principles of European Civil Procedure. *International Journal of Procedural Law.* 2011, Vol. 1, No. 2, p. 209.

46 Arenas García, R. Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgements: Too Many Words in the Sea. In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2010.* Vol. XII. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2011, p. 360.

47 The Hague Programme: Strengthening Freedom, Security and Justice in the European Union. 2005/C 53/01 [online]. *EUR-lex.* Published on 3 March 2005, para. 3.2 [cit. 20. 10. 2019]. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XG0303(01)&from=EN

culture.[48] Since the Stockholm programme, no similar programme has been published by the European Council. European Commission published The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union. The Commission has determined further strengthening of trust as one of the challenges. The aim is to ensure trust in judicial decisions irrespective of the Member State where the judgments have been decreed. The independence, quality and efficiency of the judicial systems and the respect for the rule of law are necessary. Of essential importance for strengthening trust according to this The EU Justice Agenda are upholding fundamental rights, judicial training, operational co-operation (fast and secure exchange information) and codification of existing laws and practices.[49]

Nowadays, while the principle of mutual recognition has still its explicit basis in the primary EU law, in civil matters the Art. 67 para. 4 and the Art. 81 of TFEU,[50] the principle of mutual trust does not. Prechal contemplates that mutual trust could be subsumed to the principle of sincere (loyal) cooperation. Such principle is expressed in the Art. 4 para. 3 of the Treaty on European Union ("TEU").[51] Kramer also points to the link with the Art. 4 para. 3 of TEU, but in conjunction with mutual respect.[52] Should they be correct, the principle of mutual trust would be indirectly embedded in the primary law of EU.[53] Moreover, the article above presents an objective

48 The Stockholm Programme – an Open and Secure Europe Serving and Protecting Citizens. 2010/C 115/01 [online]. *EUR-lex*. Published on 4 May 2010, para. 3 et 4.2.1 [cit. 20. 10. 2019]. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:EN:PDF

49 The EU Justice Agenda for 2020–Strengthening Trust, Mobility and Growth within the Union COM(2014) 144 final [online]. *EUR-lex*. Published on 11 March 2014 [cit. 20. 10. 2019]. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0144&from=EN

50 See Art. 67 para. 4 and Art. 81 TFEU.

51 Prechal, S. Mutual Trust Before the Court of Justice of the European Union. *European Papers*. 2017, No. 1, pp. 91–92.

52 Kramer, X. Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights. *Netherlands International Law Review*. 2013, p. 364.

53 The Art. 4 para. 3 TEU: "*Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*"

for the EU and all such objectives must be respected by regulations of the European private international law.[54]

It is noteworthy that the above-mentioned regulations (in the table) explicitly refer to The Tampere European Council in their recitals, besides the Brussels I bis Regulation and the Insolvency Regulation Recast. Regulations take over a conclusion of the Tampere European Council which is most appropriate for a given type of regulation. The principle of mutual recognition of judicial decisions as the cornerstone for the creation of a genuine judicial area or for judicial cooperation in civil matters (as the conclusion of the Tampere European Council stated) is introduced in European Enforcement Order Regulation[55], Succession Regulation[56], Matrimonial Property Regulation[57], Property Consequences of Registered Partnerships Regulation[58] and in the Brussels II bis Regulation.[59] The establishing of common procedural rules to simplify and accelerate the settlement is set in Small Claims Procedure Regulation[60] and Maintenance Regulation[61], similarly in European Payment Order Regulation.[62]

54 Fallon, M., Kruger, T. The Spatial Scope of the EU´s Rules on Jurisdiction and Enforcement of Judgments: From Bilateral Modus to Unilateral Universality? In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2012/2013*. Vol. XIV. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2013, p. 17.

55 Recital 3 Preamble to the European Enforcement Order Regulation.

56 Recital 3 Preamble to the Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European certificate of succession ("Succession Regulation").

57 Recital 3 Preamble to the Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes ("Matrimonial Property Regulation").

58 Recital 3 Preamble to the Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships ("Property Consequences of Registered Partnerships Regulation").

59 Recital 2 Preamble to the Brussels II bis Regulation.

60 Recital 4 Preamble to the Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure ("Small Claims Procedure Regulation").

61 Recital 4 Preamble to the Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ("Maintenance Regulation").

62 Recital 3 Preamble to the European Payment Order Regulation.

Most of these regulations also refer to a programme (common to the Commission and to the Council) of measures for implementation of the principle of mutual recognition of decisions (of 30 November 2000).[63] Some of the regulations also refer to The Hague Programme, including regulations that do not contain the principle of mutual trust in their recitals; namely Small Claims Procedure Regulation, Succession Regulation, Maintenance Regulation, Matrimonial Property Regulation and Property Consequences of Registered Partnerships Regulation.[64] Because one of the goals of The Hague Programme was the strengthening of mutual trust, the consequence is that regulations not explicitly containing the principle of mutual trust but referring to The Hague Programme, respect the principle of mutual trust.

Mutual trust as well as mutual recognition are two leading principles in judicial cooperation in civil matters. In my opinion, it does not matter whether mutual trust serves as a justification of mutual recognition or if it is a result of mutual recognition. It is clear that the principle of mutual recognition was explicitly pressed for much earlier than the principle of mutual trust. From this perspective, mutual trust seems to be rather a result of recognition. From another point of view, it is a justification of mutual recognition. If we trust in the proper application of (EU) law, this constitutes a reason for mutual recognition.

4 A step further – truly automatic recognition

4.1 The notion of automatic recognition

A judgment has effects in the territory of the State where the judgment was given. It is a manifestation of the State sovereignty. In the areas of freedom,

63 Recital 4 Preamble to the Succession Regulation, Recital 5 Preamble to the Maintenance Regulation, Recital 4 Preamble to the Matrimonial Property Regulation, Recital 4 Preamble to the Property Consequences of Registered Partnerships Regulation, Recital 5 Preamble to the Small Claims Procedure Regulation, Recital 4 Preamble to the European Enforcement Order Regulation, Recital 4 Preamble to the European Payment Order Regulation.

64 Recital 5 Preamble to the Succession regulation, Recital 6 Preamble to the Maintenance Regulation, Recital 5 Preamble to the Matrimonial Property Regulation, Recital 5 Preamble to the Property Consequences of Registered Partnerships Regulation, Recital 5 Preamble to the Small Claims Procedure Regulation.

security and justice, there are systems of recognition that create extraterritoriality. Extraterritorial effects of judgments require a high level of mutual trust between the authorities of Member States.[65] The foreign decision must be recognized (and enforced) in the addressed state in order to have such extraterritorial effects. Mutual trust justifies the principle that "*judgments given in a Member State should be recognised in all Member States without the need for any special procedure*".[66] This is stated in Recital 26 of the Brussels I bis Regulation. The fact, that a judgment given in Member State shall be recognised in other Member States without any special procedure being required, is embedded in the normative part of certain regulations. They are Brussels I bis Regulation, Brussels II bis Regulation, Succession Regulation, Matrimonial Property Regulation, Property Consequences of Registered Partnerships Regulation and Maintenance Regulation for decisions given in a Member State not bound by the 2007 Hague Protocol.[67, 68] In practice, it means that the judgment is recognized within another procedure, for instance in enforcement proceedings. Similar wording (recognition and enforcement without the need for a declaration of enforceability and without any possibility of opposing its recognition) is embodied in European Payment Procedure Regulation, Small Claims Procedure Regulation, European Enforcement Order Regulation, likewise in Maintenance Regulation for decisions given in a Member State bound by the 2007 Hague Protocol.[69] The slightly different wording is in Insolvency Regulation Recast.[70]

The recognition without any special procedure is common to all EU regulations discussed in this paper. However, the procedures in case of foreign decisions are different. Some regulations require the exequatur and contain

65 Mitsilegas, V. The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual. *Yearbook of European Law*. 2012, Vol. 31, No. 1, p. 322.

66 Recital 26 Preamble to the Brussels I bis Regulation.

67 Protocol of 23 November 2007 on the law applicable to maintenance obligations.

68 Art. 36 Brussels I bis Regulation, Art. 21 Brussels II bis Regulation, Art. 39 Succession Regulation, Art. 36 Matrimonial Property Regulation, Art. 36 Property Consequences of Registered Partnerships Regulation, Art. 23 Maintenance Regulation for decisions given in a Member State not bound by the 2007 Hague Protocol.

69 Art. 19 European Payment Order Regulation, Art. 20 Small Claims Procedure Regulation, Art. 5 European Enforcement Order Regulation, Art. 17 Maintenance Regulation.

70 Art. 19 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings ("the Insolvency Regulation Recast").

grounds for refusal of recognition – Succession Regulation, Matrimonial Property Regulation, Property Consequences of Registered Partnerships Regulation and most matters according to Brussels II bis Regulation. In the Brussels I bis Regulation, the exequatur has been abolished but the grounds for refusal of recognition remain. The exequatur and the grounds for refusal of recognition are not required for European Payment Procedure Regulation, Small Claims Procedure Regulation, European Enforcement Order Regulation, Maintenance Regulation for decisions given in a Member State bound by the 2007 Hague Protocol, and in some circumstances in the Brussels II bis Regulation.[71]

In the last-mentioned group of regulations, the refusal grounds have been replaced with the minimum standards which take different forms.[72] The aim of the article is not to discuss the recognition of individual regulations in detail. In short, it can be said that the minimum standards ensure procedural proceedings and the right to a fair trial in a Member State in which the judgment has been given. There is no possibility to oppose the recognition in the Member State in which enforcement of judgment is sought.

Such an approach means that the level of mutual trust among Member States is different in various areas regulated by individual regulations. The public interest can serve as one explanation of the various levels of mutual trust.[73] The public interest (which means the social interest) lays down areas where the handling of a foreign decision is less strict. Unfortunately, I have not found the answer why in some cases or matters the public interest is considered to such a degree for the exequatur to be abolished. Of course, in some matters the interest is more urgent (e.g. the rights of access with a child or return of a child according to the Brussels II bis Regulation).[74] Apart from this, there are other reasons for abolishing the exequatur – namely, a successful declaration of enforceability, the costs and the expenses, the formalities,

71 Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial.* The Hague: T. M. C. Asser Press, 2017, p. 57.

72 Ibid., p. 105.

73 See Mitsilegas, V. The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual. *Yearbook of European Law*. 2012, Vol. 31, No. 1, p. 332 for the public interest in the Brussels II bis Regulation and child abduction.

74 See Art. 40-45 Brussels II bis Regulation.

the fact that the process is time-consuming and incompatible with an area of justice as far as civil matters are concerned.[75] It prevents free movement of judgments which is a goal of the area of freedom, security and justice.

It is not only the exequatur that constitutes an obstacle to a free movement of judgments. In certain regulations, there are grounds for refusal of recognition that prevent such circulation as well. In these instances, the recognition of foreign judgments cannot be automatic as it is often called.[76] This is connected to "*the principle of full respect for another Contracting State´s judgments.*"[77] The second principle linked to non-existence of procedural obstacles, is "*the principle of a swift and simple procedure for recognition and enforcement of another Contracting State´s judgments.*"[78] These two principles are forms the principle of free movement of judgments.

Nowadays, we can talk about a semi-automatic recognition because of the way a foreign judgment's recognition can be refused. Mutual trust cannot

75 Arenas García, R. Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgements: Too Many Words in the Sea. In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2010*. Vol. XII. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2011, p. 355; Dickinson, A. The Revision of the Brussels I Regulation. In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2010*. Vol. XII. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2011, p. 254; Kramer, X. Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights. *Netherlands International Law Review*. 2013, p. 347; Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, p. 46.

76 See for example Presidency Conclusions [online]. *Tampere European Council. 15 and 16 October 1999*, p. 4 [cit. 20. 10. 2019]. https://www.consilium.europa.eu/media/21059/tampere-european-council-presidency-conclusions.pdf; Arenas García, R. Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgements: Too Many Words in the Sea. In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2010*. Vol. XII. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2011, p. 357; Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, pp. 18, 62; Kramer, X. Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights. *Netherlands International Law Review*. 2013, pp. 355, 364; Zilinsky, M. Mutual Trust and Cross-Border Enforcement of Judgments in Civil Matters in the EU: Does the Step-by-Step Approach Work? *Netherlands International Law Review*. 2011, p. 116 et seq.

77 Pontier, J. A., Burg, E. *EU Principles on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters*. The Hague: T. M. C. Asser Press, 2004, p. 28.

78 Ibid.

be fully utilized. Siehr points out that it is an automatic recognition until it has been decided that the foreign judgment cannot be recognised.[79] Automatic recognition thus means that we can rely on a foreign judgment without necessarily undergoing some formal procedure or register the foreign judgment.[80] However, it does not mean that there is no difference between foreign and domestic judgments (the treatment is different).[81]

In the following part of the paper, I will introduce two regulations that are closest to automatic recognition and thus to the free movement of judgments.

4.2 The Insolvency Regulation Recast and the Maintenance Regulation

First, there is the Insolvency Regulation Recast. In its Recital, the notion of automatic recognition is directly mentioned and clarified. "*Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the Member State in which the proceedings were opened extend to all other Member States. The recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust.*"[82] This explicitly refers to the immediate recognition of judgments.[83] It implies that recognition is mandatory[84] or direct without intermediate steps.[85] The consequence is that a judgment has the same effect in any other Member State as in the State of the opening proceedings.[86] Because of such effects, we talk about the universality of main

79 Siehr, K. Art. 21. In: Magnus, U., Mankowski, P. (eds.). *European Commentaries on Private International Law (ECPIL). Commentary Brussels IIbis Regulation.* Köln: Verlag Dr. Otto Schmidt KG, 2017, p. 284.

80 Wautelet, P. Article 35. In: Magnus, U., Mankowski, P. (eds.). *European Commentaries on Private International Law (ECPIL). Commentary Brussels Ibis Regulation.* Köln: Verlag Dr. Otto Schmidt KG, 2016, p. 818.

81 Ibid.

82 Recital 65 Preamble to the Insolvency Regulation Recast.

83 Ibid.

84 Veder, M. Article 19 and 20. In: Bork, R., Van Zwieten, K. (eds.). *Commentary on the European Insolvency Regulation.* Oxford: Oxford University Press, 2016, p. 307, 316.

85 Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial.* The Hague: T. M. C. Asser Press, 2017, p. 50 and there Hess, Pfeiffer et Schlosser, 2007; Hess, Oberhammer et Schlosser, 2013, p. 384.

86 Art. 20 para. 1 Insolvency Regulation Recast.

insolvency proceedings[87] (the so-called extension model).[88] The mechanism of automatic recognition serves as a guarantee of the principle of the universality.[89] The practical consequence is that a foreign judgment has the same effect as if it was a domestic judgment.[90] It should be noted that automatic recognition impacts the judgment's opening insolvency proceedings. The decisions concerning the course and closure of insolvency proceedings and compositions approved by the court are also recognized without further formalities.[91]

However, an automatic recognition does not mean there are no conditions or control. In particular, the conditions laid down by the regulation (as in the Art. 19 and 32) must be fulfilled.[92] For instance, the international jurisdiction of the courts must be respected.[93]

The regulation provides only one ground for refusal of recognition insolvency proceedings – public policy.[94] Through the literature concerned with insolvency proceedings, the exceptionality of the application of public policy is accentuated due to its violation of the mutual trust principle.[95] One of the conditions of its application is that the effects of the recognition or enforcement would be manifestly contrary to the public policy of the addressed state. Namely and demonstratively, if it is contrary to its fundamental principles or the constitutional rights and liberties of the individual,[96] including the right to a fair

87 This applies to the main insolvency proceedings alone (not to the secondary or territorial insolvency proceedings). See Pachl, L. Nařízení Rady (ES) o úpadkovém řízení. In: Kozák, J., Budín, P. *Insolvenční zákon a předpisy související. Komentář*. Praha: ASPI, 2008, p. 1045.

88 Veder, M. Article 20. In: Bork, R., Van Zwieten, K. (eds.). *Commentary on the European Insolvency Regulation*. Oxford: Oxford University Press, 2016, p. 317.

89 Mahdalová, S. *Evropské insolvenční právo – aktuální trendy, výzvy, budoucnost*. Brno: Masarykova univerzita, 2016, p. 63.

90 Ibid., p. 64.

91 Art. 32 para. 1 Insolvency Regulation Recast.

92 Veder, M. Article 20. In: Bork, R., Van Zwieten, K. (eds.). *Commentary on the European Insolvency Regulation*. Oxford: Oxford University Press, 2016, p. 313.

93 Art. 19, Art. 3 Insolvency Regulation Recast.

94 Art. 33 Insolvency Regulation Recast.

95 Oberhammer, P. Article 33. In: Bork, R., Van Zwieten, K. (eds.). *Commentary on the European Insolvency Regulation*. Oxford: Oxford University Press, 2016, p. 387; Mahdalová, S. *Evropské insolvenční právo – aktuální trendy, výzvy, budoucnost*. Brno: Masarykova univerzita, 2016, p. 72.

96 Art. 33 Insolvency Regulation Recast.

trial among other things.[97] The application of public policy presents discretion of authorities of the addressed state. This is the reason why this ground for refusal should be applied as little as possible and should be interpreted restrictively.[98] As Hazelhorst points out (with reference to The Heidelberg Report, see Chapter 4.3), although the public policy is often invoked in the context of the Insolvency Regulation, its application is usually denied.[99]

The second regulation that should be mentioned is the Maintenance Regulation. There are two groups of judgments – decisions given in a Member State (1) bound by the 2007 Hague Protocol and (2) not bound by that Protocol. The latter is applied to decisions given in the United Kingdom and Denmark.[100]

The majority of Member States follow the first route. It means there is no requirement for any special procedure for recognition of a judgment and there is no possibility of opposing its recognition and no need for a declaration of enforceability.[101] It constitutes an automatic recognition, a free movement of decisions in other words. Needless to say, there is a right of a defendant to apply for a review of the decision under certain circumstances.[102] However, there is no ground for refusal of recognition, including the public policy exception. Hence there are missing means of how a violation of the fundamental rights can be prevented. That is why the public policy exception should be introduced.[103] Different treatment is applied to decisions given in a Member State not bound by the 2007 Hague Protocol (there are grounds of refusal of recognition).[104]

97 Bork, R. Recognition and Enforcement. In: Bork, R., Mangano, R. *European Cross-Border Insolvency Law*. Oxford: Oxford University Press, 2016, p. 188; Mahdalová, S. *Evropské insolvenční právo – aktuální trendy, výzvy, budoucnost*. Brno: Masarykova univerzita, 2016, p. 69.

98 Bork, R. Recognition and Enforcement. In: Bork, R., Mangano, R. *European Cross-Border Insolvency Law*. Oxford: Oxford University Press, 2016, p. 184.

99 Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, p. 93.

100 Walker, L. *Maintenance and Child Support in Private International Law*. Oxford and Portland, Oregon: Hart Publishing, 2015, p. 97.

101 Art. 17 Maintenance Regulation.

102 Art. 19 Maintenance Regulation.

103 Walker, L. *Maintenance and Child Support in Private International Law*. Oxford and Portland, Oregon: Hart Publishing, 2015, p. 144.

104 Art. 24 Maintenance Regulation.

Public policy, already being mentioned several times in this article as a ground for refusal, is ought to be discussed in detail in the following chapter.

4.3 Public policy

Aside from the Insolvency Regulation Recast and the Maintenance Regulation, the public policy clause is also included in some other regulations. See the table below:

Regulation	Does it contain the public policy exception about the recognition of a foreign judgment?
Brussels I bis Regulation	Yes, Art. 45
Brussels II bis Regulation	Yes, Art. 22 (judgments relating to divorce, legal separation or marriage annulment) and Art. 23 (judgments relating to parental responsibility)
European Payment Order Regulation	No
European Enforcement Order Regulation	No
Small Claims Procedure Regulation	No
Insolvency Regulation Recast	Yes, Art. 33
Maintenance Regulation	Yes, Art. 24 (only decisions given in a Member State not bound by the 2007 Hague Protocol)
Matrimonial Property Regulation	Yes, Art. 37
Property Consequences of Registered Partnerships Regulation	Yes, Art. 37
Succession Regulation	Yes, Art. 40

4.3.1 Regulations that do not contain the public policy clause

The public policy clause is not included in European Enforcement Order Regulation, Small Claims Procedure Regulation and European Payment Order Regulation.[105] These regulations lay down the minimum standards

105 See these regulations.

intended to protect debtor´s right to a fair trial,[106] for example the service of documents.[107] Full compliance with the minimum standards is necessary in the Member State of origin because there is no control in the Member State addressed.[108] While the Brussels I Regulation and the Brussels II bis Regulation require the exequatur in the State addressed, some regulations – European Enforcement Order Regulation, Small Claims Procedure Regulation and European Payment Order Regulation – contain the control by the State of origin based upon the minimum standards.[109] The latter regulations introduce harmonised civil procedural rules with cross-border elements by the minimum standards.[110] However, there is no possibility to apply the public policy clause in the State of enforcement. Mutual trust is essential because both the judgment is given and the control of the minimum standards is executed by the courts of the same Member State.[111]

There is a need to consider whether the effort to avoid violations of fair trial is better in the State of origin than the effort to remedy them in the State addressed (the State of enforcement).[112] The uncertainty or perhaps disadvantage is that the minimum standards need not to be followed in practice despite the presence of the harmonised procedural rules.[113] Nevertheless, the minimum standards can help to achieve mutual trust.[114] Among other sources, Action Plan Implementing the Stockholm Programme from

106 Drličková, K. Kapitola IV. In: Rozehnalová, N., Drličková, K., Kyselovská T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie.* Praha: Wolters Kluwer ČR, 2018, p. 289.

107 Art. 13-15 European Enforcement Order Regulation, Art. 13-15 European Payment Order Regulation, Art. 13 Small Claims Procedure Regulation.

108 Drličková, K. Kapitola IV. In: Rozehnalová, N., Drličková, K., Kyselovská T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie.* Praha: Wolters Kluwer ČR, 2018, p. 289 and the European Enforcement Order Regulation, the European Payment Order Regulation, the Small Claims Procedure Regulation.

109 Kramer, X. Cross-Border Enforcement in the EU: Mutual Trust versus Fair Trial: Towards Principles of European Civil Procedure. *International Journal of Procedural Law.* 2011, Vol. 1, No. 2, p. 212.

110 Ibid.

111 Weller, M. Mutual trust: in search of the future of European Union private international law. *Journal of Private International Law.* 2015, Vol. 11, No. 1, p. 84.

112 Kramer, X. Cross-Border Enforcement in the EU: Mutual Trust versus Fair Trial: Towards Principles of European Civil Procedure. *International Journal of Procedural Law.* 2011, Vol. 1, No. 2, p. 222.

113 Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial.* The Hague: T. M. C. Asser Press, 2017, p. 393.

114 Ibid.

European Commission (as discussed above) affirms that mutual trust requires the minimum standards like procedural rights and a different understanding of the legal traditions and methods.[115]

If the Member States have no guarantee that the minimum standards are respected in the State of origin, then the public policy could serve as a safeguard to the State of enforcement. Of course, as it has already been argued, if there is a ground for refusal of recognition, then the recognition cannot be fully automatic. Needless to say, we have to consider the nature of public policy.

4.3.2 The nature of public policy

Almost all states over the world incorporate the public policy clause in their legal orders.[116] The public policy clause should be used restrictively, that is in cases when a recognition of a judgment is *manifestly* contrary to public policy (basic principles) in the Member State addressed. The word "manifestly" just refers to the restrictive application of this mechanism.[117] The public policy exception can be used only exceptionally. Therefore, it is referred to it as means *ultima ratio*[118] or *ultimum remedium*.[119] Regulations containing the public policy exception are listed in the table above. The manifest contradiction (a breach of an essential rule of law or a breach of a fundamental right in the legal order of State of enforcement) is stated in the practice of the courts related to recognition of judgments as well.[120] These are the conditions for the application of the public policy exception.

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115 Action Plan Implementing the Stockholm Programme 2010. COM(2010) 171 final [online]. *EUR-lex*. Published on 19 April 2010, pp. 4 et 8 [cit. 20. 10. 2019]. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0171:FIN:EN:PDF

116 Lagarde, P. Public Policy. In: Kurt, L. (ed.*). International Encyclopedia of Comparative Law.* Vol. 3. Tübingen: J. C. Mohr, 1991, pp. 6–7; Kučera, Z., Pauknerová, M., Růžička, K. et al. *Mezinárodní právo soukromé.* Plzeň-Brno: Aleš Čeněk-Doplněk, 2015, p. 191.

117 Mosconi, F. Exceptions to the Operation of Choice of Law Rules. In: *Recueil des cours 1989*. Vol. 217. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1990, pp. 64–65.

118 Pauknerová, M. § 4. In: Pauknerová, M., Rozehnalová, N., Zavadilová, M. et al. *Zákon o mezinárodním právu soukromém. Komentář.* Praha: Wolters Kluwer ČR, 2013, p. 39.

119 Bogdan, M. Private International Law as Component of the Law of the Forum. General Course on Private International Law. In: *Recueil des cours 2010*. Vol. 348. Leiden/Boston: Martinus Nijhoff Publishers, 2011, p. 170.

120 See for example Judgment of the Court of Justice (First Chamber) of 6 September 2012, Case C-619/10, para. 51; Judgment of the Court of Justice of 28 March 2000, Case C-7/98, para. 37.

The public policy clause is contained in most of the mentioned regulations. The role of the public policy is to remedy any irregularities in the State addressed that have occurred in the State of origin. Although the aim of European instruments is the coordination of differences in the process of settling disputes among the courts of Member States and thus harmonisation of the legal systems with common values, the differences persist. This is the reason why there is a place for the public policy clause despite the similarities in intra-community situations and common values of Member States.[121]

There is a remarkable study from 2011, known as The Heidelberg report, on the factual application of the public policy exception in the European instruments of private international procedural law. Authors of that report conclude that "*public policy is often invoked, but seldom applied*"[122] and that there is a lack of case-law. This is shown in detail in the examined regulations. There are three main reasons why there is not so much case-law: 1) a cross-border enforcement of judgments where there is a weaker party is unusual, for the provision of instruments is implemented in the residence of that weaker party; 2) there is no possibility of substantive review of a foreign judgment; 3) it does not happen in case of the conflicts concerning matters of sovereignty of EU Member States due to the limited scope of EU instruments.[123]

Although the report is 9 years old and I have not examined the application in the last years, I think that the conclusion is clear – the public policy clause in the EU instruments fulfils the intended function. It serves as a safeguard that could be used in very exceptional cases when a recognition of a foreign judgment is manifestly contrary to public policy in the State of enforcement.

Thus, on the one hand, we have the minimum standards that must be met in the State of origin and no control in the State addressed, or more precisely, no grounds for refusal of recognition and no declaration

121 Hess, B., Pfeiffer, T. Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law [online]. *Directorate-General for Internal Policies*. Published in 2011, p. 20 [cit. 20. 10. 2019]. http://www.europarl.europa.eu/RegData/etudes/STUD/2011/453189/IPOL-JURI_ET(2011)453189_EN.pdf

122 Ibid., p. 18.

123 Ibid., pp. 13–14.

of enforceability. On the other hand, we have the public policy exception that a State of enforcement could apply if conditions for the application of that mechanism are fulfilled.

The public policy exception may be considered as a double-edged sword. On the one hand, it is an intruder to the principle of mutual trust as it provides a way for refusal of recognition of a foreign judgment. On the other hand, it can strengthen the principle of mutual trust since the Member States distrust each other. They lack the confidence that the minimum standards are abided. If a possibility to apply the public policy clause for the State of enforcement exists, then a Member State can genuinely trust other Member States because there is a way how a recognition of a foreign judgment could be occasionally refused.

The other grounds for refusal of recognition should be abolished [as in the Brussels I bis Regulation recognition the grounds in the Art. 45 para. 1 letters b)–e)]. Some of these grounds should be replaced by the minimum standards provided in European Enforcement Order Regulation, Small Claims Procedure Regulation and European Payment Order Regulation. Moreover, not all grounds for refusal in the Brussels I bis Regulation recognition are compatible with the principle of mutual recognition,[124] and thus with the principle of mutual trust.

5 Conclusion

Why is it important to talk about mutual trust? There is no doubt that mutual trust among the EU Member States is an important part of the European judicial area. If it did not exist, "the life" of foreign judgments would be more complicated.

Unfortunately, there is no definition of what mutual trust is. Yet, there has been continuous debate about the need for mutual trust, how it could be strengthened and how we could achieve it. I believe that the competent

124 See Arenas García, R. Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgements: Too Many Words in the Sea. In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2010*. Vol. XII. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2011, p. 364 et seq.

authorities of the EU should clearly define the concept of mutual trust first. Were a definition to exist, we could work with it. So far, we have been reliant on quite vague definitions, especially those provided by the CJEU.

In this paper, among others, I explain the approach of Arenas García. He considers mutual trust as a legal obligation that means that authorities of a Member State trust the authorities of another Member State. He also points out that mutual trust is a fact, so it is a question of genuine trust.[125] I follow both approaches as they reflect the reality of recognition of foreign judgments in the European private international law.

Mutual trust as a legal obligation is laid down explicitly or indirectly in the recitals of the regulations that I have followed in this paper. It does not matter whether the principle of mutual trust is the precondition or the consequence of the principle of mutual recognition. It is important that mutual trust is embodied in the EU regulations as the secondary law of EU. Nevertheless, it is not directly embedded in the primary law of EU.

Mutual trust as a fact is more complicated. On the one hand, the regulations allow grounds for refusal of recognition (except for European Enforcement Order Regulation, Small Claims Procedure Regulation and European Payment Order Regulation). The consequence is that Member States can use such grounds and refuse to recognize a foreign decision. On the other hand, the application of the public policy clause, which is contained in most of the regulations, is not often used in practice (as The Heidelberg Report proved).

We can talk about different levels of mutual trust. At its highest level, it means there are no obstacles and no formal procedures required for a recognition and no grounds for a recognition refusal. It results in a completely free movement of judgments. Such level has not been achieved yet due to the existence of grounds for refusal of recognition (or even the declaration of enforceability). Sometimes we can find indications such as "controlled

125 Arenas García, R. Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgements: Too Many Words in the Sea. In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2010*. Vol. XII. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2011, p. 372.

free movement of judgments",[126] or that the recognition is automatic until it has been decided that the foreign judgment cannot be recognised.[127] From the last part of the previous sentence it could be deduced that the recognition is conditional. Neither can we assert that there is no distinction between domestic and foreign decisions of courts. The territoriality is still a prevalent concept in the area of recognition of foreign judgments.

The notion of automatic recognition does not mean that recognition of a foreign judgment is truly automatic or unconditional. The notion varies from regulation to regulation. The Insolvency Regulation Recast is the closest to truly automatic recognition due to the immediate extraterritorial extension of the effects of the decision. Needless to say, there is still the possibility to apply the public policy clause.

I fully agree that the public policy clause can be perceived as a means of reducing trust as well as increasing it. Because of the nature of the public policy (each state has its own values and principles as a part of the public policy), it undermines genuine trust and hence should be abolished.

As long as the grounds for refusal of recognition or even the exequatur persist, it does not matter whether mutual trust is genuine among Member States. The legislators (at the EU level) allow for distrust by determining such grounds (or the exequatur). In the upshot, it must be the EU legislators who revise the existing regulations and thus abolish the exequatur and the grounds for recognition of judgments. This is the first step to unconditional automatic recognition. In this way, mutual trust will be achieved as a legal obligation.

But can the EU legislators do so easily? Of course not. The analysis of everyday reality is needed. Some types of evaluations have been carried

126 Hess, B., Pfeiffer, T. Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law [online]. *Directorate-General for Internal Policies*. Published in 2011, p. 26 [cit. 20. 10. 2019]. http://www.europarl.europa.eu/RegData/etudes/STUD/2011/453189/IPOL-JURI_ET(2011)453189_EN.pdf

127 Sieh, K. Art. 21. In: Magnus, U., Mankowski, P. (eds.). *European Commentaries on Private International Law (ECPIL). Commentary Brussels IIbis Regulation*. Köln: Verlag Dr. Otto Schmidt KG, 2017, p. 284.

out.[128] However, evaluations of certain regulations could not have been carried out, especially of those that have been in force for a short time (for instance the Succession Regulation – has been in force since 2015,[129] the Matrimonial Property Regulation and the Property Consequences of Registered Partnerships Regulation – have been in force since 2019). One of the possible outcomes in these instances could be a proof of the redundancy of exequatur.

In order to carry out further analysis, it is necessary to realize what to believe in. And that is where we come across the problem of the missing universal definition of mutual trust. The idea is to trust in justice, more precisely in national courts that apply the EU law properly. This requires harmonised or unified procedural rules within the EU in all areas with a cross-border element. This has not been the case so far, thus nowadays it is still more about trust in national system of law.

One way or another, we should have confidence in courts. The question, which arises, is whether to have courts (or chambers within courts) specializing in cases with cross-border elements or not. This could lead to a higher level of trust among Member States and likely to mutual trust as a fact.

To conclude, the recognition of foreign judgments is still developing and moving forward within the European judicial area. However, neither legislation (EU regulations) nor the reality of recognitions imply an unconditional recognition of judgments. The steps mentioned above must be taken into consideration. If I go back to the introduction, the roof of a house must be appropriately changed. Then the doors could stay wide open.

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128 Hazelhorst, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, p. 49 and there the results of Study on the assessment of the Brussels II bis Regulation.

129 Ibid., p. 50.

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Reciprocity as a Presumption for the Recognition of Foreign Decision

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Abstract

The paper deals with the principle of reciprocity in the field of recognition and enforcement of foreign decisions. The aim is to ascertain the approach of the Czech legal doctrine and the rules of international procedural law in relation to this institute. The issue of reciprocity outside the European judicial area is addressed, as well as the question of whether reciprocity is a non-essential condition in the area of recognition and is interchangeable with other mechanisms affecting this issue.

Keywords

Czech Republic; Reciprocity; Substantial Reciprocity; Judgment of the Recognition Court; Refusal.

1 Introduction

In the past, the principle of reciprocity has been a leading principle in the field of international procedural law. An example of its application was the application in the recognition and enforcement of foreign decisions, or the area of providing legal aid. The existence of the European judicial area also affects this issue. The regulations confirm the principle of reciprocity in a number of regulated areas and it is, in substance, declared by them.[1]

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1 Recognition of a foreign decision is regulated by EU law, international treaties (multilateral and bilateral) and national law. For example, regulations that do not operate with reciprocity are: 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 ("Brussels I bis Regulation"); Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Lugano II Convention");

However, this does not mean that, in other areas, particularly in relation to third countries, reciprocity has ceased to be up to date.[2]

The leading question can be asked to what extent, in modern arrangements, this principle has remained unchanged or, on the contrary, has been overcome. Indeed, the pressure to recognise and enforce decisions, the volume of international cooperation, etc. is an important factor for change.[3]

The purpose of the contribution is, on the one hand, to clarify the approach of the Czech legal doctrine and the rules of international procedural law

Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ("Maintenance Regulation"); Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ("Brussels II bis Regulation"); Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession ("Succession Regulation"); Conventions adopted in the framework of the Hague Conference on Private International Law also do not work with the principle of reciprocity, such as Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters; another convention is its successor, which was established in July this year. It is a convention which has great potential to become a key instrument for recognition and enforcement of foreign decisions, see Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Judgments Convention); see also North, C. Conclusion of the HCCH Judgments Convention: The objectives and architecture of the Judgments Convention, a brief overview of some key provisions, and what's next? [online]. *Conflictoflaws.net*. Published on 2 July 2019, 6 p. [cit. 14. 10. 2019]. http://conflictoflaws.net/2019/conclusion-of-the-hcch-judgments-convention-the-objectives-and-architecture-of-the-judgments-convention-a-brief-overview-of-some-key-provisions-and-whats-next/?print=pdf

2 Reciprocity is still a presumption for recognition and enforcement of foreign judgments in, for example, these following legal orders Art. 282, Chinese Civil Procedure Law, adopted at the Fourth session of the Seventh National People's Congress on 9 April 1991 and amended for the Third Time on 27 June 2017; Art. 118 letter iv) of Act No. 109/1996, Japanese Code of Civil Procedure, Amendment of Act No. 36 of 2011; Art. 54 letter a) of Act No. 5718/2007, Turkish Private International Law and International Procedural Law on 27 November 2007; Art. 52 of Act No. 32/2, Liechtenstein Enforcement Act on 24 November 1971; also it is appropriate, in the context of Switzerland and the European Union, to compare Art. 65 and Annex VII of the Lugano II Convention.

3 Elbalti, B. Reciprocity and the Recognition and Enforcement of Foreign Judgments: a Lot of Bark but Not Much Bite [online]. *Journal of Private International Law.* 2017, Vol. 13, No. 1, pp. 184–185 [cit. 15. 6. 2019]. https://www.tandfonline.com/doi/full/10.1080/17441048.2017.1304546

to that institute and to show its form in the current legislation outside the European judicial area. On the other hand, it is also necessary to consider whether the reciprocity is a 'non-essential' condition in the area of procedural law. By this we mean to what extent it is substitutable by other mechanisms such as public policy.

2 Concept of reciprocity

The concept of reciprocity is enshrined in the Czech law, both in terms of private international law and international procedural law.

Zimmermann, in his monography on the system of reciprocity, states that the principle of reciprocity is important for the mutual relationship of legal systems. In the past *Huber* had formulated the term "*comitas gentium*" – *international kurtosium*. In the 17th century, Dutch lawyer *J. Voet* formulated[4] the concept of *mutual benefit – reciproca utilitas*.[5] There is a need to respect foreign nationals and foreign law. At the same time, in certain cases, the extraterritorial nature of the foreign rules has to be recognised. If the state does not respect foreign nationals and foreign legislation, it is a necessary consequence that it will also be treated in a similar way with its own nationals and with its own legal order. The consequence of these opinions, which justify the recognition of states and the application of their legal systems, is the principle of reciprocity. The principle of reciprocity has legal relevance where there is a conditional and uniform treatment of foreigners in an area where different systems of law operate.

In the literature relating to the previous Czech Act on Private International Law and International Procedural Law, an opinion is expressed on a certain similarity between the requirement of reciprocity and the primacy of international treaties. That similarity is based on the ideology of sovereignty

4 Zimmermann, M. *Mezinárodní právo soukromé*. Brno: Právník, 1933, pp. 29–34.

5 Krčmář, J. *Úvod do mezinárodního práva soukromého. Část I. propedeutická*. Praha: Bursík & Kohout, 1906, p. 53. As a consequence of the concept of Reciprocita utilita, in the French legal literature, the formation of the théorie de la intérêt des Français – where national courts will apply the laws of foreign nationals – but the principle of reciprocity is applied with regard to the material benefit of the domestic court. See Krčmář, J. *Úvod do mezinárodního práva soukromého. Část I. propedeutická*. Praha: Bursík & Kohout, 1906, pp. 55–56; Zimmermann, M. *Mezinárodní právo soukromé*. Brno: Právník, 1933, pp. 29–34.

of the states and their equality.[6] Generally, previous structure of provisions in the law, which required reciprocity, was related to a specific act of the Czech court and to the relationship with a court of another state. It may necessarily be inferred from this that there has already been a relationship between those courts which applies to any of the procedural steps set out in the law. However, this logical conclusion does not hold up.[7] It is not a mandatory condition for a foreign state to do a reciprocal act in the past. But it is sufficient that a legislation of such a state enables that a reciprocal act may occur if it has been requested.[8] In this matter, the Supreme Court of the Czech Republic concurred with the view that [translation by the author]: "*when interpreting the concept of reciprocity, it is not necessary for a foreign State to do reciprocal act towards the Czech Republic in the past (for example, recognition of a Czech decision), it is sufficient that its legislation enables the possibility that such reciprocal act would occur (i.e. the Recognition of the decision), should it be applied for in the State concerned.*" [9] In a different decision the Supreme Court of the Czech Republic dealt with the material reciprocity in relation to the state of Arizona. It has been noted that [translation by the author]: "*the mere fact that no decision has yet been issued by a Czech court in a similar case, that would be recognised by the United States Court, cannot in itself justify for a refusal of reciprocity. Such a position on a foreign decision would result only in a 'vicious circle', because a negative decision on recognition would justify a refusal of recognition in a second State and vice versa.*"[10] Reciprocity does not only have *a formal side to the matter*, but a political side as well which is of great importance and cannot be ignored.[11]

The presumption of reciprocity in respect of recognition and enforcement is a concept which was defined later in the Roman Empire and the emerging

6 See Art. 2 and also Art. 50, 51 para. 2 letter b), 56, 64 letter e) Former Czech PILA. See also Steiner, V., Štajgr, F. *Československé mezinárodní civilní právo procesní*. Praha: Československá akademie věd, 1967, pp. 17–18.

7 Steiner, V., Štajgr, F. *Československé mezinárodní civilní právo procesní*. Praha: Československá akademie věd, 1967, p. 18.

8 Bříza, P., Břicháček, T., Fišerová, Z. et al. *Zákon o mezinárodním právu soukromém. Komentář*. Praha: C. H. Beck, 2014, p. 92.

9 Resolution of the Supreme Court of Czech Republic of 18 December 2012, Case No. 30 Cdo 3753/2012.

10 Resolution of Supreme Court of Czech Republic of 22 August 2014, Case No. 30 Cdo 3157/2013.

11 Ibid.; also see Steiner, V., Štajgr, F. *Československé mezinárodní civilní právo procesní*. Praha: Československá akademie věd, 1967, p. 18.

individual Roman cities. The statutes of the cities were local rules of cities within Roman law. It was perfectly normal that the courts in one city gave their decisions to a further town with the effects of res judicata. The recognition of such decision was not based on the condition of reciprocity. At that time, the law of the Roman Empire was not a foreign oriented law. Following the disintegration of the Roman Empire, several separate areas and countries were formed at a later stage, and with it the idea of the sovereignty of the state was formulating. Therefore, the application of a foreign law and the recognition of a foreign judgment could be considered as a matter of comity, in which the state makes such a claim only if it returns to its favourable position. This principle gives rise to reciprocity and gives grounds for reciprocity as a prerequisite for recognition and enforcement of foreign decisions.[12]

3 Formal and material reciprocity

In his monography *Zimmermann* divides the reciprocity into formal *(i.e.* absolute*)* and material *(i.e.* relative*)* issues. Formal reciprocity means that foreigners are treated in the same way as nationals. It is the assimilation of foreigners, who could be given a different legal status than they would have in their home countries. The requirement is that nationals and foreigners are treated the same way, while making no distinction between them.[13] The formal reciprocity is regulated in Art. 26 (3) of the Act No. 91/2012 Coll., on Private International Law (Czech Republic) ("Czech PILA"). In case of formal reciprocity, a Czech citizen may not have the same specific right in a foreign state as the citizen of that foreign state might have in the Czech Republic. It is sufficient if the foreign state treats the Czech citizen in the same way as his own national. The principle of reciprocity is not infringed if a Czech citizen cannot enjoy a specific right in a foreign state, since that foreign state does not even confer such right on its own citizens. The Ministry of Foreign

12 Lenhoff, A. Reciprocity and the Law of Foreign Judgments: A Historical – Critical Analysis [online]. *Louisiana Law Review*. 1956, Vol. 16, No. 3, pp. 465–483 [cit. 17. 10. 2019]. https://digitalcommons.law.lsu.edu/lalrev/vol16/iss3/2

13 Zimmermann, M. *Mezinárodní právo soukromé*. Brno: Právník, 1933, pp. 29–34; Pauknerová, M., Rozehnalová, N., Zavadilová, M. et al. *Zákon o mezinárodním právu soukromém. Komentář*. Praha: Wolters Kluwer, 2013, p. 97.

Affairs of the Czech Republic may decide that this provision shall not apply unless formal reciprocity is guaranteed in relation to a foreign state. On the other hand, in the context of the material reciprocity, the judicial authority of the Czech Republic itself becomes aware of the lack of reciprocity and shall not grant a specific right. It is the judicial authority itself that decides on the absence of material reciprocity. In the case of formal reciprocity, it is the Ministry's free discretion whether or not the formal reciprocity is given.[14] Within the European countries where legal systems are similar, there are no difficulties in applying formal reciprocity. However, the formal reciprocity takes on a different extent when two completely different legal orders are affected. Whereas the material reciprocity means that foreigners are granted the same rights as nationals of a state abroad, regardless of whether equality between foreigners and nationals will be violated. The proof that reciprocity actually exists cannot be a mere fact, but must be proved.[15]

In international procedural law, reciprocity is conceived as a condition for certain acts of the Czech authorities in relation to foreign countries and involves availability of the same or similar actions by the foreign authorities towards the Czech entities. The concept of material reciprocity is the subject matter when the fulfilment of reciprocity is assessed by an authority in the conduct of a particular act, in which it determines whether or not the reciprocity is fulfilled. Thus, the principle of reciprocity is clearly expressed in terms of procedural matters. Not only in the context of the recognition and enforcement of foreign judgments, but also in the area of legal aid, as well as in the context of the exemption from court fees, the recognition of foreign judgments in insolvency proceedings and the recognition of foreign arbitral awards.[16]

In the case of procedural law, reciprocity can be divided into material and formally guaranteed material reciprocity. The latter applies where a measure is carried out by a foreign authority and there is also an act in the form

14 Kučera, Z., Pauknerová, M., Růžička, K. et. al. *Mezinárodní právo soukromé*. Plzeň-Brno: Aleš Čeněk-Doplněk, pp. 223–224.

15 Ibid.

16 See Art. 10, 15, 103, 111, 120 Czech PILA.

of an international convention. It is sufficient for it to be material that the act is carried out by a foreign authority and there is no need for such an act.[17]

4 Material reciprocity as a precondition for recognition of a foreign judgment

One of the conditions for recognition and enforcement of foreign decisions is the requirement of reciprocity. In the past, the crucial question was whether material or formal reciprocity was involved. The view on this institute has evolved over the years. Shall we mention following: publication from the year 1967 from Štajgr and *Steiner* states that this is a formal reciprocity.[18] They consider that material reciprocity means that in a state in which a decision is issued, identical or at least similar conditions must be laid down for recognition and enforcement of a judgment in the law of the state of recognition and vice versa. This may be demonstrated on an example where, in the case of material reciprocity, it will not be possible to recognise such decisions of the states requiring the issuing of exequatur in the form of a full review of the decision, or where the conditions laid down in those decisions are more strict than those laid down in the legislation of the member state of recognition. In the case of formal reciprocity both authors mention that it is sufficient for the foreign state to declare the foreign judgment to be recognisable and enforceable subject to reciprocity, while there is no need to further examine the specific conditions and its content. Their conclusions are also supported by the previous 1950 legislation. The rules of the recognition and enforcement of foreign decisions were previously contained in Art. 638 (e) and Art. 644 of Code of Civil Procedure, which concerned material reciprocity, where it was a requirement for the reciprocity to be ensured by international treaties or government decrees.[19] When comparing the two sets of rules, the authors infer that, because of the complex nature of the legislation with regard to previous experiences and the need

17 Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Úvod do mezinárodního práva soukromého*. Praha: Wolters Kluwer, 2017, pp. 58–59.

18 Steiner, V., Štajgr, F. *Československé mezinárodní civilní právo procesní*. Praha: Československá akademie věd, 1967, pp. 222–224.

19 Act No. 142/1950 Coll., Proceedings in Civil Legal Matters (Czech Republic) ("Code of Civil Procedure").

to facilitate relations between states in the context of the recognition and enforcement of a foreign decision, in these specific terms (regarding the legislation to the Act No. 97/1963 Coll., on Private International and Procedural Law (Czech Republic) ("Former Czech PILA")) it is formal reciprocity. In addition, the explanatory memorandum to Former Czech PILA, in its list of material reciprocity, does not contain provisions relating to the recognition and enforcement of foreign judgments.[20]

Eller as well addresses the issue raised in the context of determining the nature of reciprocity for the recognition and enforcement of foreign decisions. He states that the Law on Private International Law and the Rules of Procedure from the year 1963 state nothing on this issue thus allowing room for dual interpretation. He also summarises the findings of *Štajger* and *Steiner,* and is in favour of the fact that this is formal reciprocity.[21] On the other hand, *Kučera* considers this to be material reciprocity.[22] In the commentary to the 1963 Law he states that the bestowal of the same status to foreign nationals is not subject to any condition. If a foreign state does not treat Czechoslovak citizens in the same way as their own citizens although nationals of that State have the same status as Czechoslovak citizens, there would be no reciprocity between the procedures of these two states. In the case of formal reciprocity, there is no need for the Czechoslovak citizen to use a specific law of the citizen of that foreign state in Czechoslovakia. It is sufficient that the foreign state treats the foreign citizen in the same way as its own citizen which logically implies that a foreign state cannot grant rights to foreign nationals that are not conferred on its own citizens. This is the essence of the formal reciprocity on which it is based. In the case of material reciprocity, the provision of a right or authority to a foreign national is connected to the fact that his state provides the same right or entitlement to its own nationals.[23] He also states that, in the event of recognition and enforcement of a foreign decision, there is material reciprocity. It is necessary

20 Explanatory Memorandum to the Act No. 97/1963 Coll., on Private International and Procedural Law ("Former Czech PILA").

21 Eller, O. *Mezinárodní občanské právo procesní.* Brno: Univerzita J. E. Purkyně v Brně, 1987, pp. 34–36.

22 Kučera, Z. *Mezinárodní právo soukromé.* Praha: Panorama, 1980, p. 343.

23 Kučera, Z., Tichý, L. *Zákon o mezinárodním právu soukromém a procesním. Komentář.* Praha: Panorama, 1989, pp. 187–188, 278.

for the authorities of a foreign state to recognise and, where appropriate, execute judgments delivered by Czechoslovak courts in the matters of the same kind, without the need for reciprocity to be guaranteed by an international agreement. It is sufficient if the factuality is present.[24] *Tichý* also takes the view, in his monography, that this is a material reciprocity.[25]

4.1 Exceptions to reciprocity and the effect of EU law

If the foreign judgment is not directed against a national of the Czech Republic or Czech legal person, reciprocity is not required. *Kučera* takes the view that the requirement of reciprocity in all cases could have an adverse effect on, at that time – Czechoslovak creditors. This is based on the example of a Czechoslovak foreign trade company in a foreign state reaching a decision which condemns a defendant who is a national of that foreign state to monetary performance. After the decision has been taken, it is established that the defendant has assets in Czechoslovakia. The creditor will therefore bring an application for enforcement of the judgment at the discretion of the Czechoslovak court. If we were to insist on a condition of reciprocity which does not exist in this particular case, the Czechoslovak subject would be forced to conduct costly and lengthy procedures for the enforcement of decisions in a foreign state.[26] Similarly, no reciprocity is required in the matters of status.[27] The same applies to the unified area of recognition.

Within the framework of European Union ("EU") legislation, it is no longer possible to act on the basis of reciprocity. Reciprocity is based on the principle of *mutual trust,* on which the EU rules are built.[28] The rules in current legislation differ from the European and international rules in the reciprocity requirement. International agreements are concluded in order to make the recognition and enforcement of the other state mandatory

24 Kučera, Z., Tichý, L. *Zákon o mezinárodním právu soukromém a procesním. Komentář.* Praha: Panorama, 1989, p. 312.

25 Tichý, L. *Základy uznání cizích soudních rozhodnutí v českém a evropském právu.* Praha: Univerzita Karlova, 1995, pp. 82–84.

26 Kučera, Z., Tichý, L. *Zákon o mezinárodním právu soukromém a procesním. Komentář.* Praha: Panorama, 1989, p. 312.

27 Tichý, L. *Základy uznání cizích soudních rozhodnutí v českém a evropském právu.* Praha: Univerzita Karlova, 1995, pp. 82–84.

28 Pauknerová, M., Rozehnalová, N., Zavadilová, M. et al. *Zákon o mezinárodním právu soukromém. Komentář.* Praha: Wolters Kluwer, 2013, pp. 100–101.

for a Contracting state, regardless of whether or not the other state carries out a decision of the state of recognition in similar cases. This is also the case for the EU. As a general rule, international law does not require the member states to recognise and enforce foreign judgments they do so in accordance with courtesy. It is logical, then, to make sure that their courtesy will be conditional (logically, on the assumption that it is not contractually guaranteed), that the same courtesy is provided by the other state.[29]

The recognition and enforcement of judgments handed down by the courts of the member states must be distinguished from the situation of the recognition and enforcement of decisions of a non-Contracting state where there is a condition of reciprocity. The effect of membership within the EU and the European law has the consequence of another regime of reciprocity in the recognition and enforcement of foreign judgments. The conditions for recognition and enforcement of a member state's decision are much more liberal than is the case under the national regime, in particular the reciprocity envisaged by an international treaty itself or a membership of an international organisation, for example in the EU. *Pauknerová* provides a comparison of the conditions for recognition and enforcement in the European legislation – the Brussels I bis Regulation and the conditions resulting from national legislation such as the Czech Act (§ 15 Czech PILA). National rules are more stringent and express the requirement of reciprocity.[30] The recognition and enforcement of a foreign state judicial decision should be made subject to such conditions to enable the possibility of such a member state of recognition to refuse to recognise such a decision, for example for lack of conformity with public policy. She also states that there are different considerations on how the conditions for recognition and enforcement within the EU should be. Generally a refusal of recognition on grounds of conflict with public policy is seen with displeasure and which may be removed in the future. The EU rules on recognition and enforcement are limited to a European area of recognition and enforcement only applied to the recognition and enforcement of the member states. It will then be for each

29 Vaške, V. *Uznání a výkon cizích rozhodnutí v České republice.* Praha: C. H. Beck, 2007, p. 418.
30 Pauknerová, M. *Evropské mezinárodní právo soukromé.* Praha: C. H. Beck, 2013, p. 84.

state to decide what national legislation to adopt and which it will then apply to relations with third countries.[31]

4.2 Establishing reciprocity

Where material reciprocity applies, it is necessary for the examining court to assess the law of the foreign state concerned or its established practice. In order to establish reciprocity, three groups of surveys can be distinguished, namely:

a) The first group are the general statements made by the Ministry of Justice. The statements by the Ministry of Justice on reciprocity are based on prior negotiations between the concerned ministries of the Czech Republic and the competent authorities of a foreign state. However these are not international treaties by its nature.

b) The second group are cases where the court asks the Ministry of Justice to comment on the issue of reciprocity in a particular case. In such cases, the Ministry assesses whether there is an international agreement and whether there is reciprocity present. There is also an analysis of EU and/or national law, where appropriate. Account shall also be taken of the established practice of the state concerned. After the analyses have been carried out, the Ministry shall provide the court with a statement. The Ministry may also address the question to the state concerned.

c) The third group includes *the ad hoc* reciprocity cases by the court. The court may, without referring the matter to the Ministry on a case by case basis, examine the reciprocity itself. A distinction can be drawn here with regard to the court's procedure for the determination of reciprocity and foreign law. In the event of a court identifying the content of a foreign right, it shall proceed *to* an *ex officio* procedure and take all necessary steps to establish its content. If the court does not find the content of foreign law, it can apply to the Ministry of Justice for cooperation. When establishing reciprocity, the court is not bound by any procedure and thus may or may not request communication from the Ministry.

31 Ibid., p. 85.

4.2.1 Statement by the Ministry on reciprocity

Some countries require declarations of reciprocity from their ministries. This was also the case in the Czech legislation. The reciprocal declarations were binding in the past and thus the courts had to treat the reciprocity as guaranteed in the past, even if they were aware that the foreign courts did not recognise the Czech decision. The declaration of reciprocity is a public declaration signed by the Minister. This is not an email from the Ministry of Justice staff sent in a specific case at the court's request. This would constitute proof of reciprocity in cases where it had to be established in the absence of a declaration. The current legislation leaves these declarations binding and the court will take them into account as any other evidence. Most expert members share the view that statements can continue to maintain their legal force and binding force. The wording of the new provision respects the independence of judicial decisions.[32] *Fišerová* states in the commentaries that the declaration by the Ministry of Justice on reciprocity can still maintain a greater degree of legal force.[33] The Ministry of Justice website provides an overview of the statements on reciprocity issued by the Ministry of Justice in agreement with the Ministry of Foreign Affairs.[34] It is the facilitation of the situation and the practice of issuing such declarations.

4.2.2 Temporal aspects of reciprocity

It is true that, in the absence of reciprocity of a legal or contractual nature, it can be ensured in practice. The practice of recognition is the result of permanent case law and it can be inferred from the practice of the authorities of the state. The timing of reciprocity is also relevant. This means a determination of reciprocity in time. For example, reciprocity does not have to be granted at the time of the decision but will be guaranteed at the time

32 Explanatory Memorandum to the Act No. 91/2012 Coll., on Private International Law (Czech Republic).

33 Bříza, P., Břicháček, T., Fišerová, Z. et al. *Zákon o mezinárodním právu soukromém. Komentář.* Praha: C. H. Beck, 2014, pp. 94–95. There is an opinion that appears in the literature that the Declaration of the Ministry of Justice on reciprocity is binding. See Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Úvod do mezinárodního práva soukromého.* Praha: Wolters Kluwer, 2017, pp. 58–59.

34 Ministry of Justice. Declaration of the Ministry of Justice on reciprocity in civil matters [online]. *Justice.cz* [cit. 20. 1. 2020]. https://www.justice.cz/web/msp/prohlaseni-o-vzajemnosti-v-obcanskych-vecech

when recognition of this Decision is applied. There are many solutions in different legal systems. Some countries prefer the moment at which the proposal for recognition is made. If the legislation itself is based on the rule of law, such a solution should not give rise to any complications. *Tichý* states that it would be most correct to rely on the point at which the decision was in force, since, from that point in time, the decision is eligible for recognition.[35]

The Supreme Court has ruled on this issue in the past. In particular they dealt with the temporal aspect of the Declaration of the Ministry of Justice on reciprocity. In the present case, it is claimed that the declaration from the date of its publication could not apply to all (in this case, German) decisions, irrespective of when they were issued. It was stated that, in the statements, Art. II was worded in such a way that, if there was a presumption that the Czech courts had 'henceforth' recognised and enforced the decisions of the German courts, it could be concluded that the condition of reciprocity was satisfied only in respect of judgments issued after the date of the declaration. It was stated that the word 'henceforth' used in the declaration must be regarded as referring to a procedure followed by the courts after the date of publication and does not mean that reciprocity should be guaranteed for those decisions that are published after that date. The Declaration of the Ministry of Justice is of a declaratory nature, which merely declares an already existing relationship between two states. The Supreme Court states that the term 'henceforth' used in all statements only means guidance for the courts determining enforcement proceedings in the future from the point of reference to the state in which the statutory conditions for recognition and enforcement are fulfilled. The statement cannot be such as to confer rights, but certifies the already existing reality, namely guaranteeing reciprocity on the part of a foreign state.[36]

4.2.3 Specificities of the determination of reciprocity

Reciprocity is established by benchmarking foreign recognition and foreign practices. *Tichý* states that there are opinions in which the condition

35 Tichý, L. *Základy uznání cizích soudních rozhodnutí v českém a evropském právu.* Praha: Univerzita Karlova, 1995, pp. 88–90.

36 Resolution of the Supreme Court of Czech Republic of 9 December 2006, Case No. 20 Cdo 1688/2006.

of reciprocity is fulfilled in cases where the procedural position of a domestic creditor in a foreign state is not less favourable than that of a creditor from a foreign state in the territory of the country. However, he does not agree with that view, as that conclusion would be aimed at exceeding the scope of the recognition right of the two states and would encroach on the whole area of the procedural law of those states. The only decisive thing is the legislation of recognition and its practical application. Since there are differences in the conditions of reciprocity in the different legislations, it is not too acceptable to require a certain degree of conformity of the mutual recognition assumptions. This is because it could easily arise due to a lack of entitlement to the exclusion of a presumption of recognition. However, it is necessary to consider a comprehensive assessment of foreign law. A foreign state must, in principle, have equivalent conditions for recognition and enforcement of a decision of the same kind.[37]

The presumption of reciprocity may be established by law or by virtue of existing practice of recognition among states. The presumption of reciprocity must be verifiable and reviewable. Security is not and cannot be 100 %, the practice and law can change over time. The Court seeks reciprocity *ex officio* in the case of mutual recognition of the principle of reciprocity between two specific states. Where reciprocity is guaranteed by means of an agreement between member states, reciprocity exists and there is no need to examine it. Guaranteeing reciprocity can also be established by law. If there is a statutory provision, there is no longer any need for proof of the practice of recognition in so far as the foreign rules allow for the operation of a domestic decision, while there is no fear of non-compliance.

In the context of the issue addressed, the Supreme Court of the Czech Republic has issued a resolution concerning the composition of the security for the costs of the proceedings. In that decision, it dealt with the question of whether the court was required to ascertain, in order to establish reciprocity, the content of the law of the country against which reciprocity was examined (examined in relation to the Commonwealth of Dominica). This issue has not yet been addressed by the court. The Supreme Court

37 Tichý, L. *Základy uznání cizích soudních rozhodnutí v českém a evropském právu.* Praha: Univerzita Karlova, 1995, pp. 85–87.

of the Czech Republic stated [translation by the author]: "*If an institution applies a rule of law whose use is dependent on reciprocity, it does not apply for foreign law as a result of that rule and does not place itself in the position of a foreign authority, but merely raises the question whether there are sufficient guarantees that the foreign authorities have acted in a certain manner. The conclusions regarding reciprocity made are more or less likely (since the domestic authority, in respect of the sovereignty of other states, cannot conclude that the foreign authority has necessarily acted [would be required to act] in accordance with the opinion of the national authority). The latter does not mean, however, that the Court could, with regard to reciprocity, be able to make findings on a hypothetical basis, based on assumptions. In particular, it is essential for such decisions to be made with regard to the content of foreign laws, maintained practice and, where appropriate, a communication from the Ministry of Justice, and it is not possible, a priori, to order the courts which are to assess the facts to be more relevant. At the same time, it cannot be concluded that, when establishing reciprocity, courts would necessarily have to determine the content of foreign laws, since the content of foreign law is, for the purpose of assessing reciprocity, only one of the legally relevant facts. It should be added that, since courts, when determining reciprocity, take into account the content of foreign laws without applying foreign law (they do not apply), the application of Article 23 (5) z. m. p. s.* [translation by the author: Article 23 para. 5 Czech PILA] *cannot be applied in the absence of foreign law to the application of Article. It is fully acceptable (even in this respect) to conclude that if the court is not aware of any previous practice on the part of the authorities of the foreign state, the communication from the Ministry of Justice does not provide evidence of existing reciprocity, and the content of foreign law has not been detected, no reciprocity has been established.*" [38]

The refusal to recognise a foreign judgment shall be refused if there is no reciprocity on the part of the state where the foreign judgment was issued. For the recognition and enforcement of a decision material reciprocity is required, that is to say, that the state of origin has in fact recognised and enforced the Czech decision in cases of the same kind. Whether a foreign state actually carries out a similar Czech decision is a matter of inquiry. In order to establish reciprocity, the court must carry out an *ex officio* measure of inquiry. The court shall assess the evidence in the light of its own considerations.

38 Resolution of the Supreme Court of Czech Republic of 5 April 2017, Case No. 30 Cdo 4883/2016.

In order to establish reciprocity, the actual practice of the state of origin is therefore decisive. Its legislation is only a kind of guidance on the reality of its practice. For example, if the regime of a foreign state does not generally recognise a foreign judgment, such a practice seems to be the practice of the courts. However, if the courts are in a position to recognise the Czech decision in spite of its legislation, reciprocity is guaranteed. At the same time, the foreign judgment cannot be examined on the merits.

An example. In this case, we can cite an example of a decision issued prior to the Czech Republic's accession to the EU. This is a decision which is today difficult to connect with the reality:

The decision, which has commented on the issue of reciprocity, describes the case of the enforcement of the Austrian decision in the Czech Republic.[39] *There is no reciprocity convention between Austria and the Czech Republic and therefore the court is bound to deal individually with the question of enforceability in the light of the condition of reciprocity. In this case, the Court has requested, through the Ministry of Justice of the Czech Republic, the opinion of the Federal Ministry of Justice of Austria on reciprocity. According to the Austrian Enforcement Order for the execution of foreign decisions, it is presumed that reciprocity is guaranteed by the State treaties or by the provisions. As no bilateral or multilateral treaty on the recognition and enforcement of judgments in civil and commercial matters is concluded between Austria and the Czech Republic, it would prevent the Austrian courts from exercising a Czech decision. It can be concluded from this that Austria makes the enforceability of the Czech Republic's decision conditional on the conclusion of a bilateral or multilateral agreement. The Austrian provision does not accept a procedure such as that of the Czech Republic, where the courts are willing, on a case-by-case basis, to assess enforceability in the light of the circumstances of the case and to enforce the Austrian decision on the territory of the Czech Republic. On the basis of the fact that it follows from the observations of Austria that the courts do not have as a matter of principle any decisions of the Czech courts, there is no possibility, under Czech law, of exercising Austrian decisions. In the light of the Austrian opinion, their decisions are not enforceable in the Czech Republic.*[40]

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39 Resolution of the Regional Court of Brno of 25 July 1996, Case No. 20 C 28/96. In: Supreme Court of Czech Republic. *The Supreme Court Yearbook: Supreme Court.* Praha: Supreme Court of Czech Republic, 1997, pp. 144–147.

40 Vaške, V. *Přehled judikatury ve věcech civilního řízení s mezinárodním prvkem.* Praha: ASPI, a. s., 2006, pp. 75–76.

An example. *Another decision addressing the issue of reciprocity prior to the accession of the Czech Republic to the European Union is the Supreme Court which dismissed the appeal on the enforcement of the ruling of the Polish court. In the question under consideration, the Court noted the existence of an international treaty between Poland and the Czech Republic on legal aid and the regulation of legal relationships in cases of occasional, family and criminal matters. In so far as the present case concerned commercial matters, it was not possible to apply that contract to the present case. Whereas the Polish courts have failed to recognise the decisions of the Czech courts in commercial matters up to 30.4.2004, that is to say, prior to entering the European Union, such decisions cannot be enforced in the absence of reciprocity.*[41]

5 Development trends of reciprocity in respect of the recognition and enforcement of foreign decisions

The perception of reciprocity may vary from one legal system to another. Reciprocity may be a requirement for recognition and enforcement of foreign judgments. As *Elbalti* indicates, reciprocity may be perceived as a *defence*. He states that, in some jurisdictions, reciprocity has the form of an additional requirement for failure to recognise a foreign judgment.[42] Reciprocity shall be used as means of retaliation against the issuing state in respect of any decision taken by the member state of recognition. The intention is to force changes in regulation by states that have a strict recognition regime. He also states that the development of this concept of reciprocity was twofold. The first one was the abolition of reciprocity. The purpose of the cancellation of reciprocity is justified by the difficulties which may be caused by the reciprocity requirement for recognition of the decision.

41 Resolution of the Supreme Court of Czech Republic of 29 March 2007, Case No. 20 Cdo 3102/2005.

42 *Elbaiti* in his article mentions several states and their legal regulation, where reciprocity is seen as a defence. He divides the states, on the one hand, in those in which reciprocity has been abolished as a requirement for the recognition and enforcement of foreign judgments, such as Poland, Bulgaria, Macedonia, Lithuania, Spain and others. And to those states that still retain the principle of reciprocity. For example, Slovenia, Tunisia, Turkey, Czech Republic, Romania and Panama. See Elbalti, B. Reciprocity and the Recognition and Enforcement of Foreign Judgments: a Lot of Bark but Not Much Bite [online]. *Journal of Private International Law*. 2017, Vol. 13, No. 1, pp. 187–189 [cit. 15. 6. 2019]. https://www.tandfonline.com/doi/full/10.1080/17441048.2017.1304546

Another purpose is to modernise the overall system of recognition and, at the same time, to strengthen the free movement of decisions. A second trend was the relaxation of the strictness of the application of reciprocity. At the same time, there have been developments at both legislative and judicial level.[43] The reason for maintaining reciprocity varies from one piece of legislation to another. *Elbalti* states that, for example, in Tunisia, the reciprocity requirement has been maintained, as it fulfils the function of the security valve*, allowing the state* to make positive use of foreign decisions while taking into account the sovereignty of the state. In States where reciprocity is still in place, its application is either limited or subject to certain exceptions. For example, in the Czech legislation, reciprocity is only required for the recognition of judgments given against persons who are nationals of the state of recognition.[44]

On the other hand, reciprocity may constitute the legal basis for the recognition and enforcement of foreign judgments. In legal systems where reciprocity is the basis for recognition and enforcement is considered to be a value for recognition, which is a prerequisite for enforcement. The legal orders which require such a type of reciprocity generally also require that reciprocity be formally established between the state and the state of recognition. The existence of formal reciprocity is actually the only possible way of obtaining effects in the State of recognition.[45] In some jurisdictions, formal reciprocity is still in place but is mitigated.[46] In his report, *Elbalti* sets out two situations where reciprocity is an effective means of refusing recognition. The first example shows the recognition of a foreign decision in China. The Chinese Law recognises foreign decisions only on the basis of an international agreement or on the basis of reciprocity. The problem is that judicial practice is such that in the absence of an international agreement the Chinese courts normally refuse recognition of foreign judgments

43 Ibid., pp. 186–187.

44 Art. 15 para. 1 letter f) Czech PILA.

45 Elbalti, B. Reciprocity and the Recognition and Enforcement of Foreign Judgments: a Lot of Bark but Not Much Bite [online]. *Journal of Private International Law.* 2017, Vol. 13, No. 1, pp. 196–197 [cit. 15. 6. 2019]. https://www.tandfonline.com/doi/full/10.1080/17441048.2017.1304546

46 For example, the Netherlands, Sweden, Finland, Denmark and Austria. See Ibid., pp. 196–197.

due to the absence of reciprocity. Even though, for example, the Chinese decision has already been recognised abroad.[47] He cites the example of the refusal by the Chinese courts to recognise the Japanese decisions after the Chinese courts had ruled that there is no reciprocity between countries.[48] The second situation is when a foreign judgment is not recognised due to lack of reciprocity in the state of issue of the decision. He cites the example of the Japanese court, which refused to recognise the Belgian decision on the basis that the Belgian courts were implementing the substance of the case before the Court. Another example is the refusal by the German courts to recognise Liechtenstein's decision since, under Liechtenstein law, foreign judgments can only be recognised on the basis of a contractual obligation (i.e. on the basis of an international agreement).[49] Reciprocity is a relevant presumption for the recognition and enforcement of foreign judgments only in those legal systems where their legislation is too strict. At the same time, it states that the practice is different for those legal orders. He refers, for example, to judicial practice in Russia, Sweden and Norway, where, despite the fact that foreign judgments are recognised only if there is an international treaty, judicial practice is different and there is recognition despite the absence of an international treaty between certain states.

6 Elimination of reciprocity

Already in the past, there has been a claim that casts doubt on the merits of refusing to recognize and enforce foreign decisions for lack of reciprocity. If there is no consensus among the member states on mutual recognition of decisions, individuals cannot legally organise their relations even

47 *Elbaiti* states that a change of the application of reciprocity for possible recognition and enforcement of a foreign decision in China can be seen. See Ibid., pp. 203–205, 218. See also Huang, J. Reciprocal Recognition and Enforcement of Foreign Judgments in China: Promising Developments, Prospective Challenges and Proposed Solutions. *Legal Studies Research Paper No. 19/23* [online]. Published in March 2019 [cit. 20. 1. 2020]. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3359349

48 See Elbalti, B. Reciprocity and the Recognition and Enforcement of Foreign Judgments: a Lot of Bark but Not Much Bite [online]. *Journal of Private International Law*. 2017, Vol. 13, No. 1, pp. 201–204 [cit. 15. 6. 2019]. https://www.tandfonline.com/doi/full/10.1080/17441048.2017.1304546

49 Ibid., p. 206.

if they have reached a court decision, so it can no longer achieve the decision to have legal effects in another.[50]

Tichý states that reciprocity is lacking in its own merits, since it does not share a foreign decision with the content of the foreign judgment. The historical link to public international law and the law on aliens are also unfounded. Likewise, the perception of a waiver as a result of recognition is a false and incorrect conclusion. In the development of the Institute of reciprocity, more friendly and favourable conditions for recognition need to be offered. He also considers that mechanisms in the form of public policy or lack of jurisdiction are fully sufficient to enable a possible refusal of recognition of a judgment. Thus, even a lack of reciprocity can cause harm to private individuals who cannot in any way guarantee reciprocity.[51] Finally, he adds that it is perfectly justifiable for the condition of reciprocity to be removed.[52]

Lenhoff claims that the reciprocal treatment of the treatment of foreign decisions is based on significant irregularities. He also refers to a large fallacy, which is based on the idea that the interests of the foreign national are compared by a policy which is contrary to such enforcement only because it is a foreign national. He also argues that the insistence of reciprocity serves to mislead the forum state to pay its attention away from the actual question, whether the decision indicates that the foreign national has been the victim of injustice. The courts in the recognition of foreign judgments always have to examine the question of whether the way in which a decision was issued was in accordance with the procedural fair play. The strong state guarantees thus prevent the foreign judgment from producing its effects in that state. It is questionable whether reciprocity can provide a guarantee. He states that there are states whose administration of justice could not be regarded as a model of perfection. However, by fulfilling the reciprocity requirement, they can ensure preferred status in a country with a high degree of judicial

50 Rozehnalová, N., Týč, V. et al. *Vybrané problémy mezinárodního práva soukromého v justiční praxi*. Brno: Masarykova univerzita, 1998, p. 113.

51 Tichý, L. *Základy uznání cizích soudních rozhodnutí v českém a evropském právu*. Praha: Univerzita Karlova, 1995, pp. 90–91.

52 Ibid. See also Elbalti, B. Reciprocity and the Recognition and Enforcement of Foreign Judgments: a Lot of Bark but Not Much Bite [online]. *Journal of Private International Law*. 2017, Vol. 13, No. 1, pp. 184–218 [cit. 15. 6. 2019]. https://www.tandfonline.com/doi/full/10.1080/17441048.2017.1304546

administration. The requirement of reciprocity is arbitrary in legal logic and undesirable in terms of legal policy.[53]

The requirement of reciprocity, which in some legal orders has the effect of making it almost meaningless. I.e. such a condition, which is indicated in the literature, but applied exceptionally in practice. In particular, in order to maintain the rights of the parties, it is reasonable to consider that reciprocity is currently not in recognition and enforcement of foreign decisions. *Elbaiti* takes the view that reciprocity is more likely to exist in many jurisdictions because of psychological need for protection, namely protection of the dignity and honour of the state, the protection of the state's sovereignty and the protection of international equality between states. Also, reciprocity can be considered useful as it enables the recognising state to avoid controversial issues such as the independence and impartiality of the foreign judicial system. Therefore, it is considered more secure to address the issues of recognition and enforcement of foreign decisions with reciprocity. It can also be considered that it has not taken the right time to eliminate reciprocity. Since it is not known that reciprocity in legal orders will be abolished in the future, the courts are bound to interpret it in a liberal manner.[54]

7 Conclusion

The development of the recognition right itself and the importance of international agreements and the impact of European law in the form of issuing legal instruments influenced the conditions for recognition. In so far as it is necessary to guarantee reciprocity. From the Brussels Convention to today's Brussels I bis Regulation, there is no reciprocity requirement among the member states of the EU. The states that operate with reciprocity that is contractually guaranteed are not prone to any complications, but the states that operate with factual reciprocity are often in difficulty

53 Lenhoff, A. Reciprocity and the Law of Foreign Judgments: A Historical – Critical Analysis [online]. *Louisiana Law Review*. 1956, Vol. 16, No. 3, pp. 465–483 [cit. 17. 10. 2019]. https://digitalcommons.law.lsu.edu/lalrev/vol16/iss3/2

54 Elbalti, B. Reciprocity and the Recognition and Enforcement of Foreign Judgments: a Lot of Bark but Not Much Bite [online]. *Journal of Private International Law.* 2017, Vol. 13, No. 1, pp. 214–217 [cit. 15. 6. 2019]. https://www.tandfonline.com/doi/full/10.1080/17441048.2017.1304546

in identifying it. Only some states have a well organised case law in order to provide clear evidence of its existence.

Lenhoff, in his article, starts with the first question: "*Why is reciprocity?*" From the answer, a clear definition is expected, what is meant by reciprocity. The issue is that reciprocity is seen as a general idea rather than a holistic concept.[55] The perception of the Institute varies from one legal order to another, including its application as part of the recognition and enforcement of judgments. However, it is common ground that, in the spirit of reciprocity, some behaviour of one subject is in relation to the behaviour of the other subject. By virtue of national sovereignty, individual states are not obliged to recognize foreign decisions, they do so for courtesy. The very idea of reciprocity continues to form the basis of international law. Reciprocity is an essential part of recognition. Recognition has a major impact on its development. As it loses the importance of reciprocity, it liberalises the area of recognition.

The aim of the paper is to determine and establish whether the recognition and enforcement instrument is at present a relevant instrument. In conclusion, reciprocity is a means of defending and protecting the sovereignty of the state against the recognition of foreign decisions. It can now be assumed that reciprocity will not be abolished in the foreseeable future, as states feel more secure behind an imaginary reciprocity shield.

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Choice of Court Agreements after Brexit

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Abstract

The aim of the contribution is to assess whether Hague Convention on Choice of Court Agreement and Brussels Ibis Regulation are comparable legal instruments as far as choice of court agreements are concerned. The article shall analyze mutual features of the two legal instruments as well as their divergences in relation to choice of court agreements. The article shall demonstrate whether Hague Convention presents a complete and a comprehensive solution in terms of choice of court agreements for the UK provided that the Brussels Regulation is no longer applicable.

Keywords

Choice of Court Agreement; Hague Convention; Brussels I bis Regulation.

1 Introduction

As the dust begins to settle after the United Kingdom's ("UK") historic vote to leave the European Union ("EU"), attention is now turning to the impact of so-called Brexit on those areas that were not central to the popular political debate.[1] Upon the finalization of the withdrawal agreement between the UK and the EU neither of the EU founding treaties (the TEU[2] and the TFEU[3]) will be applicable in the UK. This includes the Art. 288 of the TFEU which provides for the direct application and binding force of the EU regulations.[4]

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1 Masters, S., McRae, B. What does Brexit mean for the Brussels Regime. *Journal of International Arbitration*. 2016, Vol. 33, No. 7, p. 483.

2 Treaty establishing the European Community.

3 Treaty on the Functioning of the European Union.

4 Masters, S., McRae, B. What does Brexit mean for the Brussels Regime. *Journal of International Arbitration*. 2016, Vol. 33, No. 7, p. 483.

Consequently, on 28 December 2018 the UK signed the Hague Convention on Choice of Court Agreements of 30 June 2005 ("Hague Convention on Choice of Court Agreements").[5] This legal instrument was created by the Hague Conference on Private International Law ("HCCH") which is a global intergovernmental organization for cross-border cooperation in civil and commercial matters.[6] Moreover, Hague Convention on Choice of Court Agreements was ratified by the 28 EU member states as well as by Mexico, Montenegro, and Singapore.[7]

Hague Convention on Choice of Court Agreements provides an international framework for rules on choice of court agreements.[8] Since choice of court agreements are not always respected under divergent national rules, the aim of Hague Convention on Choice of Court Agreements is to provide certainty to businesses engaging in cross-border activities and create legal environment more amenable to international trade and investment.[9]

Once the UK leaves the EU, the 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

5 Choice of court section [online]. *hcch.net* [cit. 24. 3. 2019]. https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court

6 Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*. 2016, Vol. 10, No. 2, pp. 105–117.

7 Choice of court section [online]. *hcch.net* [cit. 24. 3. 2019]. https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court

8 Brekoulakis, L. S. The Notion and the Superiority of Arbitration Agreements over Jurisdiction Agreements: Time to Abandon It? *Journal of International Arbitration*. 2007, Vol. 24, No. 4, p. 345; See also Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*. 2016, Vol. 10, No.2, pp. 105–117.

9 Choice of court section [online]. *hcch.net* [cit. 24. 3. 2019]. https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court; See also Frischknecht, A. A. et al. *Enforcement of Foreign Arbitral Awards and Judgements in New York*. The Hague: Kluwer Law International, 2018, p. 42; See also Palermo, G. The Future of Cross-Border Disputes Settlement: Back to Litigation? In: Gonzalez-Bueno, C. (ed.). *40 under 40 International Arbitration*. Madrid: Dykinson, 2018, p. 357; See also Rea, M., Marotti, C. M. What is all the fuss? The Potential Impact of the Hague Convention on the Choice of Court Agreement on International Arbitration [online]. *arbitrationblog.kluwerarbitration.com*. Published on 16 June 2017 [cit. 15. 5. 2019]. http://arbitrationblog.kluwerarbitration.com/2017/06/16/fuss-potential-impact-hague-convention-choice-court-agreement-international-arbitration/

and commercial matters ("Brussels I bis Regulation") will no longer apply in the UK.[10] Due to the fact that Brussels I bis Regulation, among other, governs choice of court agreements, Hague Convention on Choice of Court Agreements is perceived as an alternative jurisdictional regime for cases involving such agreements.[11] Hague Convention on Choice of Court Agreements gives protection to the jurisdiction of the UK courts designated in choice of court agreements which will be respected in the rest of the EU, regardless of the outcome of the Brexit negotiations.[12]

The aim of this article is to assess whether Hague Convention on Choice of Court Agreements and Brussels I bis Regulation are comparable legal instruments as far as choice of court agreements are concerned. The article shall analyze mutual features of the two legal instruments as well as their divergences in relation to choice of court agreements. The article shall demonstrate whether Hague Convention on Choice of Court Agreements presents a complete and a comprehensive solution in terms of choice of court agreements for the UK provided that the Brussels I bis Regulation is no longer applicable.

To begin with, the scopes of application of Hague Convention on Choice of Court Agreements and Brussels I bis Regulation shall be compared.[13] Thus, material, geographical, personal and temporal scopes of application

10 Croisant, G. Towards the Uncertainties of a Hard Brexit: An opportunity for International Arbitration [online]. *arbitrationblog.kluwerarbitration.com*. Published on 27 January 2017 [cit. 15. 5. 2019]. http://arbitrationblog.kluwerarbitration.com/2017/01/27/towards-the-uncertainties-of-a-hard-brexit-an-opportunity-for-international-arbitration/; See also Moser, G. Brexit, Cognitive Biases and the Jurisdictional Conundrum [online]. *arbitrationblog.kluwerarbitration.com*. Published on 14 and 15 December 2018 [cit. 15. 5. 2019]. http://arbitrationblog.kluwerarbitration.com/2018/12/15/brexit-cognitive-biases-and-the-jurisdictional-conundrum/; See also Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*. 2016, Vol. 10, No.2, pp. 105–117.

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12 Ibid.

13 Art. 1, 2 Hague Convention on Choice of Court Agreements.

of both legal instruments will be examined as well as the pre-condition of an international element.[14]

Next, the article shall deal with choice of court agreements in general. Firstly, the definition of a "choice of court agreement" under both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation will be analyzed.[15] Secondly, the exclusivity of a choice of court agreement will be assessed based on both documents.[16] In this context, the legal consequence of conclusion of a non-exclusive choice of court agreement will be considered. Thirdly, the assessment of material and formal validity of a choice of court agreement arising out of the two documents will be compared.[17] Next, the matter of severability of a choice of court agreement shall be examined based on both Brussels I bis Regulation and Hague Convention on Choice of Court Agreements.[18]

Consequently, the effects of a choice of court agreement arising out of the two legal instruments will be compared.[19] In this context, the rule that the designated court shall have the jurisdiction will be analysed as well as any exceptions to it. Next, the obligations of the court not chosen will be examined.[20]

Furthermore, the article shall also consider the process of recognition and enforcement of judgments given by a court designated in a choice of court agreement under both Brussels I bis Regulation and Hague Convention on Choice of Court Agreements.[21] The definitions of the term "judgment" arising out of both documents will be evaluated.[22] Moreover, the article shall compare the grounds on which an enforcement of a judgment may be refused.[23]

Finally, the article shall consider the question of an actual incompatibility of Brussels I bis Regulation and Hague Convention on Choice of Court

14 Art. 1 Hague Convention on Choice of Court Agreements.
15 Ibid., Art. 3.
16 Ibid., Art. 3 letter a).
17 Ibid., Art. 9 letter a).
18 Ibid., Art. 3 letter d) or Art. 9 letter a).
19 Ibid., Art. 8.
20 Ibid.
21 Ibid.
22 Ibid., Art. 4 para. 1.
23 Ibid., Art. 9.

Agreements.[24] This question will be assessed in a situation when the parties reside exclusively within the EU member states and, consequently, in a situation when only one of them or none of them resides within the EU.[25]

For the purposes of this article, the court designated in a choice of agreement shall be referred to as the "designated" or "chosen" court. The court non-designated in a choice of agreement shall be referred to as the "non-designated", "not chosen", "seized", or "requsted" court.

2 Scope of application of both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation

In order to assess whether Hague Convention on Choice of Court Agreements and Brussels I bis Regulation are comparable legal instruments, it is necessary to compare the scopes of their application. Thus, material, personal, temporal and geographical scopes of application of both documents shall be analyzed. First of all, however, the pre-condition of an "international element" will be examined.

2.1 International element

Both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation are applicable only in disputes where there is an "international element" and, thus, it is first necessary to analyze this pre-condition.[26]

2.1.1 Hague Convention on Choice of Court Agreements

Art. 1 para. 1 of Hague Convention on Choice of Court Agreements specifically states that it applies only to international cases.[27] The definition of the term "international" is different in relation to jurisdictional issues (Chapter II of Hague Convention on Choice of Court Agreements) and with

24 Ibid., Art. 26.
25 Ibid., Art. 26.
26 Art. 1 Hague Convention on Choice of Court Agreements; See also National information and online forms concerning Regulation No. 1215/2012 [online]. *e-justice.europa.eu* [cit. 24. 3. 2019]. https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do
27 Art. 1 para. 1 Hague Convention on Choice of Court Agreements.

regard to recognition and enforcement matters (Chapter III of Hague Convention on Choice of Court Agreements).[28]

"*For the Hague Convention's jurisdictional rules to apply, a case is international unless the parties are resident in the same contracting state and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.*"[29] Thus, the jurisdictional rules of Hague Convention on Choice of Court Agreements apply either if the parties are not resident in the same state or if some other element relevant to the case has a connection with some other state.[30] In other words, the choice of a foreign court does not make a case international if it is otherwise fully domestic.[31]

The term "residence" is defined in Art. 4 para. 2 of Hague Convention on Choice of Court Agreements which stipulates that: "*For the purposes of this Convention, an entity or person other than a natural person shall be considered to be resident in the State: a) where it has its statutory seat; b) under whose law it was incorporated or formed; c) where it has its central administration; or d) where it has its principal place of business.*"[32] This provision is a reconciliation[33] of different conceptions

28 Ibid., Art. 1 para. 2, 3.

29 Beaumont, P., Ahmed, M. Exclusive choice of court agreements: some issues on the Hague Convention on Choice of Court Agreements and its relationship with the Brussels I Recast especially anti-suit injunctions, concurrent proceedings and the implications of Brexit. *Journal of Private International Law*. 2017, Vol. 13, No. 2, p. 392.

30 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 40 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf; See also Palermo., G. The Future of Cross-Border Disputes Settlement: Back to Litigation? In: Gonzalez-Bueno, C. (ed.). *40 under 40 International Arbitration*. Madrid: Dykinson, 2018, p. 359.

31 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 34 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

32 Art. 4 para. 2, 3 Hague Convention on Choice of Court Agreements.

33 "*It was necessary to include the siège statutaire, which is translated into English as 'statutory seat'. However, this term does not refer to the corporation's seat as laid down by some statute (legislation) but as laid down by the statut, the document containing the constitution of the company – for example, the articles of association. In the common law, the nearest equivalent is 'registered office'* ". In practice, the State where the corporation has its statutory seat will almost always be the State under whose law it was incorporated or formed; while the State where it has its central administration will usually be that in which it has its principal place of business." See Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 56 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

of civil law and common law countries. It only applies to legal persons and it provides an autonomous definition of a residence of legal persons.[34]

"*For the purposes of obtaining the recognition and enforcement of a judgment in a contracting state, it is sufficient that the judgment presented is foreign.*"[35] Thus, in recognition and enforcement matters the requirement of an international element is fulfilled if the judgment was given by a foreign court.[36]

2.1.2 Brussels I bis Regulation

Similarly, Brussels I bis Regulation does not apply to purely internal situations as the existence of an international element is required.[37] Brussels I bis Regulation itself, however, does not regulate what constitutes an international element.[38] Similarly to Hague Convention on Choice of Court Agreements, the international element also differs in jurisdictional issues (Chapter II of Brussels I bis Regulation) and recognition and enforcement matters (Chapter III of Brussels I bis Regulation).[39]

As for the jurisdictional matters, the requirement of international element generally means that parties or the subject-matter are domiciled in two different EU member states.[40] This, however, is not an absolute rule.[41] "*The international nature of the legal relationship at issue need not necessarily derive (…) from*

34 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 56 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

35 Beaumont, P., Ahmed, M. Exclusive choice of court agreements: some issues on the Hague Convention on Choice of Court Agreements and its relationship with the Brussels I Recast especially anti-suit injunctions, concurrent proceedings and the implications of Brexit. *Journal of Private International Law*. 2017, Vol. 13, No. 2, p. 392.

36 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 34 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

37 Gonclaves, A. S. de S. Choice-of-Court-Agreements in the E-Commerce International Contracts. *Masaryk University Journal of Law and Technology*. 2017, Vol. 11, No. 1, pp. 63–76; See also Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 173.

38 Hartley, C. Trevor. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 102.

39 Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 174.

40 Ibid., p. 173.

41 Ibid.

the involvement, either because of the subject-matter of the proceedings or the respective domiciles of the parties, of a number of contracting states. The involvement of a contracting state and a non-contracting state, for example because the claimant and one defendant are domiciled in the first State and the events at issue occurred in the second, would also make the legal relationship at issue international in nature."[42] Thus, the existence of an international element must be established in each case individually.[43]

The term "domicile" is regulated by Art. 62 and 63 of Brussels I bis Regulation and is subject to numerous jurisprudence.[44]

The Art. 62 which applies to natural persons does not provide an autonomous definition of a domicile of natural persons as it refers to national laws.[45] The Art. 63 para. 1 which is designed to be applied for legal persons stipulates that: "*For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat; (b) central administration; or (c) principal place of business.*" The Art. 63, thus, provides an autonomous definition of a domicile of legal persons as well as Hague Convention on Choice of Court Agreements.[46]

Similarly to Hague Convention on Choice of Court Agreements, in cases of recognition and enforcement of an award, the condition of an international element is fulfilled provided that a judgment was given by a court of another EU member state.[47]

To sum up this subchapter, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation require international element in order to invoke their applicability. As far as jurisdictional issues are concerned, Brussels I bis Regulation does not provide an autonomous definition of domicile of natural persons as it refers to national laws. As for legal

42 Judgment of the Court of Justice (Grand Chamber) of 1 March 2005, Case C-281/02.

43 Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 174.

44 Art. 62, 63 Brussels I bis Regulation; See also Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 181. See for example Judgment of the Court of Justice of 19 February 2002, Case C-256/00 and Judgment of the Court of Justice of 5 October 1999, Case C-420/97.

45 Art. 62 Brussels I bis Regulation.

46 Ibid., Art. 63.

47 Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 174.

persons, however, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation provide an autonomous definition of domicile of legal persons. Regarding recognition and enforcement matters, according to both legal instruments it is sufficient if the judgment is foreign. Thus, both legal documents regulate the issue of international element in a similar way.

2.2 Material scope of application

2.2.1 Hague Convention on Choice of Court Agreements

Hague Convention on Choice of Court Agreements was designed to apply in civil and commercial matters pursuant to its Art. 1 para. 1.[48] The concept of "civil and commercial matters" has an autonomous meaning and does not entail a reference to national laws or other instruments.[49] The concept introduced in Hague Convention on Choice of Court Agreements shall be mainly understood in a way that it excludes public law and criminal law.[50] This provision is, however, subject to numerous exceptions.[51]

First of all, Art. 2 para. 1 of Hague Convention on Choice of Court Agreements states that it does not apply to consumer contracts or contracts of employment.[52] "*This exclusion covers an agreement between a consumer and a non-consumer, as well as one between two consumers.*"[53] Hence Hague Convention on Choice of Court Agreements primarily applies in "business to business"

48 Art. 1 para. 1 Hague Convention on Choice of Court Agreements; See also Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 36 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

49 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 42 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

50 Ibid.

51 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 42 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

52 Art. 2 para. 1 Hague Convention on Choice of Court Agreements.

53 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 42 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

commercial cases.[54] Moreover, it excludes both individual and collective contracts of employment.[55]

Secondly, Art. 2 para. 2 provides that Hague Convention on Choice of Court Agreements does not apply to a number of specific areas of law listed in its sixteen sub-paragraphs.[56] These cover various matters, such as status and capacity; family law and succession; insolvency; carriage of passengers or goods; maritime matters; anti-trust (competition) matters; nuclear liability; personal injury; damage to tangible property; immovable property; the validity, nullity, or dissolution of legal persons; intellectual property rights other than copyright and related rights; and entries in public registers.[57] Thus, the jurisdictional rules of the Convention apply to matters, such as banking and finance; settlement; distribution agreements; licensing agreements; copyright and related rights etc.[58] It is important to bear in mind the Art. 2 para. 3 which sets an important rule according to which proceedings that relate to one of the excluded matters[59] referred to in Art. 2 para. 2 of Hague Convention on Choice of Court Agreements are not automatically excluded.[60]

54 Beaumont, P., Ahmed, M. Exclusive choice of court agreements: some issues on the Hague Convention on Choice of Court Agreements and its relationship with the Brussels I Recast especially anti-suit injunctions, concurrent proceedings and the implications of Brexit. *Journal of Private International Law*. 2017, Vol. 13, No. 2, p. 392; See also Brand, A. Ronald. *Forum non conviens: history, global practice, and future under the Hague convention on choice of court agreements*. New York: Oxford University Press, 2007, p. 205.

55 Art. 2 para. 1 letter b) Hague Convention on Choice of Court Agreements.

56 Ibid., Art. 2 para. 2.

57 Ibid.

58 Forner-Hooft, v. A. Brexit and the Future of Intellectual Property Litigation. *Journal of International Arbitration*. 2016, Vol. 33, No. 7, p. 556.

59 This applies to contracts of insurance, for example. The EU has, however, invoked a declaration in this regard pursuant to Art. 21 according to which Hague Convention on Choice of Court Agreements does not apply to insurance contracts. See Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*. 2016, Vol. 10, No. 2, pp. 105–117.

60 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 36 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

Thirdly, Art. 2 para. 4 excludes arbitration and proceedings related thereto.[61] "*This should be interpreted widely and covers any proceedings in which the court gives assistance to the arbitral process – for example, deciding whether an arbitration agreement is valid or not; ordering parties to proceed to arbitration or to discontinue arbitration proceedings; revoking, amending, recognising or enforcing arbitral awards; appointing or dismissing arbitrators; fixing the place of arbitration; or extending the time-limit for making awards.*"[62]

Finally, Art. 2 para. 6 stipulates that privileges and immunities of States, or international organizations, shall not be affected.[63]

2.2.2 Brussels I bis Regulation

Art. 1 para. 1 of Brussels I bis Regulation provides that: "*This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii).*"[64]

Similarly to Hague Convention on Choice of Court Agreements, the term "civil and commercial" must be interpreted autonomously pursuant to ECJ's decision *LTU v. Eurocontrol*.[65] Based on case law, an action between a public authority and a person governed by private law is excluded out of the material scope of Brussels I bis Regulation.[66] Contrastingly, an enforcement of civil-law rights arising out of criminal proceedings falls within the scope of Brussels I bis Regulation as well as matters involving a public authority not acting in the exercise of its powers.[67]

61 Art. 2 para. 4 Hague Convention on Choice of Court Agreements.

62 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 48 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

63 Art. 2 para. 6 Hague Convention on Choice of Court Agreements.

64 Art. 1 para. 1 Brussels I bis Regulation.

65 Judgment of the Court of Justice of 14 October 1976, Case C-29/76; See also Kyselovská, T., Rozehnalová, N. *Rozhodování Soudního dvora EU ve věcech příslušnosti: (analýza rozhodnutí dle nařízení Brusel Ibis)*. Brno: Masarykova univerzita, 2014, p. 488.

66 Judgment of the Court of Justice of 14 October 1976, Case C-29/76; See also Council Convention No. 78/884/EC of 9 October 1978 on the accession on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice.

67 Judgment of the Court of Justice of 21 April 1993, Case C-172/91; See also Judgment of the Court of Justice of 16 December 1980, Case C-814/79.

Moreover, Brussels I bis Regulation itself excludes certain matters from the scope of its application in Art. 1 para. 2.[68] These are: "*(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage; (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (c) social security; (d) arbitration; (e) maintenance obligations arising from a family relationship, parentage, marriage or affinity; (f) wills and succession, including maintenance obligations arising by reason of death.*"[69]

To conclude this sub-chapter, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation apply only to civil and commercial matters. They both exclude arbitration; insolvency; family law; wills and succession; social security; and questions of status and capacity out of the material scope of their application. Hague Convention on Choice of Court Agreements additionally excludes competition law claims; tort claims; consumer contracts; employment contracts; carriage of passengers or goods; liability for nuclear damage; personal injury; damage to property; immovable property; and maritime matters. Therefore, the material scope of application of Hague Convention on Choice of Court Agreements is narrower.[70]

2.3 Personal scope of application

2.3.1 Hague Convention on Choice of Court Agreements

Hague Convention on Choice of Court Agreements does not expressly regulate its personal scope of application and for the purposes of this article it is not necessary to determine this question any further.[71]

68 Art. 1 para. 2 Brussels I bis Regulation.

69 Ibid.

70 Forner-Hooft, v. A. Brexit and the Future of Intellectual Property Litigation. *Journal of International Arbitration*. 2016, Vol. 33, No. 7, p. 556; See also Masters, S., McRae, B. What does Brexit mean for the Brussels Regime. *Journal of International Arbitration*. 2016, Vol. 33, No. 7, p. 496.

71 Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 178.

2.3.2 Brussels I bis Regulation

Brussels I bis Regulation does not expressly regulate its personal scope[72] of application, either.[73] As far as choice of court agreements are concerned, however, none of the parties has to be domiciled in the EU member state as Brussels I bis Regulation is applicable provided that parties choose any court of the EU member state.[74] As for the provisions on the recognition and enforcement, these apply to any judgment given in the EU member state.[75]

2.4 Temporal and geographical scopes of application

2.4.1 Hague Convention on Choice of Court Agreements

Art. 16 para. 1 of Hague Convention on Choice of Court Agreements contains a basic rule according to which it applies to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court.[76] Thus, as far as the temporal scope of application of Hague Convention on Choice of Court Agreements is concerned, the date when the court proceedings are commenced is irrelevant.[77] Consequently, Art. 31 specifies when Hague Convention on Choice of Court Agreements enters into force for each state.[78]

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72 Its personal scope is, however, deduced based on its Art. 4 para. 1 according to which as far as the provisions on jurisdiction are concerned, persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that Member state. This rule is subject to numerous exceptions (for example: Art. 6 para. 1, Art. 7, Art. 11 para. 1, Art. 17 para. 1, Art. 21 para. 1, Art. 24, Art. 25 para. 1). See Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 178.

73 Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 178.

74 Ibid., p. 244.

75 Art. 36 para. 1 Brussels I bis Regulation.

76 Art. 16 para. 1 Hague Convention on Choice of Court Agreements.

77 Forner-Delaygua, Q. Changes to jurisdiction based on exclusive jurisdiction agreements under the Brussels I Regulation Recast. *Journal of Private International Law*. 2015, Vol. 11, No. 3, p. 404; See also Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 80 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

78 Art. 31 para. 1 Hague Convention on Choice of Court Agreements.

Hague Convention on Choice of Court Agreements entered into force in 27[79] EU member states and in Mexico on 1 October 2015.[80] Furthermore, it entered into force on 1 October 2016 for Singapore, on 1 August 2018 for Montenegro, on 1 September 2018 for Denmark and on 1 April 2019 for the United Kingdom.[81] Moreover, China, Ukraine and the USA signed Hague Convention on Choice of Court Agreements, but they have not ratified it yet.[82] Hague Convention on Choice of Court Agreements only applies if the court designated by a choice of court agreement is in a state which is bound by it.[83]

2.4.2 Brussels I bis Regulation

Art. 66 para. 1 of Brussels I bis Regulations stipulates that: "*This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015.*"[84] Thus, Brussels I bis Regulations is interpreted in a way that its provisions are applicable to choice of court agreements concluded both before and after it came into force.[85]

Pursuant to Art. 81 Brussels I bis Regulations is applicable in courts of all EU member states including the UK, Ireland and Denmark.[86]

79 Excluding Denmark, where it entered into force on 1 September 2018.

80 Status table [online]. *hcch.net* [cit. 24. 3. 2019]. https://www.hcch.net/en/instruments/conventions/status-table/?cid=98

81 Ibid.

82 Status table [online]. *hcch.net* [cit. 24. 3. 2019]. https://www.hcch.net/en/instruments/conventions/status-table/?cid=98; See also Blackwell, H. Recent Developments in the PRC: A Change in Tide for Arbitration? [online]. *arbitrationblog.kluwerarbitration.com*. Published on 5 December 2017 [cit. 15. 5. 2019]. http://arbitrationblog.kluwerarbitration.com/2017/12/05/recent-developments-prc-change-tide-arbitration/; See also Born, B. G. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. The Hague: Kluwer Law International, 2016, p. 17, 18; See also Frischknecht, A. A. et al. *Enforcement of Foreign Arbitral Awards and Judgements in New York*. The Hague: Kluwer Law International, 2018, p. 42.

83 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 90.

84 Art. 66 para. 1 Brussels I bis Regulation.

85 Forner-Delaygua, Q. Changes to jurisdiction based on exclusive jurisdiction agreements under the Brussels I Regulation Recast. *Journal of Private International Law*. 2015, Vol. 11, No. 3, p. 404.

86 Art. 81 Brussels I bis Regulation; See also Cuniberti, G. Denmark to Apply Brussels I Recast [online]. *conflictoflaw.net*. Published on 24 March 2013 [cit. 15. 5. 2019]. http://conflictoflaws.net/2013/denmark-to-apply-brussels-i-recast/; See also Hartley, C. Trevor. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, pp. 35–37.

In summation, as for the temporal scope of application of both legal documents, Hague Convention on Choice of Court Agreements applies to choice of court agreements concluded after its entry into force for the State of the chosen court whereas Brussels I bis Regulation applies to legal proceedings initiated after 10 January 2015.[87] The temporal scope of both legal documents is, thus, not really comparable.[88] As for the geographical scope of application of the two legal instruments, it is clear that Hague Convention on Choice of Court Agreements has a wider scope as it was ratified by all EU member states and several other countries.

2.5 Conclusion

Both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation require the presence of an international element in order to invoke their applicability. As for the jurisdictional issues, both Brussels I bis Regulation and Hague Convention on Choice of Court Agreements provide an autonomous definition of domicile which applies to legal persons. As far as recognition and enforcement issues are concerned, pursuant to both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation it is sufficient if the judgment is given by a foreign court.

As for the material scope of application, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation apply only to civil and commercial matters. They both exclude arbitration; insolvency; family law; wills and succession; social security and questions of status and capacity. Hague Convention on Choice of Court Agreements, however, additionally excludes competition law claims; tort claims; consumer contracts; employment contracts; carriage of passengers or goods; liability for nuclear damage; personal injury; damage to property; immovable property and maritime matters which makes its material scope of application narrower.

The temporal scope of application of both legal documents is not really comparable.

87 Slaughter and May. Brexit Essentials Jurisdiction Agreements: New Developments [online]. *Slaughterandmay*. Published on 5 July 2018 [cit. 24. 3. 2019]. https://www.slaughterandmay.com/media/2536943/brexit-essentials-jurisdiction-agreements-new-developments.pdf

88 Ibid.

As far as the geographical scope of application is concerned, Hague Convention on Choice of Court Agreements has a wider scope of application due to the fact it was ratified by all EU member states and Singapore, Mexico, and Montenegro.

3 Choice of court agreements under both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation

3.1 Definitions

3.1.1 Hague Convention on Choice of Court Agreements

Art. 3 a) of Hague Convention on Choice of Court Agreements provides a definition of a choice of court agreement.[89] It states that: " '*Exclusive choice of court agreement' means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one contracting state or one or more specific courts of one contracting state to the exclusion of the jurisdiction of any other courts.*"[90]

The above definition implies the following requirements of a choice of court agreement: (i) an agreement between two or more parties (material validity of a choice of court agreement); (ii) fulfilment of formal requirements of paragraph c) (formal validity of a choice of court agreement); (iii) exclusivity of a choice of court agreement; (iv) the designated court in a contracting state; (v) the designation for the purpose of deciding disputes which have arisen in connection with a particular legal relationship.[91]

The first three requirements will be further analysed below.

As for the fourth requirement that the designated court shall be in a contracting state, this is a reference to the geographical scope of application

89 Art. 3 letter a) Hague Convention on Choice of Court Agreements.

90 Ibid.

91 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 50 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

of Hague Convention on Choice of Court Agreements.[92] Hague Convention on Choice of Court Agreements applies only to choice of court agreements in favour of the contracting states and agreements designating the courts of non-contracting states are not covered by this legal instrument.[93]

The fifth requirement provides that the designation must be for the purpose of deciding disputes which have arisen in connection with a particular legal relationship, present or future.[94]

3.1.2 Brussels I bis Regulation

Art. 25 para. 1 of Brussels I bis Regulation provides that: "*If the parties, regardless of their domicile, have agreed that a court or the courts of a member state are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that member state. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing; (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce (…).*"[95]

This definition contains similar requirements regarding a choice of court agreement. These are: (i) an agreement between two or more parties (material validity of a choice of court agreement); (ii) fulfilment of formal requirements (formal validity of a choice of court agreement); (iii) exclusivity of a choice of court agreement; (iv) the designated court within the EU member states; (v) the designation for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, future or present.[96]

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92 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention.* Oxford: Oxford University Press, 2013, p. 90.

93 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 52 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

94 Ibid.

95 Art. 25 para. 1 Brussels I bis Regulation.

96 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention.* Oxford: Oxford University Press, 2013, p. 130, 142.

Similarly to Hague Convention on Choice of Court Agreements, the first three requirements will be further analysed below.

As for the fourth requirement that the designated court shall be in the EU member state, this is again a reference to the geographical scope of application of Brussels I bis Regulation. Correspondingly to Hague Convention on Choice of Court Agreements, the fifth requirement provides that the designation must be for the purpose of deciding disputes which have arisen in connection with a particular legal relationship, present or future.[97]

Moreover, it must be noted that Brussels I bis Regulation contains special provisions dealing with matters of insurance, consumer law, employment contracts and exclusive jurisdiction.[98] Choice of court agreements are very limited or not permitted at all in these areas as a result of protection of weaker contracting parties.[99] Due to the fact that these areas are excluded out of material scope of application of Hague Convention on Choice of Court Agreements, these issues shall not be analyzed any further.

3.2 Material validity

3.2.1 Hague Convention on Choice of Court Agreements

Pursuant to its Art. 3 a) Hague Convention on Choice of Court Agreements is only applicable if parties consent to a choice of court agreement.[100] "*A choice of court agreement cannot be established unilaterally: there must be agreement. Whether there is consent is normally decided by the law of the State of the chosen court, including its rules of choice of law.*"[101] Thus, when assessing the material validity of a choice of court agreement, a designated court decides by its own law.

97 Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, pp. 242–243.

98 Art. 15, 19, 23 and 24 Brussels I bis Regulation.

99 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 190.

100 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 50 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

101 Ibid.

A non-designated court is, however, also bound to use the law of the court designated in a choice of court agreement.[102]

3.2.2 Brussels I bis Regulation

Similarly to Hague Convention on Choice of Court Agreements, parties' consent is a necessary requirement which safeguards the material validity of a choice of court agreement.[103] Correspondingly to Hague Convention on Choice of Court Agreements, pursuant to Art. 25 para. 1 of Brussels I bis Regulation the material validity of a choice of court agreement shall be determined by the law of the country of the designated court no matter if it is being decided in the country of the chosen court or not.[104]

Therefore, Hague Convention on Choice of Court Agreements and Brussels I bis Regulation govern the material validity of a choice of court agreement in the same way.

3.3 Formal validity

3.3.1 Hague Convention on Choice of Court Agreements

Regarding the formal validity of a choice of court agreement, the Art. 3 c) of Hague Convention on Choice of Court Agreements declares that: "*An exclusive choice of court agreement must be concluded or documented – i) in writing; or ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference.*"[105]

Thus, a choice of court agreement is firstly deemed to be formally valid provided that it is in writing.[106] "*The other possible form is intended to cover electronic means of data transmission or storage. This includes all normal possibilities, provided that the data is retrievable so that it can be referred to and understood on future*

102 Bříza, P. Choice-of-Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation be the Way out of the Gasser – Owusu Disillusion? *Journal of Private International Law*. 2009, Vol. 5, No. 3, p. 556.

103 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 130.

104 Ibid.

105 Art. 3 letter c) Hague Convention on Choice of Court Agreements.

106 Ibid.

occasions. It covers, for example, e-mail and fax."[107] Therefore, a formally valid choice of court agreement under Hague Convention on Choice of Court Agreements must be either concluded in one of these forms or it must be documented in it.

Formal requirements arising out of Art. 3 c) of Hague Convention on Choice of Court Agreements have two important consequences. Firstly, a choice of court agreement not complying with conditions stipulated in Art. 3 c) does not fall within the scope of application of Hague Convention on Choice of Court Agreements.[108] Secondly, if a choice of court agreement complies with these requirements, a court of a contracting state cannot refuse to give effect to it because, for example, it is written in a foreign language, it is in small type or it is not signed by the parties separately from the main agreement.[109] In other words, contracting states are not allowed to create their own formal requirements regarding choice of court agreements.[110]

3.3.2 Brussels I bis Regulation

As far as formal validity of a choice of court agreement under Brussels I bis Regulation is concerned, it is regulated by its Art. 25 para. 1.[111] It provides that: "*The agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing; (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.*"[112] Furthermore, pursuant to Art. 25 para. 2: "*Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.*"[113]

107 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net.* Published on 8 November 2013, p. 54 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf
108 Ibid.
109 Ibid.
110 Ibid.
111 Art. 25 para. 1 Brussels I bis Regulation.
112 Ibid.
113 Ibid., Art. 25 para. 2.

Similarly to Hague Convention on Choice of Court Agreements, ECJ stressed out in its decisions *Elefanten Schuh v. Jacqmain* and *Trasporti Castelletti v. Hugo Trumpy* that the EU member states cannot lay down formal requirements of choice of court agreements.[114]

Thus, under Brussels I bis Regulation a choice of court agreement must be in the following form: (i) in writing or evidenced in writing including electronic form; or (ii) based on practices established between the parties; (iii) or arising out of international trade or commerce usages.[115] Therefore, compared to Hague Convention on Choice of Court Agreements, Brussels I bis Regulation additionally provides that a form which accords to practices or arises out of international trade or commerce usages is acceptable.

As far as international trade or commerce usages are concerned, these derive from Art. 9 para. 2 of the United Nations Convention of 11 April 1980 on contracts for the international sale of goods. Based on ECJ's decision *MSG v. Les Gravières Rhénanes SARL*: "*It must therefore be considered that the fact that one of the parties to the contract did not react or remained silent in the face of a commercial letter of confirmation from the other party containing a pre-printed reference to the courts having jurisdiction and that one of the parties repeatedly paid without objection invoices issued by the other party containing a similar reference may be deemed to constitute consent to the jurisdiction clause in issue, provided that such conduct is consistent with a practice in force in the area of international trade or commerce in which the parties in question are operating and the parties are or ought to have been aware of that practice*."[116] Reference to international trade or commerce usages thus broadens number of situations in which the conditions regarding formal validity of a choice of court agreement are deemed to be fulfilled.

To summarize, Brussels I bis Regulation provides more favourable requirements regarding formal validity of a choice of court agreement as a higher

114 Judgment of the Court of Justice of 24 June 1981, Case C-150/80 and Judgment of the Court of Justice of 16 March 1999, Case C-159/97; See also Kyselovská, T., Rozehnalová, N. *Rozhodování Soudního dvora EU ve věcech příslušnosti: (analýza rozhodnutí dle nařízení Brusel Ibis)*. Brno: Masarykova univerzita, 2014, p. 465, 446.

115 Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 245, 246.

116 Judgment of the Court of Justice (Sixth Chamber) of 20 February 1997, Case C-106/95; See also Kyselovská, T., Rozehnalová, N. *Rozhodování Soudního dvora EU ve věcech příslušnosti: (analýza rozhodnutí dle nařízení Brusel Ibis)*. Brno: Masarykova univerzita, 2014, p. 116.

number of choice of court agreements is likely to be considered formally valid. This includes especially choice of court agreements in a form which accords with the practices that the parties have established between them or in the form common for international trade and commerce.

3.4 Exclusivity

3.4.1 Hague Convention on Choice of Court Agreements

Hague Convention on Choice of Court Agreements only applies to exclusive choice of court agreements.[117] Art. 3 a) stipulates that: " *'Exclusive choice of court agreement' means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one contracting state or one or more specific courts of one contracting state to the exclusion of the jurisdiction of any other courts.*"[118]

Thus, in order for Hague Convention on Choice of Court Agreements to be applicable, parties must ensure that their choice of court agreement designates the courts of one contracting state and that the designation is to the exclusion of any other courts.[119] An exclusive choice of court agreement may refer either to the courts of one contracting state in general, or to one or more specific courts in one contracting state.[120] Therefore, if a choice of court clause is non-exclusive and provides for the courts of two or more contracting states, then Hague Convention on Choice

117 Art. 3 letter a) Hague Convention on Choice of Court Agreements.

118 Ibid.

119 Born, B. G. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. The Hague: Kluwer Law International, 2016, p. 16, 17; See also Frischknecht, A. A. et al. *Enforcement of Foreign Arbitral Awards and Judgements in New York*. The Hague: Kluwer Law International, 2018, p. 42; See also Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*. 2016, Vol. 10, No. 2, pp. 105–117.

120 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 52 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf; Art. 3 letter a) Hague Convention on Choice of Court Agreements.

of Court Agreements will not be applicable. The same applies in cases where there is no choice made at all.[121]

A choice of court agreement under Hague Convention on Choice of Court Agreements must be exclusive irrespective of the party bringing the proceedings.[122] "*That means, for example, that a clause cannot be 'asymmetrical' or 'unilateral', that is, it cannot designate the exclusive jurisdiction of one contracting state's courts to apply if one party were to bring proceedings, but allow the other party the choice to bring proceedings in a court of any other contracting state.*"[123]

To avoid confusion, Hague Convention on Choice of Court Agreements deems all choices of jurisdiction exclusive unless the parties have provided otherwise.[124]

Despite the fact that the scope of Hague Convention on Choice of Court Agreements is limited to exclusive choice of court agreements, contracting states have the possibility of extending its scope to cover non-exclusive choice of court agreements pursuant to its Art. 22.[125]

3.4.2 Brussels I bis Regulation

As far as exclusivity of a choice of court agreement under Brussels I bis Regulation is concerned, its Art. 25 para. 1 provides that: "*Jurisdiction shall*

121 Affaki, G. B., Naón, A. G. H. *Jurisdictional choices in times of trouble*. Paris: International Chamber of Commerce, 2015, p. 191; See also Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*. 2016, Vol. 10, No. 2, pp. 105–117.

122 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 52 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf. Art. 3 letter a) Hague Convention on Choice of Court Agreements.

123 Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*. 2016, Vol. 10, No. 2, pp. 105–117.

124 Art. 3 letter c) Hague Convention on Choice of Court Agreements; See also Palermo, G. The Future of Cross-Border Disputes Settlement: Back to Litigation? In: Gonzalez-Bueno, C. (ed.). *40 under 40 International Arbitration*. Madrid: Dykinson, 2018, p. 361.

125 Art. 22 Hague Convention; See also Alameda, C. A. Choice of Court Agreements under Brussels I Recast Regulation [online]. *ejtn.eu* [cit. 24. 3. 2019]. http://www.ejtn.eu/Documents/Themis%20Luxembourg/Written_paper_Spain1.pdf; See also Born, B. G. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. The Hague: Kluwer Law International, 2016, p. 16, 17.

be exclusive unless the parties have agreed otherwise."[126] This provision is understood in a way that if there is no agreement as to the exclusivity of the court designated in a choice of court agreement, its jurisdiction will be considered to be exclusive.[127] Similarly, pursuant to Brussels I bis Regulation parties may either choose a particular court in the EU member state or the courts generally of the EU member state.[128] So far, this regulation corresponds to Art. 3 c) of Hague Convention on Choice of Court Agreements.

Under Brussels I bis Regulation, however, provided that parties agree on a non-exclusive choice of court agreement, effect will be given to this.[129] If parties, for example, decide that two courts of two countries should decide the dispute, Brussels I bis Regulation will still apply.[130] Moreover, under Brussels I bis Regulation asymmetrical clauses are acceptable.[131]

This regulation is, thus, different than the one in Hague Convention on Choice of Court Agreements. Hague Convention on Choice of Court Agreements applies only to exclusive choice of court agreements; non-exclusive and asymmetrical choice of court agreements invoke its inapplicability. Pursuant to Brussels I bis Regulation, however, non-exclusive and asymmetrical choice of court agreements are acceptable.[132]

3.5 Severability

3.5.1 Hague Convention on Choice of Court Agreements

Art. 3 d) of Hague Convention on Choice of Court Agreements stipulates that: "*An exclusive choice of court agreement that forms part of a contract shall*

126 Art. 25 para. 1 Brussels I bis Regulation.

127 Born, B. G. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. The Hague: Kluwer Law International, 2016, p. 16, 17.

128 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 141.

129 Forner-Hooft, v. A. Brexit and the Future of Intellectual Property Litigation. *Journal of International Arbitration*. 2016, Vol. 33, No. 7, p. 559.

130 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 141.

131 Born, B. G. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. The Hague: Kluwer Law International, 2016, p. 16, 17.

132 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 141.

be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid."[133] Therefore, Hague Convention on Choice of Court Agreements explicitly incorporates the principle of severability according to which the designated court may hold the main contract invalid without depriving the choice of court agreement of its validity and vice versa.[134]

3.5.2 Brussels I bis Regulation

Art. 25 para. 5 of Brussels I bis Regulation provides that: "*An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.*"[135] Similarly to Hague Convention on Choice of Court Agreements, Brussels I bis Regulation incorporates the principle of severability.[136]

Thus, both legal instruments provide that the invalidity of the main contract does not invoke the invalidity of a choice of court agreement and vice versa due to the principle of severability.

3.6 Conclusion

To conclude this sub-chapter, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation contain requirements regarding choice of court agreements.

First of all, both legal instruments apply only to choice of court agreements designating the courts which are located within the geographical scope of their application.[137] Moreover, both documents stipulate that

133 Art. 3 letter d) Hague Convention on Choice of Court Agreements.

134 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 54 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

135 Art. 25 para. 5 Brussels I bis Regulation.

136 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, pp. 137–139.

137 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 52 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

the designation must be for the purposes of deciding disputes that have arisen in connection with a particular legal relationship.

Secondly, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation incorporate certain conditions related to the material and formal validity of choice of court agreements.

As for the material validity, it is governed in the same way under both legal instruments. Both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation are applicable only if parties agree on a choice of court agreement. Under both regulations the material validity of such an agreement is to be determined by the law of the country of the designated court.

As far as the formal validity of a choice of court agreement is concerned, Brussels I bis Regulation represents a more favourable regulation. Under Brussels I bis Regulation, a greater number of choice of court agreements is likely to be considered formally valid especially those which accord with the practices that the parties have established between them or those which are in the form common for international trade and commerce.

Consequently, both legal instruments regulate the question of exclusivity of a choice of court agreement.

Under both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation a court of choice agreement is presumed to be exclusive unless stated otherwise. Moreover, under both documents parties may either choose a particular court of one state or the courts generally of that state.

The difference, between the two legal instruments is that Hague Convention on Choice of Court Agreements applies only to exclusive choice of court agreements. Non-exclusive and asymmetrical choice of court agreements invoke its inapplicability. Under Brussels I bis Regulation, however, if the parties conclude a non-exclusive or an asymmetrical choice of court agreement, Brussels I bis Regulation will still apply. Therefore, Brussels I bis Regulation is likely to cover more court of choice agreements.

With regards to severability, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation stipulate that the invalidity of the main contract does not invoke the invalidity of a choice of court agreement and *vice versa*.

To conclude, Brussels I bis Regulation provides more favourable general regulation of choice of court agreements.

4 Effects of choice of court agreements

The most important effect of a valid choice of court agreement is that it grants jurisdiction to the designated court and deprives all other courts of their jurisdiction.[138]

4.1 Hague Convention on Choice of Court Agreements

Art. 5 para. 1 of Hague Convention on Choice of Court Agreements, which is considered as the key provision of this legal instrument, provides that: "*The court or courts of a contracting state designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that state.*"[139]

According to this provision a court designated in an exclusive choice of court agreement has the jurisdiction to decide the dispute at hand.[140] The only applicable exception to this rule is the nullity and voidness of a choice of law agreement which is to be assessed pursuant to the law of the state of the chosen court including its choice-of-law rules.[141] "*The 'null and void'*

138 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention.* Oxford: Oxford University Press, 2013, p. 172.

139 Art. 5 para. 1 Hague Convention on Choice of Court Agreements.

140 Ibid.; See also Born, B. G. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing.* The Hague: Kluwer Law International, 2016, pp. 16, 17; See also Palermo, G. The Future of Cross-Border Disputes Settlement: Back to Litigation? In: Gonzalez-Bueno, C. (ed.). *40 under 40 International Arbitration.* Madrid: Dykinson, 2018, p. 360.

141 Affaki, G. B., Naón, A. G. H. *Jurisdictional choices in times of trouble.* Paris: International Chamber of Commerce, 2015, p. 88; See also Bříza, P. Choice-of-Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation be the Way out of the Gasser – Owusu Disillusion? *Journal of Private International Law.* 2009, Vol. 5, No. 3, p. 556; See also Jhangiani, S. Amin, R. The Hague Convention on Choice of Court Agreements: A Rival to the New York Convention and a "Game-Changer" for International Disputes? [online]. *arbitrationblog.kluwerarbitration.com.* Published on 23 September 2016 [cit. 15. 5. 2019]. http://arbitrationblog.kluwerarbitration.com/2016/09/23/the-hague-convention-on-choice-of-court-agreements-a-rival-to-the-new-york-convention-and-a-game-changer-for-international-disputes/?_ga=2.38319014.449827635.1558337497-2077811134.1558337497

provision is primarily intended to refer to generally recognised grounds like fraud, mistake, misrepresentation, duress and lack of capacity."[142]

Consequently, Art. 5 para. 2 reinforces the obligation laid down in Art. 5 para. 1. It stipulates that the court designated in a choice of court agreement shall not decline to exercise its jurisdiction on the ground that the dispute should be decided in a court of another state.[143] There are two legal doctrines on the basis of which a court might consider that the dispute should be decided in a court of another state − forum non conviens and lis pendens.[144] Art. 5 para. 2 is understood in a way that it precludes resort to these doctrines.[145]

It must be noted, however, that neither Art. 5 para. 1 nor Art. 5 para. 2 affect internal state rules on allocation of jurisdiction among the courts of a contracting state.[146]

Subsequently, Art. 6 is considered as the second key provision of Hague Convention on Choice of Court Agreements as it regulates the obligations of the court not chosen.[147] According to this provision, if proceedings

142 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 56 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

143 Art. 5 para. 2 Hague Convention on Choice of Court Agreements.

144 Affaki, G. B., Naón, A. G. H. *Jurisdictional choices in times of trouble*. Paris: International Chamber of Commerce, 2015, p. 191; See also Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 58 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf; See also Landbrecht, J. The Singapore International Commercial Court (SICC) – an Alternative to International Arbitration? *ASA Bulletin*. 2016, Vol. 34, No. 1, p. 117; See also Palermo, G. The Future of Cross-Border Disputes Settlement: Back to Litigation? In: Gonzalez-Bueno, C. (ed.). *40 under 40 International Arbitration*. Madrid: Dykinson, 2018, p. 362.

145 Brand, A. R. *Forum non conviens: history, global practice, and future under the Hague convention on choice of court agreements*. New York: Oxford University Press, 2007, p. 208; See also Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 58 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

146 Art. 5 para. 3 Hague Convention on Choice of Court Agreements.

147 Jhangiani, S. Amin, R. The Hague Convention on Choice of Court Agreements: A Rival to the New York Convention and a "Game-Changer" for International Disputes? [online]. *arbitrationblog.kluwerarbitration.com*. Published on 23 September 2016 [cit. 15. 5. 2019]. http://arbitrationblog.kluwerarbitration.com/2016/09/23/the-hague-convention-on-choice-of-court-agreements-a-rival-to-the-new-york-convention-and-a-game-changer-for-international-disputes/?_ga=2.38319014.449827635.1558337497-2077811134.1558337497; See also Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*. 2016, Vol. 10, No. 2, p. 108.

are brought in the courts of a contracting state that was not designated in a court of choice agreement that court must decline to hear the case.[148]

Moreover, Art. 6 lays down five exceptions to the rule that the proceedings must be dismissed by the court not chosen.[149] These are: (i) nullity and voidness of a choice of court agreement under the law of the state of the chosen court; (ii) lack of capacity to conclude a choice of court agreement under the law of the state of the court seized; (iii) manifest injustice; (iv) incapability of performance; or (v) the chosen court has decided not to hear the case.[150] It is important to bear in mind that when assessing the nullity and voidness of a choice of court agreement, the court seized applies the law of the state of the chosen court.[151] In all the other cases, the court seized applies its own law including its choice-of-law provisions.[152]

4.2 Brussels I bis Regulation

Under Art. 25 para. 1 of Brussels I bis Regulation, the court chosen in a choice of court agreement is also obliged to hear the case.[153] It is important to point out that the court is obliged to hear the case, regardless of the domicile of the parties as in terms of choice of court agreements under Brussels I bis Regulation, the connection with the territory of the EU is no longer

148 Affaki, G. Bachir. Naón, A. G. Horacio. *Jurisdictional choices in times of trouble*. Paris: International Chamber of Commerce, 2015, p. 195; See also Born, B. G. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. The Hague: Kluwer Law International, 2016, p. 16, 17; See also Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*. 2016, Vol. 10, No. 2, pp. 105–117; See also Palermo, G. The Future of Cross-Border Disputes Settlement: Back to Litigation? In: Gonzalez-Bueno, C. (ed.). *40 under 40 International Arbitration*. Madrid: Dykinson, 2018, p. 360.

149 Art. 6 Hague Convention on Choice of Court Agreements.

150 Ibid.

151 Affaki, G. B., Naón, A. G. H. *Jurisdictional choices in times of trouble*. Paris: International Chamber of Commerce, 2015, p. 191; See also Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 62 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

152 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 62 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

153 Art. 25 para. 1 Brussels I bis Regulation.

necessary.[154] "*This means that if, for example, a Chinese company and Thai company choose the courts of Germany, the German courts are obliged to apply the Regulation.*"[155]

Although it is not expressly stated, Art. 25 para. 1 of Brussels I bis Regulation is understood in a way that the court designated cannot decline the case on the ground of the doctrine *forum non conviens*.[156] This also applies in case of Hague Convention on Choice of Court Agreements.[157]

As far as the obligations of the court not chosen are concerned, Art. 31 para. 3 states that: "*Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another member state shall decline jurisdiction in favour of that court.*" Similarly to Hague Convention on Choice of Court Agreements, the court not chosen is obliged to decline its jurisdiction.[158]

Unlike Hague Convention on Choice of Court Agreements, however, overriding the *lis pendens* rule is regulated in a slightly different manner.[159] Art. 31 of Brussels I bis Regulation states that: "*Where a court of a member state on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seized, any court of another member state shall stay the proceedings until such time as the court seized on the basis of the agreement declares that it has no jurisdiction under the agreement.*"[160] This provision provides that where an exclusive choice of court agreement designates a court of the EU member state, a court of another member state, even if it was seized first, is obliged to stay the proceedings until the designated court declares that it had no jurisdiction

154 Affaki, G. B., Naón, A. G. H. *Jurisdictional choices in times of trouble*. Paris: International Chamber of Commerce, 2015, p. 87; See also Born, B. Gary. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. The Hague: Kluwer Law International, 2016, p. 16, 17.

155 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 100.

156 Landbrecht, J. The Singapore International Commercial Court (SICC) – an Alternative to International Arbitration? *ASA Bulletin*. 2016, Vol. 34, No. 1, p. 117.

157 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 58 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

158 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 182.

159 Ibid., p. 228.

160 Art. 31 para. 2 Brussels I bis Regulation.

due to invalidity of a choice of court agreement.[161] Thus, this provision lays down a reverse *lis pendens* rule as the court seized must first stay its proceedings in favour of the designated court which is the one that determines the validity of the choice of court agreement.[162] The designated court, on the other hand, is entitled to go ahead with the proceedings without waiting for the court first seized to stay the proceedings before it.[163] This is different than the regulation of Hague Convention on Choice of Court Agreements which only provides that the designated court is not permitted to decline its jurisdiction on the ground that the dispute should be decided in a court of another State based on *lis pendens* rule.[164]

What is more, unlike Hague Convention on Choice of Court Agreements, Brussels I bis Regulation does not lay down further exceptions to the rule that the court not chosen shall decline its jurisdiction.[165]

4.3 Conclusion

Under both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation the court designated in a choice of court agreement is obliged to decide the case, whereas the court not chosen shall decline its jurisdiction.

Moreover, both legal instruments implicitly state that the court designated cannot decline the case on the ground of *forum non conviens*.[166]

As far as the *lis pendens* rule is concerned, Hague Convention on Choice of Court Agreements only states that the designated court shall not

161 Affaki, G. B., Naón, A. G. Horacio. *Jurisdictional choices in times of trouble*. Paris: International Chamber of Commerce, 2015, p. 193; See also Forner-Hooft, v. A. Brexit and the Future of Intellectual Property Litigation. *Journal of International Arbitration*. 2016, Vol. 33, No. 7, p. 561.

162 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 228.

163 Ibid.

164 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 58 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

165 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 183.

166 Ibid.

decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State based on *lis pendens* rule. Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters ("Brussels Convention"), however, contains a reverse *lis pendens* rule pursuant to which the court seized shall stay its proceedings in favour of the designated court which is the one that determines the validity of the choice of court agreement.

Moreover, Brussels I bis Regulation does not lay down further exceptions to the rule that the court not chosen shall decline its jurisdiction. Therefore, Brussels I bis Regulation seems to be more favourable towards the applicability of choice of court agreements.

5 Recognition and enforcement of judgments given by courts designated in a choice of court agreement

5.1 Judgment

In order to compare the process of recognition and enforcement of judgments given by courts designated in a choice of court agreement under both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation, it is necessary to define the term "judgment".

5.1.1 Hague Convention on Choice of Court Agreements

Art. 4 para. 1 of Hague Convention on Choice of Court Agreements stipulates that: "'*Judgment' means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.*"[167]

The definition in the sense of Hague Convention on Choice of Court Agreements covers any decision on the merits, regardless of what it is called.[168]

167 Art. 4 para. 1 Hague Convention on Choice of Court Agreements.
168 Ibid.

It excludes procedural rulings with the exception of decisions as to costs or expenses.[169] Moreover, it excludes interim measures.[170]

Next, pursuant to Art. 12 a settlement concluded before (or approved by) court of a contracting state designated in an exclusive choice of court agreement must be enforced in other contracting states in the same manner as a judgment.[171]

5.1.2 Brussels I bis Regulation

Pursuant to Art. 2 a) of Brussels I bis Regulation: " *'Judgment' means any judgment given by a court or tribunal of a member state, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court. For the purposes of Chapter III,*[172] *'judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement.*"

Under Brussels I bis Regulation the term "judgment" must be interpreted autonomously regardless of its form and denomination under national laws of the EU member states.[173] The term "judgment" covers a decision on the merits, not on the procedure.[174] Furthermore, a judgment must be enforceable in the state of origin, thus, it does not matter whether an appeal against the judgment to a higher court is admissible.[175] In contrast to Hague Convention on Choice of Court Agreements, Brussels I bis Regulation also applies to interim measures.[176]

169 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net.* Published on 8 November 2013, p. 54 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

170 Ibid.

171 Art. 12 Hague Convention on Choice of Court Agreements.

172 Chapter III: Recognition and Enforcement Brussels I bis Regulation.

173 Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie.* Praha: Wolters Kluwer, 2018, p. 258.

174 Ibid., pp. 267–268; See also Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Úvod do mezinárodního práva soukromého.* Praha: Wolters Kluwer, 2017, p. 267.

175 Art. 38 Brussels I bis Regulation; See also Judgment of the Court of Justice of 22 November 1977, Case C-43/77.

176 Masters, S., McRae, B. What does Brexit mean for the Brussels Regime. *Journal of International Arbitration.* 2016, Vol. 33, No. 7, p. 496.

The term "court" was defined by ECJ in its decision *Kleinmotoren GmbH vs. Emilisio Beach* as a: "*judicial body of a contracting state deciding on its own authority on the issues between the parties.*"[177] Thus, the type of the court which gave decision is irrelevant.[178] It must, however, be a court of a member state which excludes arbitral awards, decision of church courts and decisions of international tribunals.[179]

Based on the abovementioned definition, however, the court settlement is not a judgment in the sense of Art. 2 a) of Brussels I bis Regulation.[180] An enforceable court settlement may, however, be enforced in other member states pursuant to Art. 59 of Brussels I bis Regulation.[181]

Therefore, as far as the definition of "judgment" under both legal instruments is concerned, there is not much of a difference. Both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation exclude procedural decisions with the exception of decisions as to costs or expenses. Moreover, court settlements are to be enforced in the same manner as judicial decisions. The difference between the two legal instruments is that Brussels Convention applies to interim measures.

5.2 Recognition and enforcement

5.2.1 Hague Convention on Choice of Court Agreements

Art. 8 para. 1. of Hague Convention on Choice of Court Agreements stipulates that: "*A judgment given by a court of a contracting state designated in an exclusive choice of court agreement shall be recognised and enforced in other contracting states.*"[182]

Thus, the key conditions regarding recognition of any judgment are, first, that the judgment has been given by a court of a contracting state and, secondly, that that court has been designated in an exclusive choice of court

177 Judgment of the Court of Justice (Sixth Chamber) of 2 June 1994, Case C-414/92.
178 Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 258; See also Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Úvod do mezinárodního práva soukromého*. Praha: Wolters Kluwer, 2017, p. 267.
179 Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 258.
180 Judgment of the Court of Justice (Sixth Chamber) of 2 June 1994, Case C-414/92.
181 Art. 59 Brussels I bis Regulation.
182 Art. 8 para. 1 Hague Convention on Choice of Court Agreements.

agreement.[183] If these requirements are satisfied, the judgment shall be recognized, unless there is a reason why it should not be.[184]

Pursuant to Art. 8 para. 2 no review as to the merits of the judgment is permitted.[185] Art. 8 para. 2, however, further stipulates that the court addressed shall be bound by the findings of facts on which the court of origin based its jurisdiction.[186] "*This means that if, for example, the court addressed has to decide whether the formal requirements of a choice of court agreement were satisfied, it has to accept any findings of fact made by the court of origin. It is, however, free to draw its own conclusions of law from these facts.*"[187] Thus, this provision is understood in a way that the court addressed may itself decide whether a choice of court agreement was within the scope of the court of origin.[188]

Consequently, Art. 8 para. 3 provides that a judgment will be recognised only if it has effect in the State of origin and will be enforced only if it is enforceable in the State of origin.[189] Finally, Art. 8 para. 4 provides that recognition or enforcement of a judgment may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired.[190]

Generally speaking, Art. 8 of Hague Convention on Choice of Court Agreements incorporates the principles of recognition and enforcement and the following Art. 9 of Hague Convention on Choice of Court Agreements sets out exception to these principles. There are seven situations listed in which recognition or enforcement of a judgment may be refused.[191] It must be emphasized that the wording of Art. 9 using the words "may"

183 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention.* Oxford: Oxford University Press, 2013, p. 195.
184 Ibid., p. 196.
185 Art. 8 para. 2 Hague Convention on Choice of Court Agreements.
186 Ibid.
187 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention.* Oxford: Oxford University Press, 2013, p. 197.
188 Ibid., p. 195.
189 Art. 8 para. 3 Hague Convention on Choice of Court Agreements.
190 Ibid., Art. 8 para. 4.
191 Ibid.

rather than "shall" indicates that courts are not obliged to not to recognize or not to enforce a judgment; they are, however, entitled to do so.[192]

Based on Art. 9 a), recognition or enforcement may be refused if the choice of court agreement is null and void under the law of the state of the chosen court.[193] Thus, the court addressed may decide whether the choice of court agreement is valid as to its substance unless the chosen court has resolved this question.[194] Art. 9 b) provides that recognition or enforcement may be refused if a party lacked the capacity to conclude a choice of court agreement under the law of the requested State.[195] Next, Art. 9 c) stipulates that recognition or enforcement may be refused due to insufficient notification of a defendant that the proceedings are being brought.[196] Pursuant to Art. 9 d) fraud consitutes reason for non-recognition and non-enforcement of a judgment.[197] Under Art. 9 e) recognition or enforcement may be refused if it would be manifestly incompatible with the public policy of the requested state.[198] Finally, Art. 9 f) and g) deal with conflicting judgments either from the requested state or from third countries.[199] These two articles have been copied from Brussels I bis Regulation.[200]

Furthermore, Art. 11 para. 1 stipulates that: "*Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.*"[201] This wording was adopted to take account of the fact that "punitive" damages may be "compensatory" and should be enforced

192 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 96 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

193 Art. 9 letter a) Hague Convention on Choice of Court Agreements.

194 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 198.

195 Art. 9 letter b) Hague Convention on Choice of Court Agreements.

196 Ibid., Art. 9 letter c).

197 Ibid., Art. 9 letter d).

198 Ibid., Art. 9 letter e).

199 Ibid., Art. 9 letter f), g).

200 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 201.

201 Art. 11 para. 1 Hague Convention on Choice of Court Agreements.

to that extent.[202] Thus, Art. 11 para. 2 requires the court addressed to take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.[203]

Finally, Art. 14 stipulates that recognition is governed by the law of the requested state.[204] Therefore, where the law of the requested state incorporates special procedure for recognition of a foreign judgment, the process will not be automatic.[205]

5.2.2 Brussels I bis Regulation

As far as the rules for recognition and enforcement under Brussels I bis Regulation are concerned, it must be noted that these apply generally, they are not peculiar to choice of court agreements.[206]

Art. 36 para. 1 of Brussels I bis Regulation provides that: "*A judgment given in a member state shall be recognised in other member states without any special procedure being required*."[207] Both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation incorporate a rule pursuant to which a judgment given in one member state or contracting state is to be recognised in another member or contracting state.[208] The difference, however, is that under Hague Convention on Choice of Court Agreements the process of recognition is governed by the law of the requested state, whereas under

202 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention.* Oxford: Oxford University Press, 2013, p. 204.

203 Art. 11 para. 2 Hague Convention on Choice of Court Agreements.

204 Ibid., Art. 14.

205 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net.* Published on 8 November 2013, p. 80 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

206 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention.* Oxford: Oxford University Press, 2013, p. 190.

207 Art. 36 para. 1 Brussels I bis Regulation.

208 Rea, M., Marotti, C. M. What is all the fuss? The Potential Impact of the Hague Convention on the Choice of Court Agreement on International Arbitration [online]. *arbitrationblog.kluwerarbitration.com.* Published on 16 June 2017 [cit. 15. 5. 2019]. http://arbitrationblog.kluwerarbitration.com/2017/06/16/fuss-potential-impact-hague-convention-choice-court-agreement-international-arbitration/

Brussels I bis Regulation it is automatic.[209] The solution adopted in Hague Convention on Choice of Court Agreements is less comprehensive compared to Brussels I bis Regulation.[210]

Next, pursuant to Art. 52 of Brussels I bis Regulation: "*Under no circumstances may a judgment given in a member state be reviewed as to its substance in the member state addressed.*"[211] Similar provision can also be found in Hague Convention on Choice of Court Agreements.[212] The difference between the two legal documents, however, is that Art. 45 para. 3 of Brussels I bis Regulation provides that the jurisdiction of the court of origin may not be reviewed and, therefore, the court asked is not permitted to inquire whether the court of origin had jurisdiction to decide a dispute.[213] This, however, does not apply in case of Hague Convention on Choice of Court Agreements as according to its Art. 8 para. 2 the court asked may decide itself whether a choice of court agreement was within the scope of the court of origin.[214]

As far as the grounds for non-enforcement are concerned, these are regulated in Art. 45 and 46[215] of Brussels I bis Regulation.[216] First of all, using of words "shall" instead of "may" in both provisions indicates that courts are obliged to not to recognize or not to enforce a judgment *ex officio* in case that the conditions stipulated in Art. 45 and 46 are met.[217] This is different

209 Art. 14 Hague Convention; See also Forner-Hooft, v. A. Brexit and the Future of Intellectual Property Litigation. *Journal of International Arbitration*. 2016, Vol. 33, No. 7, p. 553; See also Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 263.

210 Masters, S., McRae, B. What does Brexit mean for the Brussels Regime. *Journal of International Arbitration*. 2016, Vol. 33, No. 7, p. 496.

211 Art. 52 Brussels I bis Regulation.

212 See Art. 8 para. 2 Hague Convention.

213 Art. 45 para. 3 Brussels I bis Regulation; See also Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 189.

214 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 195.

215 Art. 45 Brussels I bis Regulation regulates the grounds for non-recognition and Art. 46 the grounds for non-enforcement. It states that: "*On the application of the person against whom enforcement is sought, the enforcement of a judgment shall be refused where one of the grounds referred to in Article 45 is found to exist*". Therefore, the grounds for non-recognition and non-enforcement shall be assessed together.

216 Art. 45 Brussels I bis Regulation.

217 Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 268.

to Hague Convention on Choice of Court Agreements which provides that a court may rule on non-enforcement or non-recognition of a judgment at its own discretion.

Regarding the specific grounds for non-recognition and non-enforcement, Art. 45 para. 1 a) provides that a recognition (or enforcement) of a judgment shall be refused if such recognition (or enforcement) is manifestly contrary to public policy (*ordre public*) in the member state addressed.[218] Similar provision may also be found in Hague Convention on Choice of Court Agreements.[219] Next, based on Art. 45 para. 1 b) failure to notify the defendant of the commencement of the proceedings constitutes a ground for non-recognition (or non-enforcement) of a judgment.[220] Comparable provision is also included in Hague Convention on Choice of Court Agreements.[221] Art. 45. para. 1 c) and d) refer to conflicting judgments either from the requested state or from third countries.[222] Corresponding provisions are incorporated in Hague Convention on Choice of Court Agreements, too.[223] Finally, Art. 45. para. 1 e) stipulates that recognition (or enforcement) shall be refused due to breach of special provisions dealing with insurance, consumers and employment contracts and exclusive jurisdiction.[224] As choice of court agreements are generally not permitted (though there are exceptions) in these areas,[225] this ground for non-recognition and non-enforcement shall not be analyzed any further.

Therefore, all the grounds for non-recognition (or non-enforcement) of a judgment stipulated in Art. 45 of Brussels I bis Regulation may also be found in Art. 9 of Hague Convention on Choice of Court Agreements.[226]

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218 Art. 45 para. 1 letter a) Brussels I bis Regulation.

219 See Art. 9 letter e) Hague Convention on Choice of Court Agreements.

220 Art. 45 para. 1 letter b) Brussels I bis Regulation.

221 See Art. 9 letter c) Hague Convention on Choice of Court Agreements.

222 Art. 45 para. 1 letter c), d) Brussels I bis Regulation.

223 Art. 9 letter f), g) Hague Convention on Choice of Court Agreements.

224 Art. 45 para. 1 lettr e) Brussels I bis Regulation.

225 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention.* Oxford: Oxford University Press, 2013, p. 190.

226 With the exception or Art. 45 para. 1 letter e) Brussels I bis Regulation which is not relevant as choice of court agreements are generally not concluded in that matter; See also Forner-Hooft, v. A. Brexit and the Future of Intellectual Property Litigation. *Journal of International Arbitration*. 2016, Vol. 33, No. 7, p. 556.

Hague Convention on Choice of Court Agreements, however, additionally provides that recognition or enforcement may be refused if the choice of court agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement was valid;[227] if a party lacked the capacity to conclude the agreement under the law of the requested State;[228] and if the judgment was obtained by fraud.[229]

5.3 Conclusion

Both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation define the term "judgment" in a similar manner. The difference between the two legal instruments is that Brussels Convention applies also to interim measures.

As far as the process of recognition and enforcement under the two legal instruments is concerned, the basic principle under both instruments is that judgments given under a choice of court agreement must be recognized and enforced in courts of other contracting or member states. In both documents, a distinction is made between the process of recognition of a judgment and its enforcement.[230] Under both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation the grounds for non-enforcement derive exclusively from these documents and may not be deduced from national laws.[231]

There are, however, certain differences between Hague Convention on Choice of Court Agreements and Brussels I bis Regulation. Firstly, under Hague Convention on Choice of Court Agreements the process of recognition is governed by the law of the requested state, whereas under Brussels I bis Regulation it is automatic.[232] Secondly, pursuant to Hague

227 Art. 9 letter a) Hague Convention on Choice of Court Agreements.

228 Ibid., Art. 9 letter b).

229 Ibid., Art. 9 letter d).

230 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, p. 188.

231 Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 264.

232 Art. 14 Hague Convention on Choice of Court Agreements; See also Rozehnalová, N., Drličková, K., Kyselovská, T., Valdhans, J. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 263.

Convention on Choice of Court Agreements the court addressed is entitled to decide itself whether a choice of court agreement was within the scope of the court of origin. Under Brussels I bis Regulation, however, the court addressed is not permitted to do so.[233] Thirdly, pursuant to Brussels I bis Regulation courts are obliged to rule on non-recognition or non-enforcement *ex officio*, whereas under Hague Convention on Choice of Court Agreements courts may decide at their own discretion.

Finally, all the grounds regarding non-recognition and non-enforcement of a judgment under Brussels I bis Regulation are also incorporated in Hague Convention on Choice of Court Agreements.[234] Hague Convention on Choice of Court Agreements, however, provides three additional grounds for non-recognition and non-enforcement of a judgment. Thus, the regulation adopted in Hague Convention on Choice of Court Agreements is more restrictive as far as recognition and enforcement of judgments is concerned.

6 Reciprocal Relationship between Hague Convention on Choice of Court Agreements and Brussels I bis Regulation

It is entirely possible that a conflict could arise between Hague Convention on Choice of Court Agreements and Brussels I bis Regulation due to the fact that both legal instruments govern agreements conferring jurisdiction.[235] Thus, it is essential to decide which instrument applies in a given case.[236]

The reciprocal relationship between Hague Convention on Choice of Court Agreements and Brussels I bis Regulation is regulated by Art. 26. para. 6 of Hague Convention on Choice of Court Agreements which provides that:

233 Hartley, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention.* Oxford: Oxford University Press, 2013, p. 189.

234 With the exception or Art. 45 para. 1 letter e) Brussels I bis Regulation which is not relevant as choice of court agreements are generally not concluded in that matter.

235 Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International.* 2016, Vol. 10, No.2, pp. 105–117.

236 Alameda, C. A. Choice of Court Agreements under Brussels I Recast Regulation [online]. *ejtn.eu* [cit. 24. 3. 2019]. http://www.ejtn.eu/Documents/Themis%20Luxembourg/Written_paper_Spain1.pdf

"*This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention – a) where none of the parties is resident in a contracting state that is not a member state of the Regional Economic Integration Organisation; b) as concerns the recognition or enforcement of judgments as between member states of the Regional Economic Integration Organisation*."[237] The underlying principle is that where a case is "regional" in terms of residence of the parties, Hague Convention on Choice of Court Agreements gives way to the regional instrument.[238]

Hague Convention on Choice of Court Agreements limits its impact on Brussels I bis Regulation as the latter's application shall not be affected where none of the parties is resident in a contracting state that is not a member state of the EU.[239] "*Brussels Ibis Regulation will always be applied if both parties in the agreement are domiciled in the EU member state; if one or both parties to the agreement are domiciled in a state party that is not the EU member state, Hague Convention becomes applicable*."[240] Thus, if a Mexican company and a Czech company choose Rotterdam district court, Hague Convention on Choice of Court Agreements prevails; if, on the other hand, German company and Czech company choose Rotterdam district court, Brussels I bis Regulation prevails.[241]

With regard to recognition and enforcement of judgments, pursuant to Art. 26. para. 6 b) of Hague Convention on Choice of Court Agreements, Brussels I bis Regulation prevails where the court that granted the judgment or the court in which recognition is sought is located in the EU.[242]

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237 Art. 26 para. 6 Hague Convention on Choice of Court Agreements.

238 Affaki, G. B., Naón, A. G. H. *Jurisdictional choices in times of trouble*. Paris: International Chamber of Commerce, 2015, p. 191; See also Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 96 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf; See also Palermo, G. The Future of Cross-Border Disputes Settlement: Back to Litigation? In: Gonzalez-Bueno, C. (ed.). *40 under 40 International Arbitration*. Madrid: Dykinson, 2018, p. 359.

239 Bříza, P. Choice-of-Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation be the Way out of the Gasser – Owusu Disillusion? *Journal of Private International Law*. 2009, Vol. 5, No. 3, p. 557, 558.

240 Alameda, C. A. Choice of Court Agreements under Brussels I Recast Regulation [online]. *ejtn.eu* [cit. 24. 3. 2019]. http://www.ejtn.eu/Documents/Themis%20Luxembourg/Written_paper_Spain1.pdf

241 Palermo, G. The Future of Cross-Border Disputes Settlement: Back to Litigation? In: Gonzalez-Bueno, C. (ed.). *40 under 40 International Arbitration*. Madrid: Dykinson, 2018, p. 359.

242 Art. 26 para. 6 letter b) Hague Convention on Choice of Court Agreements.

"*This means that the generally more limited grounds for non-recognition laid down in Art. 34 of Brussels I bis Regulation will apply in place of the wider grounds in Art. 9 of Hague Convention on Choice of Court Agreements (…) In most cases, this should make it easier to enforce the judgment.*"[243]

As far as conflicts with other international treaties[244] are concerned, Hague Convention on Choice of Court Agreements seeks to eliminate any perceived incompatibility through interpretation in its Art. 26 para. 1.[245] Where this is not possible, Hague Convention on Choice of Court Agreements specifies four cases (Art. 26 para. 2, 3, 4 and 5) in which another convention should prevail over it.[246] Therefore, Hague Convention on Choice of Court Agreements regulates circumstances in which it must "give way" to another treaty.[247] Due to the limited scope of this article, the issue of conflicts with other international treaties will not be explored any further.

7 Conclusion

To conclude, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation aim to regulate choice of court agreements in order to provide certainty to businesses engaging in cross-border activities.

To begin with, under both these legal instruments the presence of an international element is required in order to invoke their applicability. As far as their material scope of application is concerned, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation apply exclusively to civil and commercial matters excluding arbitration; insolvency;

243 Hartley, T., Dogauchi, M. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements [online]. *hcch.net*. Published on 8 November 2013, p. 38 [cit. 24. 3. 2019]. https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

244 Instruments of this kind include the Lugano Convention, the Minsk Convention and various instruments in the Americas.

245 Art. 26 para. 1 Hague Convention on Choice of Court Agreements; See also Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*. 2016, Vol. 10, No. 2, pp. 105–117.

246 Art. 26 para. 2, 3, 4 and 5 Hague Convention on Choice of Court Agreements.

247 Newing, H., Webster, L. Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*. 2016, Vol. 10, No. 2, pp. 105–117.

family law; or wills and successions. Hague Convention on Choice of Court Agreements, however, additionally excludes consumer contracts; employment contracts; carriage of passengers or goods; competition law claims; tort claims; liability for nuclear damage; personal injury; damage to property; immovable property and maritime matters. Thus, the material scope of application of Hague Convention on Choice of Court Agreements is narrower.

Regarding the geographical scope of application, Hague Convention on Choice of Court Agreements has a wider scope of application as it was ratified by all EU member states as well as Singapore, Mexico, and Montenegro. In the author's view this is not entirely relevant due to the fact that where a case is purely "regional", in terms of residence of the parties, Hague Convention on Choice of Court Agreements gives way to Brussels I bis Regulation which prevails.

Consequently, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation contain requirements regarding choice of court agreements.

Firstly, under both legal documents a choice of court agreement must be designated for the purpose of deciding disputes that have arisen in connection with a particular legal relationship.

Secondly, regarding the material validity of a choice of court agreement, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation are applicable only if both parties agree on a choice of court agreement. The material validity of such an agreement shall be determined by the law of the country of the designated court under both regulations.

Thirdly, as far as the formal validity of a choice of court agreement is concerned, Brussels I bis Regulation represents seems slightly more favourable due to the fact that a greater number of choice of court agreements is likely to be considered formally valid.

Next, both legal documents regulate the issue of exclusivity of a choice of court agreement in a way that a court of choice agreement is presumed to be exclusive unless stated otherwise. The difference is that Hague Convention on Choice of Court Agreements applies only to exclusive choice

of court agreements as non-exclusive and asymmetrical choice of court agreements invoke its inapplicability. Brussels I bis Regulation, however, applies even in these cases.

Therefore, in author's opinion Brussels I bis Regulation is likely to cover more court of choice agreements.

Regarding the effects of a choice of court agreement, under both legal instruments the court designated in such an agreement is obliged to decide the case in spite of the doctrine of *forum non conviens*. Pursuant to both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation the court not chosen shall decline its jurisdiction. Under Hague Convention on Choice of Court Agreements, however, there are five exceptions to this rule which makes this legal instrument less effective.

As far as the issue of recognition and enforcement is concerned, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation define the term "judgment" in a similar way. Moreover, the basic principle under both instruments is that a judgment given under a choice of court agreement must be recognized and enforced in another contracting state or the EU member state. There are, however, some differences between the two legal documents.

Firstly, under Hague Convention on Choice of Court Agreements the process of recognition is governed by the law of the requested state. Under Brussels I bis Regulation it is automatic which makes this regulation more convenient. Secondly, unlike Brussels I bis Regulation, Hague Convention on Choice of Court Agreements authorises the court addressed to decide itself whether a choice of court agreement was within the scope of the court of origin. Such a solution is not perfect as it may reduce the number of recognised and enforced judgments. Thirdly, when dealing with the recognition and enforcement of a choice of court agreement, courts under Brussels I bis Regulation act *ex officio*, whereas under Hague Convention on Choice of Court Agreements courts may decide at their own discretion. In author's opinion the latter solution is not desirable in light of the legal certainty. Finally, as far as grounds regarding non-recognition and non-enforcement of a judgment, Hague Convention on Choice of Court

Agreements, incorporates more grounds for non-recognition and non-enforcement of a judgment making this legal regulation less favourable.

Therefore, as far as choice of court agreements are concerned, Brussels I bis Regulation constitutes a more favourable regulation compared to Hague Convention on Choice of Court Agreements. Therefore, there is no reason why the current EU regime should not remain in place as Brussels I bis Regulation, in fact, takes precedence over the Hague Convention on Choice of Court Agreements in matters including parties within the EU member state.

Hague Convention on Choice of Court Agreements, however, represents a legal regulation which is in force not only in the EU, but in other countries, such as Mexico, Montenegro, and Singapore. Moreover, once the UK has exited the EU, Brussels I bis Regulation will no longer apply in the UK and the only alternative regime left is the one represented by Hague Convention on Choice of Court Agreements.

In spite of the fact that Hague Convention on Choice of Court Agreements does not constitute such a favourable regulation compared to Brussels I bis Regulation, it provides certainty that a choice of court clause will be upheld across the EU and a few other countries. This definitely outweighs the other alternative which is nothing else than conflict of law rules which are likely to add time and cost to cross-border enforcement of judgments. Moreover, Hague Convention on Choice of Court Agreements is open for signature for all states and, thus, it has the potential to become more widespread in the future.

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Recent Developments in European Private International Law under Case Law of the Court of Justice

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Abstract

Within the context of the subject of the Private International Law Section, the contribution identifies selected recent judgments of the Court of Justice of the European Union, which indicate further developments in this area of law. The contribution will focus on the provisions for determining international jurisdiction as well as the recognition and enforcement of foreign decisions.

Keywords

European Union; Private International Law; Court of Justice; Case-law; Judgment; Regulation; Jurisdiction; Recognition and Enforcement; Civil and Commercial Matters; Arbitral Proceedings.

1 Introduction

It is fundamental fact that the Treaty establishing the European Economic Community ("TEEC"), which introduced the internal market and the free movement of goods, persons, services, capital, also known as the "four freedoms", envisaged simultaneously by its Art. 220 the free movement of judicial and arbitration decisions (judgments and arbitral awards), its recognition and enforcement anywhere in the European Economic Community ("EEC"), as "fifth freedom". This free movement of enforcement orders has gradually emerged as a key element in strengthening cross-border law enforcement and a prerequisite for the effective application of the fundamental four freedoms at all.

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As European Commission has already in 1959 pointed out, *a true internal market between the Member States will be achieved only if adequate legal protection can be secured. The economic life of the Community may be subject to disturbances and difficulties unless it is possible, where necessary by judicial means, to ensure the recognition and enforcement of the various rights arising from the existence of a multiplicity of legal relationships. As jurisdiction in both civil and commercial matters is derived from the sovereignty of Member States, and since the effect of judicial acts is confined to each national territory, legal protection and, hence, legal certainty in the common market are essentially dependent on the adoption by the Member States of a satisfactory solution to the problem of recognition and enforcement of judgments*.[1]

Nevertheless, it took nearly six years for the expert commission[2] to submit for approval **Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters ("Brussels Convention")**, within the meaning of Art. 220 TEEC, which entered into force on 1 February 1973. Thus was laid the foundation of a uniquely European body of procedural law.[3]

The subsequent logical and second legislative step was the adoption of the **Convention of 19 June 1980 on the law applicable to contractual obligations ("Rome Convention")**, which came into force on 1. 4. 1991. The Convention does not set out its legal basis and in its short preamble refers just to "*the efforts to continue in the field of private international law to work on the harmonization of the law which has begun within the Community, in particular as regards jurisdiction and the enforcement of judgments*".

The Brussels Convention becomes source of Community law since the Member States concluded the **Protocol on the interpretation of the Brussels Convention by the Court of Justice of the European**

1 Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters by Mr P. Jenard. In: Official Journal No C 59/1 of 27 September 1968, p. 38 ("Jenard Report"). It takes the form of a commentary on the Convention (see information of the Council published on the first page of the Report).

2 The committee of experts was established in 1960. Preliminary draft od the Convention was adopted in December 1964. The draft Convention was finally adopted by the experts on 15 July 1966. The Convention was signed in Brussels on 27 September 1968.

3 Reuland, R. The Recognition of Judgments in the European Community: The Twenty-Fifth Anniversary of the Brussels Convention. *Michigan Journal of International Law*. 1993, Vol. 14, No. 4, p. 560.

Communities.[4] Under Art. 2 of the Protocol, supreme courts[5] as well as other courts when they are sitting in an appellate capacity may request the European Court of Justice ("Court of Justice") to give preliminary rulings on questions of interpretation of the Convention.

The Court of Justice, as an exclusive judicial institution of the European Communities, assumes its jurisdiction and applies the Brussels Convention according to the interpretative methods of Community law, thus making Brussels Convention 'communitarian', irrespective of the legal basis of Art. 220 TEEC, which did not accord such a character to international treaties arising therefrom.

As has already been stated by the Court on the first occasion of the interpretation of the Brussels Convention, it frequently uses words and legal concepts drawn from civil, commercial and procedural law and capable of a different meaning from one Member state to another. The question therefore arises whether these words and concepts must be regarded as having their own independent meaning and as being thus common to all the Member states or as referring to substantive rules of the law applicable in each case under the rules of conflict of laws of the court before which the matter is first brought. Neither of these two options rules out the other since the appropriate choice can only be made in respect of each of the provisions of the Brussels Convention to ensure that it is fully effective having regard to the objectives of Art. 220 of the TEEC. In any event it should be stressed that the interpretation of the said words and concepts for the purpose of the Brussels Convention does not prejudge the question of the substantive rule applicable to the particular case.[6]

According to many evaluations, the Protocol was a singular event in the continuing history of legal, social, and political integration in Europe. The Court of Justice was the first international court to be afforded jurisdiction over a private international law convention. Therefore, the Court has been given

4 This Protocol was signed in Luxembourg on 3 June 1971 and entered into force with the Convention on the same day (1 February 1973).

5 Regardless of their civil, commercial or administrative jurisdiction (i.e. in France both Cour de Cassation and Conseil d`État or in Portugal Supremo Tribunal de Justiça and Supremo Tribunal Administrativo, were entitled to submit preliminary ruling).

6 Judgment of the Court of Justice of Justice of 6 October 1976, Case 12/76, para. 10 and 11.

an opportunity of solving, in a unitary European perspective, the problems of interpretation arising from the Brussels Convention. The Court of Justice has certainly availed itself of this opportunity and has, on several occasions, interpreted disputed Brussels Convention terms by adopting a Community definition instead of a definition favored by a particular Member State.[7]

The first preliminary rulings were initiated in 1975 and 1976 by courts from almost all the Member States at that time.[8]

Incidentally, from the very first moments of the application of the Brussels Convention, it was clear that the questions referred would be divided into two basic groups:

1. questions concerning the interpretation of alternative jurisdiction under Art. 5 of the Convention[9], in particular expressions "*obligation*", "*the place of performance of the obligation*" and "*the place where the harmful event occurred*" and
2. all (and "significant") others.

More than 100 judgments of the Court of Justice were delivered under Brussels Convention and the Court's case-law contributed significantly to the updating and modernization of the Brussels Convention without necessity to amend it including and (fundamentally) uniform application across EEC.

Any State which becomes a member of the EEC was required to accede the Brussels Convention. But it has not always been a clear task. It is fact, when the United Kingdom, Ireland, and Denmark became members of the European Community ("EC") in 1973, negotiations resulting even in a 1978 Convention of accession[10] which also modified and amended the Brussels

7 Reuland, R. The Recognition of Judgments in the European Community: The Twenty-Fifth Anniversary of the Brussels Convention. *Michigan Journal of International Law*. 1993, Vol. 14, No. 4, p. 566.

8 See cases before Court of Justice: Judgment of the Court of Justice of 6 October 1976, Case 12/76; Judgment of the Court of Justice of Justice of 6 October 1976, Case 14/76; Judgment of the Court of Justice of Justice of 30 November 1976, Case 21/76; Judgment of the Court of Justice of Justice of 14 October 1976, Case 29/76.

9 See also Art. 5 Brussels I Regulation and Art. 7 Brussels I bis Regulation.

10 The fact that the accession of Ireland and the United Kingdom to the Brussels Convention was not merely a technical question underlines the fact that, in the first question referred to the Court of Justice (Case 12/76), both States were active and submitted observations even though they were not a party to the Brussels Convention at that time. See Judgment of the Court of Justice of 6 October 1976, Case 12/76, para. 5–8.

Convention on several provisions in order to accommodate the interests of the new Member States, but without altering the fundamental principles of the original document.

It was not until the **Treaty of Amsterdam**[11] that the private international law was unambiguously included in Community law. Private international law, in EC law terminology known as "*judicial cooperation in civil matters*", was excluded from the third pillar of the European Union ("EU") and attached as the new provisions to TEC (legal base was adopted in Art. 65 TEC).

Only within a year after the entry into force of the Treaty of Amsterdam, the first three key regulations are adopted:

1. Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses ("the Brussels II Regulation"), very early replaced by Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ("Brussels II bis Regulation"), which will soon be replaced (from 1 August 2022) by Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction ("Brussels II Regulation Recast"),
2. Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings ("Insolvency Regulation"), later replaced by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings ("Insolvency Regulation Recast") and
3. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation"), which has replaced the Brussels Convention apart from Denmark. Brussels I Regulation was replaced from 10 January 2015 by Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and

11 Signed on 2 October 1997 and valid from 1 May 1999.

enforcement of judgments in civil and commercial matters ("Brussels I bis Regulation").

It must be noted, that in so far as Brussels I bis Regulation repeals and replaces Brussels I Regulation which has itself replaced the Brussels Convention, as amended by successive conventions on the accession of new Member States to that convention, **the Court's interpretation** of the provisions of the latter legal instruments also **applies** to Brussels I bis Regulation whenever those provisions may be regarded as 'equivalent'.[12] This means that a substantial part of the case-law of the Court of Justice since 1976 has remained valid, but also the urgent need to use so-called **correlation tables**, which have special role in its application in this respect.[13]

It should be also pointed out, that the new legal basis contained in Art. 65 TEC as amended by the Amsterdam Treaty was extended to the adoption of legislative acts also in the **new area of EU private international law**, i.e.:

a) system for cross border service of judicial and extrajudicial documents,
b) cooperation in the taking of evidence,
c) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws,
d) eliminating obstacles to the good functioning of civil proceedings, if necessary, by promoting the compatibility of the rules on civil procedure applicable in the Member States.

The above-mentioned areas have been regulated in particular by new acts:

1. Council regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, later replaced by Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000,

12 Judgment of the Court of Justice (Eighth Chamber) of 31 May 2018, Case C-306/17.
13 See e.g. correlation table as Annex III of Brussels I bis Regulation.

2. Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters,
3. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II Regulation") and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I Regulation"),
4. Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure ("European Payment Order Regulation") and Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure ("Small Claims Procedure Regulation").

The Treaty of Amsterdam also retained a **restriction for the courts of first instance** to initiate preliminary ruling on the interpretation of regulations adopted in the field EU private international law, in a specific provision of Art. 68 TEC, which was a *lex specialis* to Art. 234 TEC as the "basic" preliminary procedure provision. According to the Court of Justice settled case law at that time, the question referred for a preliminary ruling by courts, decision of which is open to appeal, is not admissible.[14] The reference for a preliminary ruling can only be initiated by a court whose decision can no longer be challenged by an appeal, and that is generally the supreme court.[15]

The adoption of Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims ("European Enforcement Order Regulation") was an important step in the field of recognition and enforcement of judicial and extrajudicial decisions and was a *lex specialis*[16] to the Brussels I Regulation.

Other *lex specialis* regulations are adopted for **specific legal institutes** and include a new approach consisting in regulating all issues (jurisdiction,

14 See Order of the Court of Justice (Fourth Chamber) of 10 June 2004, Case C-555/03.
15 Judgment of the Court of Justice of 4 June 2002, Case C-99/00.
16 More precisely, the lex alternative, since the application of the Brussels I Regulation was not excluded.

applicable law, recognition and enforcement and cooperation of the courts/central authorities of the Member States) by one single act.[17]

2 Court of Justice role after Lisbon Treaty

Restriction which has existed from adoption of the Protocol (1971), and upheld by Amsterdam Treaty, had its advantages and disadvantages, but in fact it seemed to have forced the first instance courts to properly deal with the Court's previous case-law and to assess its possible development.

With effect from 1 December 2009 the **Treaty of Lisbon**[18] removes those restrictions on the jurisdiction of the Court of Justice of the European Union ("CJEU")[19] to give preliminary rulings in area of EU private international law for first instance courts.[20] But even before from 1 December 2009 CJEU has accepted preliminary ruling asked by first instance court (e.g. Polish court has delivered its question on 23 July 2009) with reasoning, that "*the objective pursued by Article 267 TFEU of establishing effective cooperation between the Court of Justice and the national courts and the principle of procedural economy are arguments in favour of regarding references for a preliminary ruling as admissible where they were lodged by lower courts during the transitional period that elapsed shortly before the entry into force of the Treaty of Lisbon and have not been examined by the Court until after its entry into force. Rejection on the ground of inadmissibility would, in those circumstances, only lead the referring court, which would in the meantime*

17 See Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ("Maintenance Regulation") or Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession ("Succession Regulation").

18 Signed on 13 December 2007.

19 See also Biondi, A., Eeckhout, P., Ripley, S. *EU Law after Lisbon*. Oxford: Oxford University Press, 2012, 456 p.

20 The Treaty of Lisbon also repealed former Art. 35 Treaty on European Union ("TEU") concerning police and judicial cooperation in criminal matters, therefore the jurisdiction of the Court of Justice to give preliminary rulings is no longer subject to a declaration by which each Member State recognises the jurisdiction of the Court of Justice and specifies the national courts that may request a preliminary ruling. Since that article has been repealed, those restrictions have disappeared and the Court of Justice has acquired full jurisdiction in that area. However, transitional provisions (Protocol No 36, Art. 10) provide that such jurisdiction will not apply fully until five years after the entry into force of the Treaty.

have acquired the right to make a reference, to refer the same question for a preliminary ruling once more, resulting in excessive procedural formalities and unnecessary lengthening of the duration of the main proceedings. Therefore, it must be held that since 1 December 2009 the Court has had jurisdiction to hear and determine a reference for a preliminary ruling from a court against whose decisions there is a judicial remedy under national law even where the reference was lodged prior to that date."[21]

Treaty of Lisbon has not only **cancelled the restriction** on access to preliminary ruling proceedings for first instance judicial proceedings, but in EU private international law area also:

1. expressly formulates, at the provision of the supreme legal force, the **principle of mutual recognition** of judicial and extrajudicial decisions (Art. 81 para. 1 Treaty on the Functioning of the European Union ("TFEU")),
2. weakens the context of the measures taken under EU judicial cooperation in civil matters in relation to the functioning of the internal market, and
3. extends the scope of possible measures to include alternative methods of dispute resolution and support for the training of judges and judicial staff in the field of EU private international law (which, in fact, has been in progress from the Amsterdam Treaty).

However, a clear **step back** introduced by Lisbon Treaty is enactment of special legislative procedure for family law measures having cross-border implications, i.e. unanimity of the Council legislative acts in consultation with the European Parliament.

3 Key recent Court of Justice case-law

Development of the EU private international law area has brought strengthening of the competences of the courts of the Member States, including their judicial activities, which shall be obligatory executed by judges (courts).

As the EU legislator has already explained, mutual trust in the administration of justice in the EU justifies the principle, that judgments given in a Member State should be recognised in all Member States, without the need for any

21 Judgment of the Court of Justice (First Chamber) of 17 January 2011, Case C-283/09.

special procedure. In addition, the aim of making cross-border litigation less time-consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State addressed. As a result, a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed.[22] New **Brussels I bis Regulation** therefore **cancelled** the need for an **exequatur** and provides a simplified procedure based on the principle, that a decision issued in a Member State should be treated as if it had been issued in the Member State addressed.[23]

At the same time, Art. 42 para. 1 of Brussels I bis Regulation states: "*For the purposes of enforcement in a Member State of a judgment given in another Member State, the applicant shall provide the competent enforcement authority with* (and only):

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and

(b) the certificate issued pursuant to Article 53, certifying that the judgment is enforceable and containing an extract of the judgment as well as, where appropriate, relevant information on the recoverable costs of the proceedings and the calculation of interest."

Whereas, in the system established by Brussels I Regulation, production of the certificate was not required, it became **obligatory** with the entry into force of Brussels I bis Regulation.

By extracting from the judgment whose enforcement is sought the key information and making that information easily understandable for the authorities and any interested party – thanks to the standard form that must be employed, set out in Annex I to Brussels I bis Regulation – the Art. 53 Certificate contributes to the rapid and efficient enforcement of judgments delivered abroad.[24]

What is the nature of the activity carried out by the court, when issuing certificate under Brussels I bis Regulation? There is doubt, whether, in the context of a procedure for the issue of a certificate under Art. 53 of Brussels I bis Regulation, a court is acting in the exercise of a judicial

22 Recital 26 Brussels I bis Regulation.
23 Ibid., Art. 39.
24 See Judgment of the Court of Justice (First Chamber) of 6 September 2012, Case C-619/10, para. 41.

function for the purposes of Art. 267 TFEU. Subsequently, as certificate forms the basis for implementation of the principle of direct enforcement of judgments delivered in the Member States, **shall be issued automatically, quasi-automaticity** or **could by further reviewed**?

These questions have been raised recently within two cases:

1. *Gradbeništvo Korana*, C-579/17 and
2. *Maria Fiermonte*, C-347/18.

It should by noticed, that the system established by Brussels I bis Regulation is based on the **abolition of exequatur**, which implies that no control is exercised by the competent court of the requested Member State, since only the person against whom enforcement is brought can oppose the recognition or enforcement of the judgment affecting him.

CJEU has ruled out, that it is apparent from the combined provisions of Art. 37 and 42 of that regulation that, for the purposes of the recognition and enforcement in a Member State of a judgment delivered in another Member State, the applicant must produce solely a copy of the judgment concerned accompanied by the certificate issued, in accordance with Art. 53 of that regulation, by the court of origin. That certificate is to be served on the person against whom enforcement is sought prior to any enforcement measure, in accordance with Art. 43 para. 1 of that regulation.[25]

That certificate constitutes the basis for the implementation of the principle of direct enforcement of judgments delivered abroad. Once the Art. 53 Certificate is provided to the competent enforcement authority, it will, in practice, acquire a life of its own. All the information necessary for the enforcement of the related judgment should in principle be found, in a 'user-friendly' fashion, in the certificate. It is thus fair to assume that, unless expressly questioned, the enforcement authorities are unlikely to double-check the accuracy of that information by examining the text of the judgment in question, which will often be drafted in a language they are unable to read. Therefore, in practice, the Art. 53 Certificate is likely to form the basis for execution of the judgment.[26]

25 Judgment of the Court of Justice (Second Chamber) of 28 February 2019, Case C-579/17, para. 36.

26 See Opinion of Advocate General Bobek, Judgment of the Court of Justice (First Chamber) of 4 September 2019, Case C-347/18, para. 95.

As the Court stated with regard to the certificate provided for in Art. 9 of European Enforcement Order Regulation, in the judgment of 16 June 2016, Pebros Servizi, C-511/14, the **certification of a court decision** is a **judicial act**. Consequently, the procedure for the issue of a certificate under Art. 53 of Brussels I bis Regulation is judicial in nature, with the result that a national court ruling in the context of such proceedings is entitled to refer questions to the Court for a preliminary ruling.[27]

The authorities in the Member State addressed are, under the new system, to enforce the judgment solely on the basis of the information contained in the judgment and in the Art. 53 Certificate. That is why that certificate – as the Court stated – forms the basis for the implementation of the principle of direct enforcement of judgments delivered abroad.[28] Put simply, without that certificate, the judgment is not capable of circulating freely within the European judicial area.[29]

Principally role of the authority responsible for extracting the information from the body of the judgment whose enforcement is sought and introducing that information into the specific form might often be rather mechanical. However, that may not always be the case and filling in the form in Annex I to Brussels I bis Regulation requires rather detailed information and may require some **interpretation of the final judgment** rendered.

Nevertheless, the certificate issued pursuant to Art. 53 and 42 para. 1 of Brussels I bis Regulation, and according to general scheme of the Regulation, is not automatic, but rather "**quasi-automatic**" (or almost automatic[30]). The court of origin is prior to its edition, obliged to verify that the conditions for the application of that provision are satisfied:

1. Brussels I bis Regulation is applicable *ratione temporis* and *ratione materiae* to the case at hand,
2. decision whose enforcement is sought has been issued by it,

27 Judgment of the Court of Justice (First Chamber) of 4 September 2019, Case C-347/18, para. 31.

28 Judgment of the Court of Justice (Second Chamber) of 28 February 2019, Case C-579/17, para. 37.

29 See Opinion of Advocate General Bot, Judgment of the Court of Justice (Second Chamber) of 28 February 2019, Case C-579/17, para. 44.

30 See expressly Judgment of the Court of Justice (First Chamber) of 4 September 2019, Case C-347/18, para. 38.

3. the applicant is an '*interested party*' within the meaning of Art. 53.[31]

Incidentally, the examination of a cross-border element by court is not essential at all, it may not exist at the time of certificate issue.

Finally, however, it can be concluded that Art. 53 of Brussels I bis Regulation must be interpreted as **precluding the court of the Member State of origin**, which has been requested to issue the certificate referred to in that article concerning a judgment which has acquired the force of res judicata (also issued against a consumer), **from examining of its own motion**, whether that judgment was given in compliance with the rules on jurisdiction laid down by that regulation.[32]

The court of origin cannot go further in its examination of the matter, extending its review to aspects of the dispute which fall outside the boundaries of Art. 53 of Brussels I bis Regulation. More particularly, the court of origin may **not reevaluate the substantive and jurisdictional issues** that have been settled in the judgment the enforcement of which is sought. A different interpretation of the provision would 'short-circuit' the system established by Brussels I bis Regulation, introducing an additional layer of judicial review even where national law does not provide (or no longer provides) an appeal procedure against the judgment in question. That approach would thus risk encroaching upon the principle of *res judicata*.[33]

Another good example of the necessary clarification of the importance of the provisions of EU law can be set by the interpretation of the CJEU in determining conditions of **implied prorogation of jurisdiction**. There is jurisdiction in favour of a court that would not otherwise have jurisdiction under the Brussels I bis Regulation if the plaintiff brings the matter before it and the defendant enters an appearance without contesting its jurisdiction.

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31 See Opinion of Advocate General Bobek, Judgment of the Court of Justice (First Chamber) of 4 September 2019, Case C-347/18, para. 57.

32 Judgment of the Court of Justice (First Chamber) of 4 September 2019, Case C-347/18, para. 39. As regards the right to an effective remedy referred to in Art. 47 of the Charter, that right has not been infringed given that Art. 45 of Brussels I bis Regulation enables the defendant to rely, in particular, on a potential breach of the rules on jurisdiction provided for in Chapter II, Section 4 of that regulation in respect of consumer contracts.

33 See Opinion of Advocate General Bobek, Judgment of the Court of Justice (First Chamber) of 4 September 2019, Case C-347/18, para. 58 and 59.

Art. 18 of the Brussels Convention, as it continuous within Art. 24 Brussels I Regulation and actually by **Art. 26 Brussels I bis Regulation** governs jurisdiction implied from submission. As Mr. *Jenard* has stated, it will be necessary to refer to the rules of procedure in force in the State of the court seised of the proceedings in order to determine the point in time up to which the defendant will be allowed to raise this plea, and to determine the legal meaning of the term "appearance".[34]

The first sentence of Art. 26 para. 1 of Brussels I bis Regulation provides for a rule of jurisdiction based on the **entering of an appearance by the defendant** in respect of all disputes where the jurisdiction of the court seised is not derived from other provisions of that regulation. That provision applies also in cases where the court has been seised in breach of the provisions of that regulation and implies that the entering of an appearance by the defendant may be considered to be a tacit acceptance of the jurisdiction of the court seised and thus a prorogation of that court's jurisdiction.[35]

CJEU has recently stated (**C-464/18, Ryanair DAC**), that since an absence of (any) observations cannot constitute the entering of an appearance within the meaning of Art. 26 of Brussels I bis Regulation and, therefore, cannot be considered as **tacit acceptance**, by the defendant, of the jurisdiction of the court seised, such a provision concerning the implied prorogation of jurisdiction cannot be applied in circumstances such as those in question in the main proceedings. Precisely, Art. 26 para. 1 of Brussels I bis Regulation must be interpreted as not applying in a case, where the defendant has not submitted observations or entered an appearance.[36]

In the **area of family law** and the application of these basic regulations, treaties or conventions:

1. Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, concluded in The Hague on 23 November 2007 (the 2007 Hague Convention),

34 Jenard Report, p. 38.

35 Judgment of the Court of Justice (Fourth Chamber) of 20 May 2010, Case C-111/09, para. 21.

36 Judgment of the Court of Justice (Sixth Chamber) of 11 April 2019, Case C-464/18, para. 40 and 41.

2. Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ("Brussels II bis Regulation") and
3. Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ("Maintenance Regulation"),

several cases have been decided recently by the Court of Justice, and these two below mentioned cases are genuine resource how to establish jurisdiction in joint proceedings, where decision on divorce/separation, parental responsibility and maintenance is concurrently requested within one single proceeding:

a) *A v B*, C-184/14 and
b) *R v P*, C-468/18.

In **C-184/14** referring court[37] seeked to ascertain whether Art. 3 (c) and (d) of **Maintenance Regulation** must be interpreted as meaning that, where a court of a Member State is seised of proceedings involving the separation between the parents of a minor child and a court of another Member State is seised of proceedings in matters of parental responsibility involving that child, a **maintenance** request pertaining to that same child **may be ruled** on both

- by the court that has jurisdiction to entertain the proceedings involving the separation, as a matter ancillary to the proceedings concerning the status of a person, within the meaning of Art. 3(c) of that regulation,
- and by the court that has jurisdiction to entertain the proceedings concerning parental responsibility, as a matter ancillary to those proceedings, within the meaning of Art. 3(d) of that regulation,
- or whether a decision on such a matter must necessarily be taken by the latter court.

37 Corte suprema di cassazione (Italy).

It should be observed that such a matter arises if an application relating to maintenance in respect of a minor child is deemed ancillary both to "proceedings concerning the status of a person" and to "proceedings concerning parental responsibility", within the meaning of those provisions, and not only to one of those sets of proceedings. Therefore, the scope of the concept of '**ancillary matter**' contained in Art. 3 (c) and (d) **Maintenance Regulation** was clearly delineated, as the scope of this concept cannot, however, be left to the discretion of the courts of each Member State according to their national law.

In other words, a question can also be asked, if the connecting factor provided for in Art. 3 (d) of that regulation can relate only to maintenance obligations with regard to minor children, which are cleared linked to parental responsibility, whereas the connecting factor provided for in Art. 3 (c) of that regulation can relate only to maintenance obligations between spouses and not also to those concerning minor children.

As Advocate General *Bot* has pointed out, the best interests of the child must be the guiding consideration in the application and interpretation of EU legislation. In this regard, the words of the Committee on the Rights of the Child attached to the office of the UN High Commissioner for Human Rights (OHCHR) are particularly relevant. That committee points out that (the best interests of the child) constitute a standard, an objective, an approach, a guiding notion, that must clarify, inhabit and permeate all the internal norms, policies and decisions, as well as the budgets relating to children.[38]

Subsequently, CJEU has stated, that, from the wording, the objectives pursued and the context of Art. 3 (c) and (d) of Maintenance Regulation, that, where two courts are seised of proceedings, one involving proceedings concerning the separation or dissolution of the marital link between married parents of minor children and the other involving proceedings involving parental responsibility for those children, an application for maintenance in respect those children cannot be regarded as ancillary both to the proceedings concerning parental responsibility, within the meaning of Art. 3 (d)

38 See Opinion of Advocate General Bot, Judgment of the Court of Justice (Third Chamber) of 16 July, Case C-184/14, para. 35.

of that regulation, and to the proceedings concerning the status of a person, within the meaning of Art. 3(c) of that regulation. They may be regarded as ancillary only to the proceedings in matters of parental responsibility.[39]

In **C468/18** the proceedings seeking to obtain the dissolution of the marital link, in this instance the divorce, and to organise the consequences for the child of the married couple were brought before the court with jurisdiction to adjudicate on the separation, owing to the common nationality of the spouses, although the place of habitual residence of one of them, at least, and of the child, was fixed in a different Member State. In such a case, the applicant's choice to seise a single court for all the applications is generally guided by the wish to take **advantage of the concentration of the proceedings**.

Art. 5 of Maintenance Regulation provides, moreover, for the court of a Member State before which the defendant enters an appearance to have jurisdiction, unless the purpose of the defendant entering an appearance was to contest that jurisdiction. As is apparent from the words 'apart from jurisdiction derived from other provisions of this Regulation', that article provides for a head of jurisdiction applicable by default where, inter alia, the criteria under Art. 3 of that regulation are not applicable. Thus, the court for the place where the defendant is habitually resident, seised by the maintenance creditor, has jurisdiction to rule on the application relating to maintenance obligations for the child under Art. 3 (a) of Maintenance Regulation. It **also has jurisdiction under Art. 5** of that regulation as the court before which the defendant entered an appearance without raising a plea alleging lack of jurisdiction.

However, it does not follow from the previous judgment in C-184/14, that where a court has declared that it has no jurisdiction to rule on an action in relation to the exercise of parental responsibility for a minor child and has designated another court as having jurisdiction to rule on that action, only that latter court has jurisdiction, in all cases, to rule on any application in relation to maintenance obligations with respect to that child.[40]

39 Judgment of the Court of Justice (Third Chamber) of 16 July, Case C-184/14, para. 47.

40 It is important to note in this connection that, in the Judgment of the Court of Justice (Third Chamber) of 16 July, Case C-184/14, the Court interpreted only points (c) and (d) of Art. 3 of Maintenance Regulation and not the other criteria for jurisdiction provided for in Art. 3 or Art. 5 thereof.

Consequently, the answer to the questions referred is that Art. 3 (a) and (d) and Art. 5 of Maintenance Regulation must be interpreted as meaning that where there is an action before a court of a Member State which includes three claims concerning, respectively, the divorce of the parents of a minor child, parental responsibility in respect of that child and the maintenance obligation with regard to that child, the court ruling on the divorce, which has declared that it has no jurisdiction to rule on the claim concerning parental responsibility, nevertheless has jurisdiction to rule on the claim concerning the maintenance obligation with regard to that child where it is also the court for the place where the defendant is habitually resident or the court before which the defendant has entered an appearance, without contesting the jurisdiction of that court.[41]

4 Conclusion

Finally, I would like to draw attention to one of the Court's most cited judgment in 2018, which does not, at first or second sight, directly concern the field of judicial cooperation in civil matters, but it certainly has a broad consequences for it.

The *Achmea Case*[42] with regard compatibility of investor-State dispute settlement mechanism established by an intra-EU bilateral investment treaty ("BIT")[43] with Art. 18 para. 1, 267 and 344 TFEU, seeks to clarify the **jurisdiction of the courts** of the Member States (not only in relation to arbitration tribunals), as well as the principle of **mutual trust** between judicial systems, in particular with regard to the status of private law entities originating in Western EU countries and trading with Central and Eastern EU Member States, which acceded to the Union after 2004.

Principally the legal order and the judicial system of the Union are based on the fundamental premises that **each Member State** shares with all the other Member States, and recognises that they share with it, a set of common

41 Judgment of the Court of Justice (Third Chamber) of 5 September 2019, Case C468/18, para. 52.

42 Judgment of the Court of Justice (Grand Chamber) of 6 March 2018, Case C-284/16.

43 Bilateral investment treaty concluded in 1991 between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic and still applicable between the Kingdom of the Netherlands and the Slovak Republic.

values on which the EU is founded, which implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.[44]

Pursuant to the **principle of sincere cooperation**, set out in the first subparagraph of **Art. 4 para. 3 TEU**, the Member States are to ensure, in their respective territories, the application of and respect for EU law. Furthermore, pursuant to the second subparagraph of Art. 4 para. 3 TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties (TEU and TFEU) or resulting from the acts of the institutions of the Union.[45] In order to ensure the preservation of the specific characteristics and the autonomy of the EU legal order, the Treaties established a **judicial system intended to ensure coherence and unity** in the interpretation of EU law, which entrusts the national courts and the Court of Justice with the task of ensuring the full application of EU law in all Member States and the judicial protection of the rights which individuals derive from EU law.[46]

It is in the context of Achmea proceedings was important argument raised[47] – risk that decisions will be made by the arbitral tribunals that might be incompatible with EU law and also with the principle of mutual trust. As GA Wathelet correctly pointed out, that argument applies not only to **international investment arbitration** but also to **international commercial arbitration**, since the latter may also lead to awards that are incompatible with EU law and be based on an alleged lack of trust in the courts and tribunals of the Member States. In spite of those risks, the Court has never disputed its validity, although arbitration of questions of EU competition law between individuals is not unknown. If international arbitration between individuals therefore does not undermine the allocation of powers fixed by the TEU and TFEU and, accordingly, the autonomy of the EU legal

44 See Opinion of the Court of Justice (Full Court) of 18 December 2014, Case Opinion 2/13, para. 168.

45 Opinions of the Court of Justice (Full Court) of 8 March 2011, Case Opinion 1/09, para. 68 and of 18 December 2014, Case Opinion 2/13, para. 173.

46 Judgment of the Court of Justice (Grand Chamber) of 13 March 2007, Case C-432/05, para. 38.

47 By number of Governments and the Commission.

system, even where the State is a party to the arbitral proceedings,[48] the same must apply in the case of international arbitration between investors and States, all the more so because the inevitable presence of the State implies greater transparency and the possibility remains that the State will be required to fulfil its obligations under EU law by means of an action for failure to fulfil obligations on the basis of Art. 258 and 259 TFEU. If the Commission's logic were followed, any arbitration would be liable to undermine the allocation of powers fixed by the TEU and TFEU and, accordingly, the autonomy of the EU legal system.[49]

Why would arbitral proceedings breach the principle of mutual trust?

Those proceedings took place only with the **consent of the parties**, or Member States concerned (also Achmea in this case freely expressed choice to use the facility which the Member States offered it).

Nevertheless, the Court of Justice has ruled completely the opposite and, in my view, not quite convincingly. According to Court statement, "*arbitration proceedings such as those referred to in Article 8 of the BIT* ***are different*** *from commercial arbitration proceedings. While the latter originate in the freely expressed wishes of the parties, the former derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19 (1) TEU requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of EU law. In those circumstances, the considerations set out in the preceding paragraph relating to commercial arbitration cannot be applied to arbitration proceedings such as those referred to in Article 8 of the BIT*." And having regard to all the characteristics of the arbitral tribunal mentioned in Art. 8 of the BIT, it must be considered that, by concluding the BIT, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law.[50]

48 Judgment of the Court of Justice (Grand Chamber) of 13 May 2015, Case C-536/13.

49 See Opinion of Advocate General Wathelet, Judgment of the Court of Justice (Grand Chamber) of 6 March 2018, Case C-284/16, para. 257–260.

50 Judgment of the Court of Justice (Grand Chamber) of 6 March 2018, Case C-284/16, para. 55 and 56.

But were the parties to arbitration really in doubt as to whether the other party would comply with EU law and the fundamental rights which it recognises?

My answer is no. Like all the ISDS[51] mechanisms contained in the BITs, Art. 8 of the BIT concerned creates a forum in which the investor may bring an action against the State in order to rely on the rights conferred on him, in public international law, by the BIT, a possibility that would not be open to him without that article. Consequently, far from expressing lack of trust in the other Member State's legal system, recourse to international arbitration is the only means of giving full practical effect to the BITs by creating a specialised forum where investors may rely on the rights conferred on them by the BITs. Therefore, I do not consider that Art. 8 of the BIT is inconsistent with the principle of mutual trust.[52]

Over and above, the risk of irreconcilable decisions possibly rendered by a national court and an arbitral tribunal is the problem more potential than real, as the chances of it occurring are rather minimal.[53]

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51 Investor-State dispute settlement.

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The Aftermath of the Achmea Case

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Abstract

The paper deals with the implications arising from the Achmea judgment which are far reaching not only for the arbitration community. With regard to investment arbitration, the decision controversially excluded the possibility of arbitration agreements in BITs concluded between EU Member States. The lack of proper reasoning concerning individual arguments used by the CJEU is discussed. The judgment is also being taken as example of increasing practice where decisions are being made based on political needs rather than as a result of legal assessment.

Keywords

Achmea; Case C-284/16; Investment Arbitration; Commercial Arbitration; (intra-EU) BIT; ICSID; EU Law Autonomy.

1 The *Achmea case*

On 6 March 2018, the Court of Justice of the EU ("CJEU") rendered a decision in case C-284/16 ("*Achmea case*"). The judgment immediately drew attention of the arbitration community and is often described as the end of the current investment protection and Investor – State dispute settlement ("ISDS") mechanism that is contained in the bilateral investment treaties ("BITs"). Considering its significance and implications for the legal relationships between states and investors, it is surprising that the CJEU restricted its findings to the mere statement, according to which Art. 267 and 344 TFEU[1] must be interpreted as precluding a provision in an international agreement concluded between Member States under which an investor from one of those Member States may, in the event of a dispute concerning

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1 Treaty on the Functioning of the European Union.

investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.

Investment arbitration has long been an integral and crucial part of investment protection system. An alternative to the jurisdiction of national courts is in form of independent and qualified arbitrators can be seen as a prerequisite for any investment because national courts are often perceived as being connected and dependent on the state, if not biased. As a result, the investors consider it unlikely for the national courts to rule that the host state breached its obligations under BIT. It is not the aim of this paper to discuss whether the investors' position is sustainable or whether an alternate dispute resolution mechanism can be found. In any case, the mistrust is mutual and the states see arbitral tribunals in investment cases as regularly favouring the investors. The point is to show the major implication the Achmea decision has on the longstanding practice.

The CJEU held that arbitral tribunal such as the one established under the BIT in question and concluded between the Netherlands and the Slovak Republic is not part of the judicial system of a Member State within the meaning of Art. 267 TFEU. As such, is not entitled to make a reference to the CJEU for a preliminary ruling which was deemed necessary because the arbitral tribunal might be called upon to apply and interpret the EU law that must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States.[2]

The CJEU then went on to examine whether the arbitral award is, in accordance with Art. 19 TEU[3], subject to review by a court of a Member State, ensuring that the questions of the European Union ("EU") law that might be subject to assessment by the arbitral tribunal can be submitted to the CJEU by means of a reference for a preliminary ruling. What has been a specific point of criticism by the CJEU is the arbitral tribunal's autonomy to determine both the procedural rules and the place of arbitration

2 Para. 41, *Achmea case.*
3 Treaty on European Union.

which then determines the applicable *lex arbitri*.[4] Further, it was reiterated that the choice of the applicable *lex arbitri* governs the scope of the possible review of an arbitral award by national courts. The control functions of the state in this particular case exercised by the German courts in accordance with section 1059 (2) ZPO[5] were described as being inadequate.[6]

It follows that the aforementioned features of the investment arbitration do not provide sufficient guarantee that the agreed dispute resolution mechanism would not prevent disputes arising in connection with the BIT from being resolved in a manner that ensures the full effectiveness of EU law.[7] The CJEU concluded that apart from the fact that the arbitral tribunal may have to deal with issues not only linked to the interpretation of the BIT but also to the interpretation and application of the EU law (with no sufficient mechanism concerning the access to the CJEU pursuant to Art. 267 TFEU), the exclusion of the jurisdiction of the civil courts of the Member State has not been agreed by private individuals but rather by the Member State itself. The arbitration agreement contained in the BIT between the Netherlands and the Slovak Republic thus calls into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties and has an adverse effect on the autonomy of EU law.[8]

Considering the aforementioned, Art. 267 and 344 TFEU effectively prevent Member States from entering into investment agreements that would enable investors from another Member State to bring disputes arising from the investment agreement before an arbitral tribunal the jurisdiction of which is the Member State bound to accept.

On one side, the decision in the *Achmea case* cannot be seen as being entirely surprising. The reserved (to say the least) position of the Commission towards intra EU investment treaties dates back to 2006 when a recommendation was made to the Members States to terminate such investment treaties with the explanation that they have been superseded by the EU law an there

4 Para. 51, *Achmea case.*
5 Code of Civil Procedure (Germany).
6 Para. 53, *Achmea case.*
7 Ibid., para. 56.
8 Ibid., para. 58, 59.

is no necessity for them in the single market.[9] The intra EU investment treaties have often been questioned with reference to the EU state aid rules.

2 The EU stance on investment protection

Since the European Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) concerning an ICSID[10] award of 11 December 2013 rendered in case No. ARB/05/20, *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania*, it has been clear the EU would like to take control over the Member States' contractual autonomy when it comes to BITs. The Euroean Commission concluded that the payment of the compensation awarded by the ICSID tribunal constitutes state aid within the scope of the relevant EU legislation and is incompatible with the internal market. As a result, Romania was ordered not to fulfil its obligations ordered by the award and even to recover any sum which has already been paid out.

It needs to be stressed, that the *Micula saga* is far from over. On 18 June 2019, the General Court rendered a decision in joint cases T624/15, T694/15 and T704/15, by which it annulled the European Commission´s decision. However no conclusion can be drawn to the effect that that the General Court disagrees and overrules the principles laid down by the *Achmea case* judgment. Quite the opposite, the General Court clearly distinguished the situation it dealt with from the *Achmea case*.[11] It can therefore be assumed that the General Court fully accepted the findings of the judgment in the *Achmea case*.

The annulment is based on the fact that the compensation awarded by the arbitral tribunal relates mostly to a time period preceding Romania's accession to the EU. Because all events of the dispute taken into account by the arbitral tribunal took place before that accession, the General Court held that the arbitral award cannot have the effect of making the European Commission competent and EU law applicable to those earlier events

9 Stoyanov, M. Increased enforcement risk in intra-EU investment treaty arbitration [online]. *Allen & Overy Legal & Regulatory Risk Note* [cit. 18. 12. 2019]. https://www.allenovery.com/en-gb/global/news-and-insights/legal-and-regulatory-risks-for-the-finance-sector/europe/increased-enforcement-risk -in-intra-EU-investment-treaty-arbitration

10 International Centre for Settlement of Investment Disputes.

11 Para. 87, *Achmea case*, decision in joint cases T 624/15, T 694/15 and T 704/15.

in so far as they produced their effects before that accession.[12] It was correctly concluded that the date of the rendering of the award is irrelevant as it only calculates and retrospectively states / confirms a right to compensation that which arose at the time of the infringements of the investor's rights committed by Romania.

Given that the EU law cannot be applied retroactively to events that took place prior to when it became effective in Romania, it was stated that the amounts granted cannot constitute state aid within the meaning of EU law. Romania cannot be prevented from fulfilling its obligations under the arbitral award. Nevertheless, it is probably too early to consider this to be a binding principle. The European Commission appealed the General Court's judgment and the case is currently pending before the CJEU.[13]

Other examples of the European Commission's stance on this issue include the Decision of the European Commission C(2016) 7827 on State Aid SA.40171 (2015/NN) dated 28 November 2016 the subject of which was the promotion of electricity production from renewable energy sources in the Czech Republic. The European Commission specifically stated that any agreement on investment arbitration violates the EU law and is contrary to the core principles on which the EU law relies, especially the freedom of establishment, the freedom to provide services and the free movement of capital. The European Commission argued with reference to Art. 49, 52, 56, and 63 TFEU, as well as Art. 64 (2), 65 (1), 66, 75 and 215 TFEU that from the substantive point of view, the EU law fully covers the field of investment protection. The members States lack therefore the competence to act unilaterally and enter into agreements that may affect the common rules listed above or alter their scope. It has been noted that potential differences between the EU regulation and BITs (or other similar international treaties entered into by the Member States) could jeopardise the attainment of the EU's objectives.[14]

12 Ibid., para. 88.

13 Appeal Case before the General Court T-624/15 of 27 September 2019, Case C-638/19 P.

14 As to the risks connected with the existence of 2 different set of rules, see also Judgment of the Court of Justice (Grand Chamber) of 3 March 2009, Case C249/06, Judgment of the Court of Justice (Grand Chamber) of 3 March 2009, Case C205/06 or Judgment of the Court of Justice (Second Chamber) of 19 November 2009, Case C118/07.

With regard to the procedural aspects or rather the dispute resolution mechanism, similar objections to those raised in the *Achmea case* were raised. It was emphasized that any disputes need to be resolved in accordance with the existing case-law of the CJEU on the basis of the principle of primacy in favour of the EU law.

From this perspective, it is somehow difficult to comprehend the uproar created by the *Achmea case*. It generally confirms the longstanding position of the European Commission and can hardly be seen as surprising. One can argue that it has not so much been a question of "if" but only of "when". What probably made the case subject to longstanding academic arguments far exceeding the arbitration community is the vagueness and ambiguity of its wording. Considering the importance of the decision together with the fact that this is first decision that directly dealt with this question, it is unusually brief and leaves many questions unanswered. Given that the CJEU completely disregarded the arguments presented by the *Bundesgerichtshof* (Federal Court of Justice, Germany) in its request for preliminary ruling and also fully contradicted the well-reasoned opinion of the advocate general *Wathelet* from 19 September 2017,[15] some doubt arise as to whether the decision is purely a legal one or whether other motives could also have played a role. Some commentators call the decision political and attribute it to the effort to comply with the negative public opinion concerning investment arbitration.[16]

One can strongly disagree with the sentiment expressed by the author of the article just quoted who opined that in order to fully understand the decision in the *Achmea case*, broader political circumstances need to be taken into account.[17] What is objectionable is not the statement itself which is up to a large extent correct. It is however evident when put into the context that the author supports the approach taken by the CJEU. Decision-making based on political needs instead of legal arguments is one of the biggest challenges the EU is faced with at the moment. Paradoxically, the detachment of people in many Member States from the EU, where they no longer

15 Opinion of Advocate General Wathelet of 19 September 2017, Case C-284/16.

16 Šturma, P. Budoucnost investiční arbitráže po rozsudku Achmea. *Právnické listy*. 2018, No. 2, pp. 26–27.

17 Ibid., p. 26.

consider it as something they are actively being part of and can identify themselves with but rather see the EU and its institutions as a separate entity which attempts to limit the sovereignty of individual Member States can – at least partially – be ascribed to the feeling that certain rulings of the CJEU are driven more by the political implications rather than proper assessment of the law at hand. The contempt for the EU and its institutions including the CJEU is only a result hereof.

Because of the limited reasoning provide by the CJEU in the *Achmea case* judgment, many questions concerning its impact on the existing BITs and the ISDS mechanism remained unanswered. The legal uncertainty it created by not elaborating on certain crucial points is the most likely reason why the decision drew so much attention and why there is until now no definite agreement on its interpretation.

3 Investment and commercial arbitration

Given the ambiguous wording of the award in the *Achmea case*, some doubts have arisen whether its conclusions remain limited to the investment arbitration or whether it might in the end affect commercial arbitration as well. For this moment, such fears seem to be unfounded.

The CJEU specifically stated that proceedings such as those referred to in the BIT between the Netherlands and the Slovak Republic are different from commercial arbitration proceedings.[18] No proper explanation is given as to nature of the difference apart from the fact that commercial arbitration originate in the freely expressed wishes of the parties whereas investment arbitration is based on the Member State's decision to remove the jurisdiction of the national courts and judicial remedies which the second subparagraph of Art. 19 (1) TEU requires to be established in the fields covered by EU law.

This argument can hardly stand. In order for the parties in commercial arbitration to be able to express their will to subject their dispute to the arbitrators, the state first has to provide for the possibility to arbitrate in form of national *lex arbitri*. Furthermore, the participation of a Member State

18 Para. 55, *Achmea case*.

in arbitral proceedings is not restricted to investment arbitration. There is nothing to prevent a Member State to agree to an arbitration agreement in commercial disputes. The *lex arbitri* usually leaves it up to the parties to the arbitration agreement to determine the scope thereof. In other words, the arbitration agreement does not need to refer to a specific dispute. It is possible to agree that all disputes that may arise in the future from a defined (and possibly broad) list of legal relationships shall be resolved in arbitration. It should be noted that the mere fact that a dispute is classified as commercial does not mean that the adjudicator (be it national court or arbitral tribunal) won't have to asses issues related to the EU law.

The argument that investment arbitration needs to be assessed differently because of the participation of a Member State does not seem to be too compelling, as long as it remains based only on the acknowledgment of a Member State as an entity different from other parties participating in arbitration.

The differentiation seem to be artificially created in order to overcome existing case law that confirmed the existing control functions of the state contained in national *lex arbitri* to be sufficient in commercial arbitration despite the fact that arbitrators, unlike national courts and tribunals, are not in a position to request the CJEU to give a preliminary ruling on questions of interpretation of the EU law.[19] It was considered satisfactory that in order to forestall differences of interpretation of the EU law, its core principles should be open to examination by national courts when asked to determine the validity of an arbitration award (as a matter of public policy) and that it should be possible for those questions to be referred, if necessary, to the CJEU for a preliminary ruling.[20] Other than that, it follows from the character of arbitral proceedings and the interest in their efficiency that review of arbitration awards should be limited in scope and that setting aside of or refusal to recognise and execute an award should be possible only in exceptional circumstances.[21]

19 Judgment of the Court of Justice of 1 June 1999, Case C-126/97, para. 40.
20 Ibid.
21 Ibid., para. 35 or Judgment of the Court of Justice (First Chamber) of 26 October 2006, Case C-168/05, para. 34.

No reason is given why these principles do not guarantee uniform application of the EU law in investment arbitration. It is correct and consistent with the existing case law that arbitral tribunals (regardless whether in investment or commercial arbitration) are not considered to be a court or tribunal of a Member State within the meaning of Art. 267 TFEU which is authorised to ask the CJEU for a preliminary ruling.

Interestingly, the advocate general *Wathelet* tried to argue in favour of enabeling the (investment) arbitral tribunals to refer questions to the CJEU.[22] The *Ascendi* decision[23] left some space for the reconsideration of the existing doctrine. The CJEU assessed the character of Spanish *Tribunal Arbitral Tributário* and came to the conclusion that it fulfils all criteria needed to the qualification of an institution as court or tribunal as defined in Art. 267 TFEU, including requirements of compulsory jurisdiction (which is lacking in commercial arbitration since the contracting parties are under no obligation, in law or in fact, to submit to the jurisdiction of arbitrators)[24] and permanence.[25]

Regardless the above, the fact remains that no reasons were given why the lack of capacity to request preliminary ruling is acceptable in commercial arbitration but makes an arbitration agreement contained in a BIT contrary to the EU law.

4 Infringement of Art. 344 TFEU

Specific character and legal status of a state would only have to be considered in connection with the alleged incompatibility of arbitration agreements contained in intra-Member States BITs with Art. 344 TFEU. It prevents Member States from submitting disputes concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties themselves.

When commenting on the *Achmea case* judgment, an argument was often raised that the application of this provision only covers disputes between

22 Opinion of Advocate General Wathelet of 19 September 2017, Case C-284/16, para. 84.
23 Judgment of the Court of Justice (Second Chamber), 12 June 2014, Case C377/13.
24 Para. 27, *Achmea case*.
25 Ibid., para. 26.

Member States and should not be extended to disputes between a Member State and private subject (the investor). Yet again, the CJEU decided not to elaborate on its conclusion so we were not provided with any explanation justifying the wide scope of the application of the Art. 344 TFEU.

It has been settled that Art. 344 TFEU encompasses participation of Member States in international dispute settlement mechanism.[26] There is no doubt that the provision is applicable to intra-Member States disputes and disputes between the EU and Member States.[27] Similarly, the creation of the Unified Patent Court has not been seen as breaching Art. 344 TFEU. It was stated that Art. 344 TFEU merely prohibits Member States from submitting a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties and on the contrary the jurisdiction which is intended to be granted to the Unified Patent Court relates only to disputes between individuals in the field of patents[28].

The prevailing opinion seems to be that the existence of an international treaty between member States containing specific dispute resolution mechanism different from the one foreseen by the Treaties is generally not in conflict with Art. 344 TFEU if it is to be used by individuals in order to pursue their claims arising from such international agreement. The exact same analogy would be applicable in case of the intra-Member States BITs. Mere failure to exclude actions brought against a Member State by an individual does not justify the broad interpretation of Art. 344 TFEU. Besides, it needs to be reminded that while the *Achmea case* concerns investment arbitration with all its specifics, the conclusions are formulated in a general way. Therefore they would inevitably have to be applied to other actions brought by individuals. This would create

26 Judgment of the Court of Justice (Grand Chamber) of 30 May 2006, Case C-459/03.

27 See Opinion 2/13 of the Court of Justice of the European Union (Full Court) of 18 December 2014 pursuant to Article 218 (11) TFEU concerning the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, para. 202 [online]. *EUR-Lex*. Published on 18 December 2014 [cit. 27. 12. 2019]. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CV0002

28 Opinion 1/09 of the Court of Justice of the European Union (Full Court) of 8 March 2011 pursuant to Article 218 (11) TFEU the creation of a unified patent litigation system – European and Community Patents Court, para. 63 [online]. *EUR-Lex*. Published on 8 March 2011 [cit. 27. 12. 2019]. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CV0001

legal uncertainty in situations where specific dispute resolution mechanism has already been declared as not infringing Art. 344 TFEU.

5 The consequences of *Achmea case*

As can be seen, the judgment in the *Achmea case* left more questions than answers. The first is whether it needs to be read as being applicable to the specific arbitration agreement contained in the BIT concluded between the Netherlands and the Slovak Republic meaning that every single arbitration agreement contained in an intra-EU BIT will have to be assessed individually or whether it automatically precludes the commencement of arbitral proceedings based on any and all BITs. The CJEU repeatedly refers to provisions in intra-EU BITs *such as Art. 8 of the BIT* concluded between the Netherlands and the Slovak Republic. It is a strong enough indication that the result should be the same with regard to any intra-EU BIT.

It became one of the major issues straight after the publication of the judgment. Many commentators tried to distinguish between several institutions before which arbitral proceedings could be held. The reason was to try to find platform for investment arbitration that would comply with the requirements specified in the *Achmea case* judgment. The primary argument is that the judgment has no immediate effect. From the international law perspective, the BITs are governed by the 1969 Vienna Convention on the Law of Treaties which does not provide for the direct termination or suspension of the intra-EU BITs due to the rendering of the *Achmea case* judgment. There was an agreement that the consent of the EU Member States (as the BITs signatories) with the dispute resolution mechanism is still valid.

It was pointed out, that should enforcement of any award be sought outside the EU, the risks that the award will be refused because of the infringement of the EU law, is limited. This was especially for arbitral proceedings held before ICSID. Unlike awards that are subject to remedies provided for by the national *lex arbitri*, the ICSID Convention[29] stipulates in Art. 53 (1) that awards rendered in ICSID arbitration shall be binding on the parties

29 Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States.

and shall not be subject to any appeal or to any other remedy except those provided for in the ICSID Convention. It means that the award is not subject to review by the national courts and can only be assessed in the execution stage.

Various scenarios of investment via third (non-EU) countries were also being considered. In its majority, arbitral tribunals considered themselves not to be bound by the *Achmea case* judgment. Among the first cases that had to take the *Achmea case* decision into account are (i) *Masdar v. Spain*,[30] (ii) *Vatenfall v. Germany*[31] or (iii) U*P and C. D Holding v. Hungary*.[32] In all those cases, the arbitral tribunals refused that the conclusions reached by the CJEU in the *Achmea case* would be applicable in arbitration before ICSID and/or in arbitral proceedings based on the Energy Charter Treaty ("ECT").[33]

Since the backlash and refusal by the arbitral community to accept the *Achmea case* decision and apply it could be foreseen, the EU reacted quickly. In its Communication of 19 July 2018[34], the European Commission not only cited the *Achmea case* judgment, but took the position that it should be extended to multilateral agreements such as the ECT.[35] This position is nothing new. The opinion that the ECT's objective and the context is that it does not apply in an intra-EU situation in any event and Member States cannot be subject to arbitration under the ECT was already expressed by the European Commission in its decision C(2016) 7827 on State Aid SA.40171 (2015/NN) dated 28 November 2016 mentioned above.

30 ICSID Award, *Masdar Solar & Wind Cooperatief U. A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1.

31 ICSID Award, *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12.

32 ICSID Award, *UP (formerly Le Chèque Déjeuner) and C. D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35.

33 Hrčka, D. Soumrak (nejen) investiční arbitráže? – Rozhodnutí SD EU C-284/16 a jeho důsledky. *Bulletin advokacie*. 2019, No. 7–8, p. 45.

34 Communication from the Commission to the European Parliament and the Council Protection of intra-EU investment, COM/2018/547 final [online]. *EUR-Lex*. Published on 19 July 2018 [cit. 27. 12. 2019]. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0547

35 Dragiev, D. 2018 In Review: The Achmea Decision and Its Reverberations in the World of Arbitration [online]. *Kluwer Arbitration Blog*. Published on 16 January 2019 [cit. 18. 12. 2019]. http://arbitrationblog.kluwerarbitration.com/2019/01/16/2018-in-review-the-achmea-decision-and-its-reverberations-in-the-world-of-arbitration/

The fact that this is more a political than legal issue was confirmed by the consequent actions of the member States. On 15 January 2019, the 22 Member States (including Czech Republic) issued a declaration[36] confirming the nonconformity of the arbitration agreements in the intra-EU BITs with the EU law. They also undertook to terminate the intra-EU BITs and inform the arbitral tribunals hearing cases arising from such intra-EU BITs accordingly. Another 5 Member States (Finland, Sweden, Malta, Luxembourg and Slovenia) issued their own declaration on the following day.[37] They agreed with the conclusions contained in the *Achmea case* judgment but refused to apply them strictly to the ECT. Finally, a separate declaration has been issued by the government of Hungary[38] who went even further and specifically stated that *Achmea case* should only be applied to intra-EU BITs but not to the ECT.

6 Conclusion

The *Achmea case* decision is one of many examples of the strict approach by the EU when it comes to the interpretation and confirmation of the supremacy of the EU law. The CJEU presented its conclusion without giving regard to any arguments presented in the proceedings and stating the non-conformity of the intra-EU BITs with the EU law without proper reasoning. This lead to legal uncertainty with regard to both ongoing arbitral proceedings (since it was not clear whether this is a decision applicable in the particular case or whether it should be recognised as having universal effects) and the investors who were not given any information and assurances about the future of the BITs. Because the decision clearly did not reach

36 Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the Legal Consequences of the Achmea Judgment and on Investment Protection in the European Union [online]. *European Commission website*. Published on 17 January 2019 [cit. 18. 12. 2019]. https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf

37 Ibid.

38 Declaration of the Representative of the Government of Hungary of 16 January 2019 on the Legal Consequences of the Achmea Judgment and on Investment Protection in the European Union [online]. *European Commission website*. Published 17 January 2019 [cit. 18. 12. 2019]. https://www.kormany.hu/download/5/1b/81000/Hungarys%20Declaration%20on%20Achmea.pdf

the intended goal, action on the political level needed to be taken. It is decisions such as this that make the EU and its policies detached from the population of the Member States. On the other hand, it also illustrates that the EU law is going to play increasing role even in field that so far enjoyed relative autonomy. In any case, it remains to be seen whether the *Achmea case* judgment really marked the end of intra-EU investment arbitration.

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Applicability of Rome I Regulation in International Commercial Arbitration

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Abstract

This contribution to the conference proceedings aims to describe the current views on the applicability of the Regulation on the law applicable to contractual obligations (Rome I Regulation) in international commercial arbitration. By means of literature review, the author introduces the arguments in favour and against its binding application before the arbitral tribunals. Furthermore, the author explains the consequences of its (non)application by an example of Czech law. Finally, the author draws attention to the difficulty of the proper application of EU law in arbitration on account of the *Nordsee* case.

Keywords

Rome I Regulation; EU Law; International Commercial Arbitration; Choice of Law; Determination of Applicable Law; Preliminary Reference.

1 Introduction

Since its entry into force in 2009, the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I Regulation") has been an indispensable instrument for the determination of applicable law in the international civil and commercial contracts within the European Union ("EU"). While it is indisputable that the Rome I Regulation must be obligatorily applied by the national courts within the EU, its binding effect on the arbitral tribunals is much more controversial. This work aims to discuss the scholarly opinions on the applicability of the Rome I Regulation in international

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commercial arbitration and to present a solution that is – at least in the author's opinion – the most compliant with the nature and objectives of the Rome I Regulation as well as with the principles of international commercial arbitration. Furthermore, the author examines the impact the Rome I Regulation would have if applied in the proceedings governed by the law of the Czech Republic. Finally, the author analyses the impracticability of the proper application of EU law before the arbitral tribunals in the light of the current case of the Court of Justice of the European Union ("CJEU").

2 The Rome Convention, The Rome I Regulation and Arbitration

In its Art. 1 (2)(d), the Rome Convention[1] ("Rome Convention") excluded arbitration agreements (along with agreements on the choice of court) from its scope. In the Giuliano-Lagarde Report[2], *Mario Giuliano* notes that there was a clash between the member states during the drafting of the Rome Convention as to such an exclusion.[3] Some member states, notably the United Kingdom, argued that arbitration agreements should be governed by the Rome Convention as they do not differ from other contractual agreements. These member states were further concerned with the fact that the existing international conventions dealing with the validity of arbitration agreements are inadequate in order to ensure a unification within the European Community ("EC"). On the other hand, certain member states such as Germany or France opposed such a view and refused to include arbitration agreements within the scope of the Rome Convention due to the independency of arbitration agreements and the complexity of arbitration as such.

Giuliano, however, adds that the exclusion does not prevent arbitration clauses being taken into consideration for the purposes of Art. 3 (1) that

1 Convention of 19 June 1980 on the law applicable to contractual obligations.

2 Council Report on the Convention on the law applicable to contractual obligations by Mario Giuliano and Paul Lagarde. In: Official Journal No C 282/1 of 31 October 1980 ("Giuliano-Lagarde Report").

3 Art. 1 para. 5 Giuliano-Lagarde Report.

deals with the choice of law made by the parties.[4] This might be perceived as a clear signal that the Rome Convention might be applicable to the merits of the dispute. The arbitral tribunals seated within the member states of the EC have indeed tended to consider the Rome Convention as potentially applicable in order to determine the substantive law of the contract subject to international arbitration proceedings.[5]

Although the adoption of conflict rules applicable to arbitration was contemplated by the European Commission[6], the Rome I Regulation, replacing the Rome Convention in 2009, did not in any way revise the relationship between the uniform rules of the EU and international arbitration. The Rome I Regulation identically excludes its applicability on arbitration agreements[7] but does not address its potential applicability on the merits of the dispute before the arbitral tribunal.

It is, however, recognized by certain authors that the Rome I Regulation is applicable to the substance of the dispute in arbitration.[8] *Yüksel*[9] argues that had the Rome I Regulation served to exclude arbitration in its entirety, it would have either not considered arbitration at all or would have phrased the Art. 1 (2)(e) as excluding "arbitration" instead of mere

4 Ibid.

5 Born, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2014, p. 2627, citing Final Award in ICC Case No. 9771; Third Partial Award in ICC Case No. 7472; Partial Award in ICC Case No. 7319; Award in ICC Case No. 7205; Partial Award in ICC Case No. 7319; Award in ICC Case No. 7205; Partial Award in ICC Case No. 7177; Final Award in ICC Case No. 6379; Final Award in ICC Case No. 6360; Award in ICC Case No. 4996 and Partial Award of 17 May 2002 and Final Award of 5 July 2005 of the Netherlands Arbitration Institute.

6 One of the questions the European Commission asked in the *Green Paper on the Conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation* of 2003 was whether one should envisage conflict rules applicable to arbitration and choice of forum clauses.

7 Art. 1 para. 2 letter e) Rome I Regulation.

8 See Bělohlávek, A. J. Law Applicable to the Merits of International Arbitration and Current Developments in European Private International Law: Conflict-of-Laws Rules and the Applicability of the Rome Convention, Rome I Regulation and Other EU Law Standards in International Arbitration. *Czech Yearbook of International Law*. 2010, Vol. 1, pp. 25–45; Lüttringhaus, J. D. Art. 1 para. 2. In: Ferrari, F. *Rome I Regulation Pocket Commentary*. Munich: Sellier European Law Publishers, 2015, p. 51.

9 Yüksel, B. The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union. *Journal of International Private Law*. 2011, Vol. 7, No. 1, p. 155.

"arbitration agreements".[10] Besides, *Yüksel* points out to the analogy between the choice-of-court clauses which are similarly excluded from the Rome I Regulation by virtue of its Art. 1 (2)(e), but do not preclude the Rome I Regulation to be applicable to the substance of the dispute before national courts.[11] *Bělohlávek* is likewise convinced that the Rome I Regulation must be applied by arbitrators within the EU[12] while he justifies the absence of any reference to arbitration in its recitals by the potential criticism from the proponents of the so-called *transnational law*.[13] Furthermore, *Bělohlávek* regards the *West Tankers*[14] case decided by the CJEU in 2009 as a ground for the binding character of the EU law (and regulations of the EU in particular) in arbitration.[15]

On the other hand, the majority of authors do not consider the Rome I Regulation to be applicable to arbitration.[16] *Grimm* notes that implementation of national conflict-of-law rules for arbitration by member states of the EC after the Rome Convention came into force confirms that EC members did not want the Rome Convention (as well as the subsequent

10 *Yüksel* points out that this is the approach of Brussels I Regulation (recast) that contains the term "arbitration" in its exclusion provision of Art. 1 para. 2 letter d).

11 Yüksel, B. The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union. *Journal of International Private Law*. 2011, Vol. 7, No. 1, p. 155. See also Plender, R., Wilderspin M. *The European private international law of obligations*. London: Sweet & Maxwell, 2009, p. 110.

12 Bělohlávek, A. J. Law Applicable to the Merits of International Arbitration and Current Developments in European Private International Law: Conflict-of-Laws Rules and the Applicability of the Rome Convention, Rome I Regulation and Other EU Law Standards in International Arbitration. *Czech Yearbook of International Law*. 2010, Vol. 1, p. 43.

13 Bělohlávek, A. J. *Rome Convention, Rome I Regulation: commentary*. New York: Juris, 2010, p. 419.

14 Judgment of the Court of Justice (Grand Chamber) of 10 February 2009, Case C-185/07. In this landmark case, the CJEU pronounced the incompatibility of the anti-suit injunctions with the Brussels I bis Regulation.

15 Bělohlávek, A. J. *Rome Convention, Rome I Regulation: commentary*. New York: Juris, 2010, p. 420.

16 See Miguel Asensio, P. A. De. The Rome I and Rome II Regulations in International Commercial Arbitration. In: Ferrari, F. (ed.). *The Impact of EU Law on International Commercial Arbitration*. New York: Juris, 2017, pp. 177–243; Calvo Caravaca, A. L., Carrascosa González, J. Art. 1. In: Magnus, U., Mankowski, P. *European commentaries on private international law (ECPIL): commentary. Vol. II, Rome I regulation*. Köln: Otto Schmidt, 2017, p. 66; Grimm, A. Applicability of the Rome I and II Regulations to International Arbitration. In: Risse, J., Pickrahn, G. et al. (eds.). *SchiedsVZ*. 2012, Vol. 10, No. 4, pp. 190–191; Bříza, P. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, pp. 692–693.

Rome I Regulation) to apply in arbitration.[17] *Grimm* further uses restriction to party autonomy, inconsistency in the application of the Rome I Regulation and unenforceability of the Rome I Regulation as arguments against the applicability of the Rome I Regulation in arbitration.[18] *Bříza* puts forward that the conflict-of-law rules of the European Union are being adopted on the grounds of the "judicial" cooperation in civil matters[19]. Any conflict-of-law rules designated for arbitral proceedings would, therefore, be beyond the competences of the EU.[20] Furthermore, *Bříza* argues that the Rome I Regulation merely completes the Brussels I Regulation[21] that excludes arbitration in its entirety from its scope.[22] Lastly, *Bříza* points out that the application of the Rome I Regulation would contradict the European Convention on International Commercial Arbitration which allows arbitrators to apply "the law they deem applicable"[23]. It would be thus odd to conclude that the Rome I Regulation is derogating an international treaty without addressing their mutual relationship.[24] Finally, *De Miguel Asensio* rejects the obligatory application of the Rome I Regulation as he considers "special" arbitration rules drafted by the member states superior to the "ordinary" choice-of-law rules that were eventually replaced by the Rome I Regulation.[25]

17 Grimm, A. Applicability of the Rome I and II Regulations to International Arbitration. In: Risse, J., Pickrahn, G. et al. (eds.). *SchiedsVZ*. 2012, Vol. 10, No. 4, p. 191.

18 Ibid., pp. 191–200.

19 Art. 81 para. 1 TFEU stipulates that "*the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States*".

20 Bříza, P. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 692.

21 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

22 Ibid. This presumption is based on Recital 7 of the Regulation that pronounces the consistency of the Regulation's substantive scope with the Brussels I bis Regulation and the Rome II Regulation. It is, however, convincingly rebutted by *Mankowski* who argues that the procedural nature of the Brussels I Regulation and the significance of the New York Convention only in the context of international procedure favour a restrictive interpretation of the exclusion in Art. 1 para. 2 letter e) of the Regulation; See Mankowski, P. Rom I-VO und Schiedsverfahren. *Recht der internationalen Wirtshcaft*. 2011, No. 1, pp. 30–45.

23 Art. VII para. 1 European Convention on International Commercial Arbitration.

24 Bříza, P. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 693.

25 Miguel Asensio, P. A. De. The Rome I and Rome II Regulations in International Commercial Arbitration. In: Ferrari, F. (ed.). *The Impact of EU Law on International Commercial Arbitration*. New York: Juris, 2017, p. 196.

The author is nevertheless convinced that the Rome I Regulation should be applicable in international commercial arbitration. Whilst arbitral proceedings indeed represent an alternative to litigation before the national courts of the EU to which the EU law applies primarily, it cannot be concluded that by choosing arbitration as a dispute resolution method the parties of such a dispute are free to disregard the EU law. Such a conclusion would be untenable in the context of the primacy of EU law[26] as well as the direct effect[27] of the Rome I Regulation.[28] Moreover, if the arbitrators had not been bound by the EU rules in the same way as the judges of the national courts, arbitration would be misused by entities with a view to avoiding the undesirable provisions of EU law. Admittedly, the wording of the Rome I Regulation is unclear as regards its applicability to arbitration as such. Yet, it is submitted that the arguments favouring the narrowness of the exclusion provision in Art. 1 (2)(e) and allowing its application on the merits of the dispute are – albeit advocated by the minority of authors – much more convincing. The author fully identifies with the opinion that had the lawmakers intended

26 See e. g. the landmark CJEU (former ECJ) cases of *Costa v. E.N.E.L.* ("*The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot, therefore, be inconsistent with that legal system.*") and *Simmenthal* ("*[…] the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but […] also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.*"). See Judgment of the Court of Justice of 15 July 1964, Case C-6/64 and Judgment of the Court of Justice of 9 March 1978 of 9 March 1978, Case C-106/77.

27 The direct effect of EU (former EC) law was firstly recognized within the case-law of the CJEU (former ECJ) in the landmark case of *Van Gend en Loos* in which the CJEU – *inter alia* – stated that "*[…] the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.*" See Judgment of the Court of Justice of 5 February 1963, Case C-26/62.

28 Yüksel, B. The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union. *Journal of International Private Law*. 2011, Vol. 7, No. 1, p. 164.

to exclude arbitration in its entirety, they would have used wording identical to the one of Brussels I Regulation or Rome I Regulation. Thus, the exclusion cannot justify the reluctance of the authors to concede the applicability of the Rome I Regulation in arbitration.

It is further submitted that failure to comply with the rules set out within the Rome I Regulation might lead to a refusal of recognition of the arbitral award for the contradiction with the EU public policy on the grounds of Art. V (2)(b) of the United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). The CJEU (former ECJ) has concluded in *Eco Swiss* that the former Art. 81 of the Treaty establishing the European Economic Community (now Art. 101 of the Treaty on the Functioning of the European Union ("TFEU")) dealing with the prohibition of cartels which might affect trade between member states "*may be regarded as a matter of public policy within the meaning of the New York Convention*"[29]. The author is convinced that the disregard for the choice-of-law rules might lead to a similar conclusion.

3 Practical Impact of the Obligation to Apply the Rome I Regulation in case of Czech Law as *Lex Arbitri*

The purpose of this chapter is to examine the practical consequences of the (non)application of the Rome I Regulation by an example of the Czech law being the *lex arbitri*.[30]

3.1 The Choice of Law by the Parties

In case the Rome I Regulation was not applicable, the provision determining the applicable law for the merits of the international arbitration would

29 Judgment of the Court of Justice of 1 June 1999, Case C-126/97, para. 39.

30 It needs to be noted that the Czech Republic is among the 31 parties of the European Convention on International Commercial Arbitration of 1961. Even if the Rome I Regulation was applicable, it would, under Art. 24 para. 1 of the Rome I Regulation, not prejudice the application of the European Convention on International Commercial Arbitration of 1961 between a party from the Czech Republic and a non-EU party. On the other hand, under Art. 24 para. 2, the Rome I Regulation would apply if the dispute concerned a party from a member state.

be Section 119 of the Act No. 91/2012 Coll., on Private International Law (Czech Republic) ("Czech PILA"). Under this section, parties are free to select any law or body of laws.[31] Furthermore, the Czech PILA allows arbitrators to decide *ex aequo et bono* in case they were expressly authorized to do so. Consequently, parties are not in any way limited as to the applicable law they wish to choose. The only exception is the choice of law in consumer arbitration, which is limited by the consumer protection provisions of the law otherwise applicable and – in certain cases[32] – by the Czech consumer protection law. It must be, however, recalled that B2C disputes are no longer arbitrable in the Czech Republic. This provision is therefore only applicable to the B2C arbitration agreements concluded before 1 December 2016.

Supposing that the Rome I Regulation is applicable, the rules on the choice of law designated by the Rome I Regulation would take precedence over the rules prescribed within the Czech PILA. Thus, Art. 3 of the Rome I Regulation shall be applicable to the merits of the dispute. When compared to the Czech PILA, it is clear that the choice of law is much more limited.

The most significant example of such limitation is the object of a choice of law under the Rome I Regulation which includes state law only.[33] A choice of a non-state body of law (such as *lex mercatoria*) or even deciding *ex aequo et bono* would thus be very problematic if the Rome I Regulation was applicable. In the case of the former, the parties might overcome such an obstacle by incorporating the non-state body into their contract by virtue

31 The formal requirements for the choice-of-law clause might be inferred from the general provision embedded in Section 87 para. 1 of the Czech PILA which requires (i) an express choice, or (ii) a choice that is without any doubt apparent from the contract or the circumstances of the case.

32 The Section 119 refers to the Section 87 para. 2 of the Czech PILA which states that "*if the legal relationships established by a consumer contract are closely associated with the territory of any European Union member state, the consumer may not be relieved of any of the protection which applies in accordance with Czech law, if the proceedings take place in the Czech Republic, even if the law of another state which is not a member of the European Union state has been chosen for the contract or is to be otherwise applied.*".

33 Mankowski, P. Art. 3. In: Magnus, U., Mankowski, P. *European commentaries on private international law (ECPIL): commentary. Vol. II, Rome I regulation.* Köln: Otto Schmidt, 2017, pp. 185–190; In Recital 14, however, the Rome I Regulation creates a possibility of adopting the common rules of substantive contract law which might be subsequently chosen by the parties to be applicable.

of Recital 13 of the Rome I Regulation.[34] Yet, such a choice is downgraded to what a German legal doctrine calls "a material reference" (*materiellrechtliche Verweisung*), i. e. a choice that does not allow the parties to derogate from the mandatory rules of the otherwise applicable law.[35] Moreover, in the case of deciding *ex aequo et bono*, the authors agree on the fact that such a choice could not be acceptable under the Rome I Regulation.[36] In the context of international arbitration, this seems to be a very sensitive issue as the international treaties on arbitration (both commercial and investment) are based on the freedom of choice of applicable law, including the rules not developed by countries.[37] Moreover, such an approach leads to an absurd conclusion that in case of domestic disputes governed by national laws, arbitrators would be free to decide *ex aequo et bono*[38] or *amiable compositeur*[39], but in case of international disputes, such a method would be forbidden.

Furthermore, considerable limitations to the party autonomy might be found both within Art. 3 (3) and Art. 3 (4) of the Rome I Regulation which tend to prevent the parties from the so-called *fraude à la loi*. Under these provisions, a choice of foreign law in a purely domestic dispute does not prevent the domestic overriding mandatory provisions from its application (para. 3) and, in case of intra-EU dispute, the parties are not

34 Yüksel, B. The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union. *Journal of International Private Law*. 2011, Vol. 7, No. 1, p. 170; Ragno, F. Art. 3. In: Ferrari, F. *Rome I Regulation Pocket Commentary*. Munich: Sellier European Law Publishers, 2015, pp. 84–88.

35 Mankowski, P. Art. 3. In: Magnus, U., Mankowski, P. *European commentaries on private international law (ECPIL): commentary. Vol. II, Rome I regulation*. Köln: Otto Schmidt, 2017, pp. 189–190; Ragno, F. Art. 3. In: Ferrari, F. *Rome I Regulation Pocket Commentary*. Munich: Sellier European Law Publishers, 2015, p. 85.

36 Hausmann, R. Anwendbares Recht vor deutschen und italienischen Schiedsgerichten – Bindung an die Rom I-Verordnung oder Sonderkollisionsrecht? In: Kronke, H., Thorn, K. *Grenzen überwinden – Prinzipien bewahren. Festschrift für Bernd von Hoffmann zum 70. Geburtstag*. Bielefeld: Gieseking Verlag, 2011, p. 979; Yüksel, B. The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union. *Journal of International Private Law*. 2011, Vol. 7, No. 1, pp. 170–171.

37 See Art. 28 para. 3 UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), Art. VII para. 2 European Convention on International Commercial Arbitration and Art. 42 para. 3 Convention on the settlement of investment disputes between States and nationals of other States (Washington Convention).

38 See under Section 25 para. 3 of the Czech Act on Arbitration Proceedings and the Enforcement of Arbitration Awards.

39 See under Section 1478 of the French Civil Procedure Code.

allowed to evade the mandatory provisions of the EU law even if they chose a non-EU law as applicable to their contract (para. 4). The Czech PILA, on the other hand, does not contain a provision similar to Art. 3 (3) and (4) of the Rome I Regulation. Therefore, if the Rome I Regulation were not applicable in arbitration, the arbitrators would not have to take overriding mandatory provisions of the law otherwise applicable into account.

3.2 Applicable Law in the Absence of Choice

In case the parties do not choose the law applicable to their contract, it would be the task of the arbitrators to determine the law applicable to the merits of the dispute. There are, however, substantial differences between the rules contained within the Czech PILA and the Rome I Regulation.

Whilst the Czech PILA merely uses the "state with which the contract is most closely associated" as a connecting factor[40], the rules prescribed by the Art. 4 of the Rome I Regulation are much more elaborated although they are based on the same principle. It needs to be noted that it is the very complexity of the Art. 4, not the disputed biding force of the EU choice-of-law rules on arbitrators, that the predecessor of the Rome I Regulation, the Rome Convention, has been used frequently by arbitrators in order to determine the applicable law in both the intra-EU disputes and the disputes concerning a non-EU based party.[41] Therefore, the application of the rules prescribed therein by arbitral tribunals is favoured even by the authors rejecting the binding character of the Rome I Regulation.[42]

40 Under Section 119 of the Czech PILA, arbitrators shall apply the conflict-of-laws rules embedded within the Czech PILA if the law had not been chosen by the parties. Thus, in case of contractual disputes, Section 87 para. 1 would be applicable to determine the law applicable to the merits of the case.

41 Miguel Asensio, P. A. De. The Rome I and Rome II Regulations in International Commercial Arbitration. In: Ferrari, F. (ed.). *The Impact of EU Law on International Commercial Arbitration*. New York: Juris, 2017, pp. 220–221, citing the Interim Award of 10 February 2005 and the Final Award of 17 May 2005 of the Netherlands Arbitration Institute concerning a dispute between parties from the Netherlands and Italy and the Final Award of ICC Case No. 6283 concerning a dispute between parties from Belgium and the United States of America.

42 Ibid., pp. 219–220; Babić, D. Rome I Regulation: binding authority for arbitral tribunals in the European Union? *Journal of Private International Law*. 2017, Vol. 13, No. 1, p. 89.

4 The Proper Application of the Rome I Regulation in the International Commercial Arbitration

It was submitted above that the primacy and the direct effect of EU law compel the arbitrators to apply the Rome I Regulation. Yet, a correct application of EU law might only be achieved under the condition that the applying entity has the possibility to submit a preliminary reference to the CJEU. In *Nordsee,* however, the Luxembourg court denied the status of a "court or tribunal of a member state" to arbitrators and arbitral tribunals.[43] Thus, it would be very odd to conclude that arbitrators are obliged to apply EU law without having the possibility to apply it properly and in the same manner as national courts – with the possibility to request a preliminary ruling.

There are, in fact, three possible ways how to overcome such an obstacle. Two of them were explicitly mentioned by the CJEU in *Nordsee*[44] – the assistance of the national court during the arbitral ongoing arbitral dispute and its role during the review of an arbitration award. Both of them are, however, more or less problematic.

As regards the former solution, the national courts' assistance must be permitted by the *lex arbitri* of the dispute. This is a scarce situation as the assisting role is very limited either under Model Law[45], the European Convention of 1961 and most of the national arbitration laws. Code of Civil Procedure (Germany) (*Zivilprozessordnung*, "ZPO") represents a significant exception as the legislators, when implementing the Model Law in Germany, explicitly extended the scope of the rules dealing with the courts' assistance.[46] Section 1050 of the ZPO does not restrict the support of the court to evidence-taking, but also includes "any other actions reserved for judges that the arbitral tribunal is not authorized to take". Moreover, the ZPO might be applicable even in foreign arbitrations[47], allowing to ensure a proper application of EU law even in case the arbitration is – despite its

43 Judgment of the Court of Justice of 23 March 1982, Case C-102/81, para. 10.
44 Ibid., para. 14.
45 Under Art. 27 Model Law, the tribunal is merely allowed to seek assistance in taking evidence.
46 Basedow, J. EU Law in International Arbitration: Referrals to the European Court of Justice. *Journal of International Arbitration*. 2015, Vol. 32, No. 4, p. 375.
47 Art. 1025 para. 2 ZPO.

applicable law – not seated in the EU. Similarly, under Section 45 of the United Kingdom's Arbitration Act of 1996[48], the court might determine any question of law arising in the course of the proceedings. It has also been submitted that Art. 1044 of the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) which enables the arbitral tribunal to request information on foreign law might be used by international arbitral tribunals to submit a preliminary reference regarding EU law.[49] As regards the Czech law, Section 20 (2) of the Act on Arbitration Proceedings and the Enforcement of Arbitration Awards ("Czech Arbitration Act") stipulates that the procedural actions which cannot be performed by arbitrators shall be performed by the court. Such a court is obliged to do so unless such an action is prohibited by the law. It is submitted that this provision of the Czech Arbitration Act might be used by arbitrators to recourse to the court in order to seek a request for a preliminary ruling.[50]

That being said, most of the EU countries, including very popular venues for international arbitration such as France or Sweden, do not provide for such a "bridge" between the arbitral tribunals and national courts in their respective arbitration laws. Regrettably, this leads to the conclusion that ensuring the proper application of EU law through court assistance is unsatisfactory unless it is possible in all member states of the EU.

Second, the erroneous application of EU law might eventually lead to the challenge of the award before the national court, which might be entitled or even compelled to request the CJEU for a preliminary ruling.[51] The award might be subsequently set aside for not being compliant with EU law as it happened in the aforementioned *Eco Swiss* case.[52] It is, however, evident

48 The Arbitration Act of 1996 is biding only in England, Wales and Northern Ireland. The Scottish Arbitration Act of 2010, however, advocates a similar approach towards the issue in question in its Rule 41.

49 *Schelkoplyas* argues that since international arbitral tribunals do not have their own domestic law, any law, including EC (now EU) law is foreign to them. See Schelkoplyas, N. *The Application of EC law in Arbitration Proceedings*. Nijmegen: Wolf Legal Publishers, 2003, pp. 404–406.

50 Accord Bělohlávek, A. J. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů*. Praha: C. H. Beck, 2012, pp. 786–787.

51 Basedow, J. The Transformation of the European Court of Justice and Arbitration Referrals. In: Ferrari, F. (ed.). *The Impact of EU Law on International Commercial Arbitration*. New York: Juris. 2017, p. 126.

52 Judgment of the Court of Justice of 1 June 1999, Case C-126/97.

that such a process towards the proper application of EU law is very costly (both financially and timewise) and might have severe consequences for the reputation of the arbitrators.[53] Thus, neither this form of an indirect request for preliminary reference is considered suitable by the author.

The third solution, cautiously outlined within scholarly writings[54], is far more radical as it endorses a direct request for preliminary reference by overruling or modifying the *Nordsee* judgment. In its opinion to the *Ascendi* case, advocate general *Szpunar* called upon the CJEU to adapt its interpretation of Art. 267 TFEU with regards to arbitral tribunals as they represent a "post-modern approach" to justice.[55] Likewise, *Basedow* points out that due to the major changes in the commercial arbitration in the EU, the CJEU should reconsider the criteria for the "tribunal"[56] within the meaning of the Art. 267 and allow arbitral tribunals to request a preliminary ruling.[57]

The author unequivocally agrees with the third solution as the current attitude of the CJEU seems to be very unbalanced. On the one hand, the CJEU requires the arbitrators to apply EU law and encourages the courts to set aside arbitral awards that are contrary to the overriding mandatory provisions of EU law. On the other hand, it does not allow the arbitrators to directly ascertain the proper application of the law they are required to apply. And while almost forty years have passed since the *Nordsee* judgment, the Luxembourg court is still reluctant to reflect the expansion of alternative dispute resolution in its case law. This "one-sided" approach is incorrect

53 Basedow, J. EU Law in International Arbitration: Referrals to the European Court of Justice. *Journal of International Arbitration*. 2015, Vol. 32, No. 4, p. 126.

54 The most prominent advocates of this approach are *Jürgen Basedow* and *Maciej Szpunar*. See Ibid; See also Szpunar, M. Referrals of Preliminary Questions by Arbitral Tribunals to the CJEU. In: Ferrari, F. (ed.). *The Impact of EU Law on International Commercial Arbitration*. New York: Juris, 2017, pp. 85–123.

55 Opinion of Advocate General Szpunar of 8 April 2014, Case C-377/13, para. 50.

56 The referring body must (i) be established by law, (ii) be permanent, (iii) have a compulsory jurisdiction, (iv) guarantee an adversary (*inter partes*) procedure, (v) apply rules of law, (vi) be independent. See Judgment of the Court of Justice of 17 September 1997, Case C-54/96, para. 23 and Judgment of the Court of Justice of 30 June 1966, Case C-61/65.

57 *Basedow* quotes an extensive increase in the number of arbitration proceedings, a favourable approach of national legislatures towards commercial arbitration and the evolution of EU law as main arguments for the reconsideration. See Basedow, J. EU Law in International Arbitration: Referrals to the European Court of Justice. *Journal of International Arbitration*. 2015, Vol. 32, No. 4, pp. 381–385.

as the mandatory application of EU law must inevitably go hand in hand with its proper application and interpretation which might only be achieved by overruling *Nordsee* and enabling the arbitral tribunals to raise a request a preliminary ruling under Art. 267 TFEU.

On top of that, this solution would further chase away the fear that the intra-EU commercial arbitrations might be threatened by the recent *Achmea* judgment in which the CJEU held that arbitration agreements within the intra-EU investment treaties have an adverse effect on the autonomy of EU law[58]. Although the CJEU explicitly differentiated commercial arbitration from the investor-state arbitration, one might potentially extend the CJEU's conclusion that the limited scope of judicial review in investment arbitration prevents the dispute to be resolved in a manner that ensures the full effectiveness of EU law[59] to the (similarly limited) review of commercial arbitration awards. Giving the arbitral tribunals the possibility to request a preliminary reference would indeed be a strong argument in favour of the conformity of intra-EU arbitrations with the autonomy of EU law.

5 Conclusion

There is no consensus among scholars as to the application of the Rome I Regulation in proceedings before international arbitral tribunals. While most of the scholars reject the view that the application ought to be applied in the same manner as before national courts, the author is convinced that the opposite view is correct. This is mainly due to the primacy of EU law which cannot be rebutted by the specificity of arbitral proceedings. And however peripheral the question of the (non)application of the Rome I Regulation might seem, it is, in fact, a crucial one. If applicable, the Rome I Regulation would have a substantial impact on the choice of applicable law as well as on the determination of applicable law in case of no choice thereof. Yet, the proper application of the Rome I Regulation cannot be achieved without reconsidering the current case law of the CJEU

58 Judgment of the Court of Justice (Grand Chamber) of 6 March 2018, Case C-284/16, para. 55.

59 Ibid., para. 52-56.

concerning the interpretation of Art. 267 TFEU, which prevents the arbitral tribunals to submit a request for a preliminary ruling.

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Investment Arbitration at the Crossroads of Public and Private International. Current Issues with ISDS[1]

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Abstract

After decades of success, investment arbitration has become an extremely controversial topic, riven by multiple allegations and concerns among the experts and various interest groups. In this contribution, we aim to examine the most relevant and severe of these issues, including regulatory chill. Regulatory chill is a purported phenomenon that claims that investment arbitration favors foreign investors, and thus intimidates host states into refusing to implement policies that would contradict with the interests of foreign investors. We not only examine these problems, but also attempt to suggest some potential remedies for alleviating these issues.

Keywords

ISDS; Regulatory Chill; Chilling Effect; Investment Arbitration.

1 Introduction

The question of investment arbitration has been a long-standing issue in the field of international economic relations. The second half of the 20th century reinforced that this method of conflict resolution, typically called Investor-State Dispute Settlement ("ISDS"), would be the dominant and defining way of solving disputes between foreign investors and host states.

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Due to its perceived advantages of objectivity and being unbound by host state interests, these arbitration tribunals became extremely popular and ISDS itself became a characteristic element of not only bilateral investment treaties ("BITs"), but also of free trade agreements' ("FTAs") investment chapters.

Yet, as time went on and more cases appeared, the publicity surrounding the concept also grew. And with it, came criticism. The first critics appeared in professional and academic circles, but in the last decade, the issue has also spread to the wider public. Investment arbitration was attacked for its seeming lack of transparency and accountability. It became evident that there is a clear divide between environmental and other public interest policy objectives and corporate-backed business interests. This opposition has shaped the debate surrounding investment arbitration ever since, and led to the articulation of several different problems that potentially could stem from ISDS.

Chief among the issues raised against ISDS-style investment arbitration is the supposed problem of regulatory chill. In short, proponents of this phenomenon claim that as a result of several dissuading factors, such as perceived pro-investor bias of the arbitrators or disproportionately large awards, host countries start to fear opposing the interests of foreign investors, and this in turn leads to lack of legislation (regulation), even when it would be necessitated and justified by public policy objectives. As noted beforehand, this is particularly problematic in case of pro-environmental legislation, which is particularly fragile and prone to being opposed to business interests. Of course, it cannot be denied that there could be several other influencing factors when it comes to regulatory chill, and it would be unwise to exclusively attribute the supposed phenomenon to the outcome of few ISDS cases.

Henceforth, this article seeks to discuss the nature and characteristics of this phenomenon. First, it will examine the historical aspects that led to the current situation. Following that, ISDS-related issues will be discussed, and then regulatory chill as a concept will be scrutinized. Based on these observations, the article will attempt to find a suitable answer to the question of how ISDS could be improved in the conclusion.

2 Historical development of ISDS and foreign investment protection in general

Before discussing ISDS-related issues, we examine the historical background of foreign investment protection in general and ISDS itself. To begin with, ISDS' history is not particularly long. The question of foreign investment first arose in the 19th century. This was the time when world trade truly became significant, and trans-country investments really took off. However, at this time, legal instruments for the protection of the property of foreign investors were still rather underdeveloped, and no solution existed that was pleasing to both the foreign investor and the host country. For the former, trusting in the local courts to resolve disputes was a foolhardy affair, and thus most foreign investors instead sought the diplomatic (and occasionally military) assistance of their home countries. By turn, this solution was naturally displeasing to the host country, which could find itself subject to diplomatic pressure or even outright military intervention. A good example of this was the 1861 French military expedition to Mexico, which was partially borne out of a desire to effectuate certain claims from French investors and creditors against the Mexican state.[2]

A real change came after the Second World War, when newly decolonized countries slowly realized that they needed foreign investments to develop their own economies, their attempts at economic independence slowly petering out. But while individual developing countries might have been open to negotiations, the general international atmosphere in already established milieus was still not very conductive to the matter. As a result, a solution was found in BITs, which first appeared in the late 1950s. These treaties were concluded between a developed country and a developing country, and contained a number of safeguards and measures aimed at ensuring the security of foreign investments, thus stimulating economic growth.[3] Most importantly, these treaties contained a novel dispute resolution method, which came to be called ISDS. This entailed neutral arbitrators being responsible

2 Torbágyi P. *Magyar Kivándorlás Latin-Amerikába az Első Világháború Előtt*. Szeged, 2009, p. 41.

3 Bilateral Investment Treaties 1959–1999 [online]. *UNCTAD*. Published in 2000, p. 1 [cit. 3. 9. 2019]. https://unctad.org/en/Docs/poiteiiad2.en.pdf

for hearing legal claims of foreign investors and adjudicating over them.[4] As we will see, this proved a popular solution, as it dealt with the local courts debate in a systematic and regulated manner.

As the 20th century rolled on, BITs and ISDS were becoming increasingly popular. This popularity eventually brought with it the need for a more formalized and systemic approach to ISDS procedures. This came to the fore in the 1960s. In 1965, the International Bank for Reconstruction and Development (IBRD) approved the submission of a convention to its members, the Convention on the Settlement of Investment Disputes. This convention outlined several general rules for ISDS, and also called for the establishment of an International Centre for Settlement of Investment Disputes ("ICSID") that would facilitate the administration of these procedural rules and provide general support to investment disputes, such as lists of arbitrators or maintaining case databases. By 1966, the Convention was signed, ratified and came into effect. In the decades since, ICSID has become the dominant facilitator of ISDS-related processes.[5] Thus we can state that while the anti-exploitation movements were still ongoing, there were already measures being put into place, and ISDS was already growing in popularity as a method of investment dispute resolution.

The success of the BITs can also be seen from the number of treaties that were concluded. From 1959 to 1969, there were yet only seventy-five BITs. From 1970 to 1979, countries concluded ninety-two BITs. The first sign of rapid growth was to be seen in the ensuing decade, as the number of BITs concluded in 1980s rose to 219.[6] This can be easily explained when we consider the general geopolitical climate of the time. By the 1980s, NIEO[7] and its supporters petered out, while the USSR-led socialist bloc was suffering from a severe downturn in influence, while China was slowly opening up to foreign investment themselves. These numbers alone show us that attitudes towards foreign investments were growing more hospitable

4 Lester, S. The ISDS controversy: How we got here and where next [online]. *ICTSD.* Published in 2016 [cit. 3. 9. 2019]. http://www.ictsd.org/opinion/the-isds-controversy-how-we-got-here-and-where-next

5 Parra, A. R. *The History of ICSID.* Oxford: Oxford University Press, 2012, pp. 1–2, 8.

6 Vandevelde, K. J. A Brief History of International Investment Agreements. *U.C.-Davis Journal of International Law & Policy*. 2005, Vol. 12, No. 2, p. 172.

7 New International Economic Order.

even in developing countries (or alternatively, we could theorize that they were forced into these agreements by economic necessity).

The true explosion, however, happened in the 1990s. During this decade, 1472 BITs were concluded.[8] This truly phenomenal expansion can be easily explained once more, if we consider that the above-mentioned processes during the 1980s only continued to intensify during the 1990s, and we can also add the true demise of the USSR and the Eastern Bloc as obvious reasons for the great increase in BITs. And to conclude the historic perspectives, we have to mention a recent trend in which BIT-like clauses are slowly being included in a number of FTAs such as NAFTA or CETA (in its original form), though the current legal situation of some of these FTAs is still uncertain. This shows to us that regulating the protection of foreign investments through international agreements has remained a staunch phenomenon, thus ensuring that ISDS too is relevant and discussable in contemporary times.

3 Issues related to ISDS

Despite its great popularity as a core component of countless BITs, and its place as the primary method of solving investment-related disputes, ISDS is increasingly facing numerous critiques, which we will examine now. However, we will reserve a separate section for the greatest potential issue, regulatory chill.

First of all, we have to address the reasons for the rise of ISDS system's criticism. One element is that foreign investment protection and investment arbitration of this specific type were without real historical precedent, meaning that when they were conceptualized, then implemented into the first BITs, it was difficult to judge accurately how it would all work in practice. Furthermore, there were relatively few cases of investment arbitration at the beginning, and these disputes were rarely reported to the public, meaning that they usually escaped any sort of public awareness or scrutiny. However, by the 1990s, the practical consequences of the ISDS and its related

8 Bilateral Investment Treaties 1959–1999 [online]. *UNCTAD*. Published in 2000, p. 1 [cit. 3. 9. 2019]. https://unctad.org/en/Docs/poiteiiad2.en.pdf

substantive investment protection regime had become increasingly clear, and with the number of cases growing, it was inevitable that some cases would be publicly reported and thus examined by the general audience.[9] So it was that with greater scrutiny came a more widespread recognition of issues with the system.

When it comes to listing the issues raised by ISDS and the general investment protection regime that it accompanies, procedural issues seems like an appropriate starting point. The most obvious of these is the fact that ISDS is a one-sided dispute settlement method. The foreign investment protection treaties that can serve as the legal basis for claims typically only contain substantive provisions related to foreign investments and investors, meaning that only they have the legal bases to initiate disputes and present claims. And while documents like the ICSID Convention or the UNCITRAL Arbitration Rules allow in principle counterclaims from respondent host states, the same is often not true of investment treaties (e.g. ECT) both from a procedural and substantive perspective, and in practice, the host state is rarely allowed by the arbitration tribunal to bring any substantial counterclaims into the dispute (meaning that they can only ask for the case to be dismissed and cannot realistically present their own grievances against the foreign investor except as a counter-argument to the investor's claims).[10] There might be historical reasons for this. The primary function of ISDS-style investment arbitration was to provide a supposedly objective form of dispute resolution for the foreign investor's benefit. Thus, it was natural that the system did not significantly account for claims by host states. We can easily assume that the view was that the host state had already enough ways (typically regulation in the name of public interest) to find remedies for any perceived grievance, in sharp contrast to the foreign investor, who is a private actor with theoretically more limited options. Nevertheless, this issue had seeped into the current trend of ISDS-opposition, as it is an obviously asymmetrical element of the system.

9 Lester, S. The ISDS controversy: How we got here and where next [online]. *ICTSD*. Published in 2016 [cit. 3. 9. 2019]. http://www.ictsd.org/opinion/the-isds-controversy-how-we-got-here-and-where-next

10 Reform Options for ISDS [online]. *UNCITRAL*, p. 4 [cit. 5. 9. 2019]. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_recs_and_justification_final.pdf

Next up is the fact that not only the respondent host state's options are limited, this system of dispute resolution is also constrained on the plaintiff's end. The meaning of this is that investment arbitration is an exclusive process reserved only for foreign investors and no others, thus it is a highly privileged remedy. This means that the domestic investors of the host state are in a natural disadvantage compared to foreign investors, since they lack one of the potential tools to remedy any grievances, they have suffered from the host state's actions.[11] This is once again theoretically justified when we look at the historical origins of ISDS. The drafters of the ISDS system likely assumed that since domestic investors already have theoretically fair, or even a more advantageous position in domestic legal recourses, there is no actual need for them to be included in a mechanism designed to protect foreign investors' investments. However, this interpretation raises the question of whether we can truly speak about equality before the law, if one investor receives a special and substantial privilege that others do not, on account of their nationality? This perceived unfairness has likely added further fuel to the criticism surrounding ISDS.

Another related aspect that should be mentioned is that many BITs do not require foreign investors to exhaust local remedies before they can turn to ISDS-style investment arbitration. This presents a further advantage for foreign investors, and essentially allows them to bypass the host state's internal judicial system completely.[12] The reasoning for this can also be found in the historic origins and evolution of ISDS. It stands to reason that foreign investors would not trust host state's courts to be unbiased, and to provide prompt decisions and compensation. In fact, it is quite easy to theorize that domestic courts could potentially frustrate the foreign investors by significantly prolonging their own processes. Given the length of investment arbitration as it is, this would logically lead to the foreign investors being denied of their awards for an unreasonable amount of time. Naturally, while this explanation seems like a probable theory, it does not diminish the fact that

11 Mohamadieh, K. The Future of Investor-State Dispute Settlement Deliberated at UNCITRAL: Unveiling a Dichotomy between Reforming and Consolidating the Current Regime. *Investment Policy Brief*. 2019, No. 16, p. 2.

12 Ibid., p. 6.

this element of ISDS can easily be turned into an argument about depriving host states of their sovereign rights.

To continue, another investor-related issue is the frequent lack of a clean hands clause. This means that arbitration tribunals and panels do not assess whether the foreign investor violated the host state's domestic laws and regulations when it comes to determining whether the foreign investor has access to the ISDS system for the given claim. A strong example of this can be found in the *Copper Mesa Mining Co. v. Republic of Ecuador* case, where the arbitration tribunal refused to consider Ecuador's objections about how the foreign investor in question used unlawful and violent means to pursue their agenda within the host state, up to hiring armed men for violent purposes. Not only the tribunal did not find this an impediment to the submission of the foreign investor's claim, it actually ended up favoring the foreign investor in its final award.[13] The same argument also arose in relation to the *Yukos Universal v. Russia*, but was presented to a Dutch court of appeals. The court, unlike the ISDS tribunal in the previous case, acknowledged the unclean hands argument.[14] In general, we can once again state a historical explanation for the lack of these clauses in investment treaties. It stands to reason that with the general mistrust in domestic legal processes, there might also have been a mistrust in domestic legislation. Thus, it made some sense not to include such clauses, since it could potentially lead to abuse by the host state to deny the ISDS system to foreign investors, or would otherwise require the tribunal to assess the objectivity or fairness of domestic regulation well before the merits phase. Furthermore, this would raise further questions about what tribunals would base their assessments on. Therefore, while this criticism seems legitimate on the surface (especially with the extreme example being provided), practical implementation of such clauses might not be the ideal approach.

13 Reform Options for ISDS [online]. *UNCITRAL*, p. 7 [cit. 5. 9. 2019]. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_recs_and_justification_final.pdf

14 De Korte, J., Wilts, G. Court allows Russia's unclean hands argument against former Yukos shareholders (Court of Appeal in The Hague) [online]. *Vosdk.nl*. Published on 3 October 2018, 4 p. [cit. 5. 9. 2019]. https://www.vosdk.nl/assets/files/assets/uploads/Court_allows_Russias_unclean_hands_argument_against_former_Yukos_shareholders___1.pdf

Besides the particularities of initiating an ISDS process, there is also the matter of arbitrator selections. Two issues are frequently raised in relation to this aspect. The first is the claim that arbitrators lack impartiality and independence. This is based on the logic that since only foreign investors can initiate arbitrations, and investment arbitrators operate on a for-profit basis, there would naturally be a pro-investor bias in arbitrations (since arbitrators benefit from foreign investors making continued use of ISDS).[15] This interpretation, in our opinion, misses the fact that respondent host states also have an influence on the selection process, and that obviously biased arbitrators would not be accepted by the host state. Furthermore, if we look at the statistics of known investment arbitration cases, there is no discernible advantage given to foreign investors when it comes to the outcome of the cases. For example, in the UNCTAD's database, there are 215 cases where the tribunal decided in favor of the host state, and only 173 cases that were decided in favor of the foreign investor.[16] Thus, the lack of obvious clues to this bias implies that it is not a decisive factor, in our opinion.

The secondary argument against arbitrator selection is that in practice, investment arbitrators come from a small pool of candidates, which raises the possibility of an overtly close intellectual consanguinity (a sort of elite and exclusive arbitrator clique), which in turn could lead to limited perspectives and decisions divorced from practical realities. However, this argument is very easy to dismiss if it is considered that the parties are ultimately responsible for choosing arbitrators, and that the most often picked arbitrators are often considered the best professionals in their field by the surveyed parties.[17] Thus, we can conclude that this factor also does not hold much weight, but nevertheless, it likely contributed to ISDS' image as an elitist institution in the public's eye.

15 European Federation for Investment Law and Arbitration A response to the criticism against ISDS [online]. *EFILA*. Published in 2015, pp. 17–18 [cit. 5. 9. 2019]. https://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf

16 Investment Policy Hub [online]. *UNCTAD* [cit. 3. 9. 2019]. https://investmentpolicy.unctad.org/investment-dispute-settlement

17 European Federation for Investment Law and Arbitration A response to the criticism against ISDS [online]. *EFILA*. Published in 2015, pp. 21–22 [cit. 5. 9. 2019]. https://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf

Another raised issue in connection to arbitrators is that whether investment arbitrators delegate their duties to arbitral secretaries in an unethical and improper manner. This criticism was given significant boost by the *Yukos Universal v. Russia* case, where Russia argued (and submitted a forensic linguist's report) that a large portion of the final award, including a significant percentage of the case's substantive analysis, was written by an arbitral secretary. While this ultimately remained unconfirmed, it did cast an unfortunate shadow on the issue.[18] Furthermore, we also have to note that ethical and other rules on arbitral secretaries can be rather vague. For example, the Young ICCA[19] Guide on Arbitral Secretaries 2014 notes that arbitral secretaries can have roles beyond purely administrative ones, as dictated and overseen by the arbitral tribunal. These can include drafting tasks for example.[20] This means in general that the role of arbitral secretaries in a given case is mostly uncertain.

Now that we are examining the conduct of arbitrators during the process, we turn to another commonly raised issue, the lack of transparency. In its original form, ISDS left little to transparency, and documentation such as hearings, awards, third-party participation and other related materials were often not available. However, it should be noted that in recent years, there has been a great increase in transparency, and investment arbitration is now far more accessible than ever before, and surpasses the transparency of domestic dispute resolution in several countries.[21] Of course, we can't discount that in domestic cases, hearings are open and public unless specifically asked by the parties, while the opposite is true in arbitral cases. In our opinion, it is undeniable that investment arbitration-related materials are now quite accessible and researchable, with cases that are not being the exceptions rather than the rule. Nevertheless, it is quite obvious that this

18 Nolan, M. D. Challenges to the Credibility of the Investor-State Arbitration System. *American University Business Law Review*. 2016, Vol. 5, No. 3, p. 442.

19 International Council for Commercial Arbitration.

20 Galagan, D., Zivkovic, P. The Challenge of the Yukos Award: an Award Written by Someone Else – a Violation of the Tribunal's Mandate [online]. *Kluwer Arbitration Blog*. Published in 2015 [cit. 8. 9. 2019]. http://arbitrationblog.kluwerarbitration.com/2015/02/27/the-challenge-of-the-yukos-award-an-award-written-by-someone-else-a-violation-of-the-tribunals-mandate/

21 IBA Arbitration Subcommittee. *Consistency, efficiency and transparency in investment treaty arbitration*. 2018, p. 53.

proactive response to transparency issues ultimately spurred other forms of criticism. As we noted in the historical section, criticism of ISDS did not really become particularly loud before the 2000s. While it's true that this was mainly the result of several high-profile cases, greater public (and thus media) access to ISDS cases in general likely contributed to the increase in ISDS critiques.

There is a further problem that is indirectly related to transparency, the lack of substantial third-party access to investment arbitration proceedings affecting them. Investment arbitration often has effects on other entities besides the respondent host state itself, such as local communities, businesses and organizations. However, the ability of these entities to participate in disputes is quite limited. *Amicus curiae* is an option, but third parties have little power besides submitting briefs. They typically have limited access to evidence, cannot participate in oral debates and cannot receive compensation, for example.[22] As noted, investment arbitration can have severe repercussions for individual parties that do not directly participate in the proceedings, and in turn, their method of participation when allowed at all, is often ignored or highly limited. The counter-argument would be that the respondent host state can adequately represent the interests of these affected, but while this may be true in principle, it is questionable just how much it can be applied when considering practical realities and that host states may not be intimately aware of or tied to these affected entities.

To continue, we also have to mention that the duration and associated legal and other costs of investment arbitration are often considered problematic. An ISDS process is resource-intensive for both parties, and given that many cases tend to linger for long, costs can also rise to levels that have negative impacts on the parties involved. It is sometimes even suggested that for developing countries (who are particularly vulnerable to financial issues), the inclusion of ISDS provisions into their BITs could easily end up causing a negative impact on their finances, even if they do not lose cases, merely because of the high costs of the proceedings. And given that these are

22 Reform Options for ISDS [online]. *UNCITRAL*, pp. 9–10 [cit. 5. 9. 2019]. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_recs_and_justification_final.pdf

developing countries, funds used for acting as respondents in ISDS cases would likely be needed elsewhere, often for urgent developmental needs. This can end up causing a disproportionally heavy burden for them when it comes to participating in cases.[23] In our opinion, we have to consider that while this is a severe issue, instituting a "loser pays everything" scheme would be equally unwise. Foreign investors (who have typically just missed out on significant sums given that they are participating in an ISDS case as the plaintiff) can equally struggle with appropriately financing their participation, and we can easily theorize that deflecting all costs onto them in a failed claim would reduce their practical ability to utilize the ISDS arbitration. This is compounded by the next issue detailed below, which makes ISDS tribunals difficult to predict in their rulings.

Finally, we would also need to discuss the conduct of arbitrators when it comes to interpreting the provisions of a given investment protection treaty. First of all, it has to be noted that there are no uniform standards or any set precedent. Arbitral practice may refer to earlier ISDS cases when making their own conclusions, but it may just as freely ignore it. A good example of this is that fair and equitable treatment standard is often interpreted in many different ways by arbitral tribunals, and there is a lack of a universal method of valuation for awarding damages.[24] Compounded by the *ad hoc* nature of investment arbitration, the lack of any permanent courts and so on, we believe that it becomes questionable whether any consistent practice can be set under such circumstances.

In conclusion, we can state that while ISDS suffers from several critiques, many of these have been resolved or are in the process of being resolved, while solutions for others do not appear so obvious. In the next section, we discuss the arguably greatest criticism of ISDS, the so-called "chilling effect".

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23 Report of Working Group III (Investor-State Dispute Settlement Reform) [online]. *United Nations Commission on International Trade Law*. Published in 2018, pp. 7–8 [cit. 11. 9. 2019]. https://undocs.org/en/A/CN.9/930/Rev.1

24 Touzet, J, de Vaublanc, M. V. The Investor-State Dispute Settlement System: The Road To Overcoming Criticism [online]. *Kluwer Arbitration Blog*. Published on 6 August 2018 [cit. 12. 9. 2019]. http://arbitrationblog.kluwerarbitration.com/2018/08/06/the-investor-state-dispute-settlement-system-the-road-to-overcoming-criticism/

4 Regulatory Chill

Now that we have looked at the various issues surrounding ISDS, it is time to talk about one of the most ambiguous and multifaceted problems of them all. That critique is regulatory chill, or the chilling effect. Despite its elusive nature, and that it is somewhat hard to pin down or objectively prove, regulatory chill has captured the imagination of many critics of investment arbitration, and we shall now examine why this is so.

The first step is determining the exact nature of regulatory chill. According to one perspective, we can speak about two general interpretations of the term: broad and narrow. In broad terms, regulatory chill can be interpreted as the general chilling (freezing) of all legislation and regulation that could affect foreign investors, with legislators and policy-makers considering the potential effects of their new regulations on foreign investors as early as during the drafting process. As a consequence, this chilling effect thus stunts any drastic legislative measure that has the potential of affecting foreign investors. Meanwhile, a narrow interpretation of regulatory chill focuses on the situation when a specific measure is apparently chilled or stopped, after the legislators had been made aware of the threat of foreign investors utilizing ISDS to sue for damages if the measure in question goes into effect or otherwise remains.[25] In a later work, *Tienhaara* also proposes the existence of a third type of regulatory chill, cross-border chill. In her view, this type of regulatory chill can exist when a government pursues some sort of measure and policy that affects foreign investments on a wide scale, and is easily transferable to other jurisdictions, which are then likely to emulate such a measure. In this case, the foreign investor's intent is not necessarily to chill the regulation in the jurisdiction it is targeting through ISDS, but to forestall and prevent such measures from being adopted in other jurisdictions where the foreign investor is active in the affected fields. In this view, not even the outcome of the ISDS case itself is necessarily indicative of whether

25 Tienhaara, K. Regulatory chill and the threat of arbitration: a view from political science. In: Brown, C., Miles, K. (eds.). *Evolution in Investment Treaty Law and Arbitration*. Cambridge: Cambridge University Press, 2011, p. 2.

the foreign investor's chilling aims have been achieved or not.[26] In our view, the first interpretation is nearly impossible to ascertain (thus, lending weight to the argument that regulatory chill is far too vague of a phenomenon), while even the narrow interpretation can be difficult to prove, unless the researcher has enough insight into the policies and process of legislation in question. However, it is true that such narrower definitions of regulatory chill could be tested through examining the actual output and behavior of legislators once regulatory chill hypothetically arises. As for the third possible interpretation of regulatory chill, it is necessary to ascertain what is specifically the easily transferable legislation in question, whether it can be determined with reasonable certainty that other jurisdictions were going to adopt the measures (and which jurisdictions), and whether it can be said that the ISDS case served as the primary reason for why they haven't. In our view, this interpretation also implies that foreign investors are consciously attempting to use regulatory chill as an intimidation tool against numerous host states, and the chilling effect is not simply a result of their behavior.

There are also other possible forms of categorization when it comes to regulatory chill. In one such case, we can speak about three types of chilling effect: anticipatory chill, response chill and precedential chill. Anticipatory chill is similar to the broad interpretation of regulatory chill, if not quite as advanced. In this scenario, the policy-maker simply weighs whether the given measure or legislation could lead to being challenged through ISDS. However, this does not quite carry the same extent of chill-internalization as the broad interpretation above. Meanwhile, response chill applies to cases where the policy-maker becomes aware of the risk of ISDS in relation to a specific measure and thus makes steps to rectify this. An example of this potentially happened in *Vattenfall v. Germany (I.)*, where after receiving the notice of arbitration, the government of Hamburg had already started modifying the disputed regulations. Thus, we can say that response chill is nearly, if not exactly the same as the narrow interpretation of regulatory chill. And finally, precedential chill refers to situations when an already concluded ISDS case influences the policy-maker, regardless of whether it has

26 Tienhaara, K. Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement. *Transnational Environmental Law*. 2018, Vol. 7, No. 2, pp. 2–3.

been involved in the case or not. This could be seen as a broader variation of cross-border chill.[27] Therefore, we can see that defining regulatory chill is not exactly a simple task, but there are common patterns in the various possible categorizations.

As for our own interpretation of how regulatory chill can be categorized, we would argue for that the first two categories in either interpretation roughly carry the same essence, while the third category should likely be separated into two: one for where intimidation of other host states happen (as proposed by the cross-border regulatory chill theory), as well as one where the host state considers its own already concluded ISDS case as the basis for future legislation (a more specific variation of precedential chill theory). In our view, this would provide the fullest view of what can constitute regulatory chill.

In the rest of the section, we examine the following three questions, based on the groundwork laid by the rest of the article: why is ISDS considered threatening enough to result in regulatory chill, what are the supposed consequences of regulatory chill, and finally, what other factors can come into play and potentially undermine its effects. After these questions has been answered, we attempt to propose solutions to regulatory chill in the conclusion of the article.

So, the first element to be discussed is what makes exactly regulatory chill a possibility, what makes ISDS cases so threatening. The answer lies in a multitude of different reasons. First of all, all the issues we presented in the previous section contribute to the notion that investment arbitration is not necessarily to the benefit of the host state. With the table seemingly hedged so much in the foreign investor's favor (at least on the surface), it is not surprising that host states would consider an ISDS proceeding a worst-case scenario for them. In our opinion, this is not surprising at all. But where the true issue lies with are arbitral awards. Especially in the case of developing countries, arbitral tribunals may award damages that could have significant impact

27 Shekhar, S. 'Regulatory Chill': Taking Right to Regulate for A Spin. Working paper [online]. *Centre for WTO Studies*. Published in 2016, pp. 22–24 [cit. 3. 9. 2019]. http://wtocentre.iift.ac.in/workingpaper/'REGULATORY%20CHILL%E2%80%99%20TAKING%20RIGHT%20TO%20REGULATE%20FOR%20A%20SPIN%20(September%202016).pdf

on the host state. A good example of how much funds could be at stake is the *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)* where the foreign investor was awarded 1769 million US dollars.[28] Though this award was partially annulled (with the final damages to be paid becoming a smaller, but still very significant sum), it serves as an excellent demonstration of just how potentially damaging ISDS arbitration can be for a small developing host state. It should also be noted that these countries are also the most reliant on foreign investment. They have little domestic capital, but typically have an abundance of natural resources or a cheap workforce. Thus, for jumpstarting and accelerating their own economic development, they need to "play nice" with foreign investors, or at least appear as tempting business partners. As a result, we can observe that they often cannot afford to antagonize foreign investors, and thus are most likely to consider the threat of investment arbitration either in an anticipatory manner or as a response to a concrete emergent situation. The pop up of precedential or cross-border chill could also be considered possible in these situations. Furthermore, even if the tribunal rules in favor of them, it could serve as a warning sign to other foreign investors that they should not invest in the said country. In our opinion, this could create a potential lose-lose scenario for the developing host state, and contribute to regulatory paralysis, or at least a chilling effect when it comes to legislation.

Next up is considering what are the negative consequences of regulatory chill. In general, regulatory chill has the potential consequence of violating and/or limiting the sovereignty of host states, in relation to a number of different fields. Based on our prior observations, it can be stated that environmental issues are probably one of the fields most likely to be opposed to the interests of foreign investors. In fact, it has recently become a common perspective among environmentalists that regulatory chill could seriously hamper sustainable development in developing countries and hinder progress when it comes to environmental protection.[29] In our view, this problem

28 Occidental v. Ecuador (II) [online]. *Investment Policy Hub* [cit. 11. 9. 2019]. https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/238/occidental-v-ecuador-ii-

29 Neumayer, E. Do countries fail to raise environmental standards? An evaluation of policy options addressing 'regulatory chill'. *International Journal of Sustainable Development*. 2001, Vol. 4, No. 3, pp. 231–232.

is further compounded by the fact that environmental legislation is often the least-developed in developing countries, which would otherwise necessitate a hastened response. The reasons for this opposition should be obvious: environmental regulation necessarily brings increased costs and lengthened bureaucratic processes for affected private entities, including foreign investments. And with the increased importance of environmental protection in many countries, it is a probable situation that during the period that the foreign investment is active, new and stricter environmental regulations would arise in the host state, which in turn would lead to a loss of expected profit. Overall, we can easily mention some examples when environmental policy became opposed to the interests of foreign investors. Two famous cases are *Vattenfall v. Germany* I[30] and II,[31] where a Swedish energy company became opposed to German environmental policy first over a Hamburg coal plant and the supposedly onerous (as perceived by the foreign investor) environmental safeguards implemented by municipal authorities, and secondly over the new German anti-nuclear environmental policy that followed in response to the Fukushima nuclear disaster. Another good example is *Pac Rim Cayman LLC v. El Salvador*[32], where a Canadian mining company came into conflict with the government of El Salvador, as the foreign investor attempted to open gold mines in the host state, but was frustrated by this endeavor by the refusal of the authorities to issue the appropriate mining licenses, based on alleged environmental concerns. There are also cases where environmental policy objectives became entangled with related causes, such as *Ethyl v. Canada*.[33] In this particular case, the issue arose over Canada banning the import of a gasoline additive (known as MMT) that is used in unleaded gasoline, citing both environmental and public health concerns over the substance, which led to an ISDS dispute

30 Vattenfall v. Germany (I) [online]. *Investment Policy Hub* [cit. 12. 9. 2019]. https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/329/vattenfall-v-germany-i-

31 Vattenfall v. Germany (II) [online]. *Investment Policy Hub* [cit. 12. 9. 2019]. https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/467/vattenfall-v-germany-ii-

32 Pac Rim v. El Salvador [online]. *Investment Policy Hub* [cit. 12. 9. 2019]. https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/356/pac-rim-v-el-salvador

33 Ethyl v. Canada [online]. *Investment Policy Hub* [cit. 12. 9. 2019]. https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/16/ethyl-v-canada

with an US chemical company that had a vested interest in the continued Canadian importation of the allegedly dangerous chemical. These cases all show that environmental regulation can be a frequent source for ISDS disputes. However, according to some empirical researches that were conducted in relation to this issue, there is no conclusive proof that environmental legislation is negatively affected by ISDS disputes. But it is also worth mentioning that the very same research also stated that due to the fact that only the adoption of new environmental regulations was examined (and not say changes to existing regulations), this element cannot be understood as the only conclusive proof towards the positive or negative development of environmental protection in a given country, so it is uncertain what the actual practical effects of ISDS are on environmental protection in its entirety.[34] In our opinion, while this empirical research suggests an only tenuous connection (despite its limited scope), it cannot be stated that ISDS has no effect on environmental protection. Given how often environmental policy butts heads with foreign investors, it is unavoidable that the two would end up affecting each other.

While its potential effects on environmental regulation are the most pressing and obvious, ISDS and thus regulatory chill can also theoretically arise in relation to other policy issues. The perfect example of foreign investors coming into conflict with a host state over labour policy is the *Veolia v. Egypt* case,[35] where conflicts arose between the French foreign investor and government of the host state over Egypt's newly enacted labour legislation, which included an increase of minimum wage. The foreign investor perceived this as a violation of the 15-year contract that its Egyptian subsidiary concluded with the governorate of Alexandria, with the aim of providing waste management services within the city. This shows that even the seemingly most innocuous and "normal" labour legislation enacted by the host state can have severe consequences when it comes to foreign investors and ISDS.

34 Berge, T. L., Berger, A. *Does investor-state dispute settlement lead to regulatory chill? Global evidence from environmental regulation*. 2019, p. 22.

35 Veolia v. Egypt [online]. *Investment Policy Hub* [cit. 12. 9. 2019]. https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/458/veolia-v-egypt

And finally, we have to note that proving regulatory chill in a given case is not always simple or easy. Regulatory chill, by its very nature, implies that the host state's policy direction is affected primarily (if not exclusively) by the threat of ISDS proceedings and the consequent arbitral awards. However, in many situations, it is not the only factor by far. Especially in cases involving powerful states that are capable of dealing with the soft sanctions and foreign investment fallout following non-performance of ISDS rewards, such as Russia (infamous for cases like *Yukos Universal v. Russia*[36]) or China, it is truly questionable whether regulatory chill can be realistically considered a primary or even relevant factor when it comes to policy decisions. From another perspective, pariah or otherwise rogue states can also realistically have other considerations besides purely monetary ones when it comes to policy decisions (and potentially can decide to non-perform arbitral awards as well). On the "bright" side, it is clear that in some situation, such as the already mentioned *Vattenfall v. Germany* II, the public interest in a given pro-environment policy is so strong that the host state can potentially feel compelled to see it through, never mind the ISDS consequences of doing so.

Having reviewed the history, and issues of ISDS arbitration, with special focus given to regulatory chill and its many questions, the conclusion will focus on providing suggestions on improving the extant ISDS framework, which could be able to alleviate the regulatory chill-related problems.

5 Conclusion

Throughout this article, we presented the evolution of the ISDS, the issues facing the investment arbitration system, with special focus given to the problem of regulatory chill. Here, in the conclusion, we attempt to provide some suggestions that aim to solve or at least alleviate regulatory chill and some of the other problems.

Regulatory chill is fundamentally a complex issue, arising out from how the framework of ISDS is structured. Thus, in order to prevent its emergence,

36 Yukos Universal v. Russia [online]. *Investment Policy Hub* [cit. 12. 9. 2019]. https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/213/yukos-universal-v-russia

several issues also need to be addressed. But for regulatory chill itself, there is one element that has to be emphasized: the phenomenon allegedly occurs because the host state believes it has much to fear from ISDS. The way to alleviate this is to reiterate and emphasize the states' right to legislate in public interest or to achieve legitimate public policy objectives. Several investment protection treaties already do this, but the issue comes from what the arbitral tribunal will consider "public interest" or "legitimate public policy objective." While the legal bases of ISDS cases do typically contain some guidelines on these, the arbitral tribunals still enjoy a rather large leeway when it comes to interpreting exactly what constitutes public interest or policy objective. Thus, the solution can be twofold: one option is to ensure that future treaties contain a more explicit and clear language regarding these states' rights to regulate, giving significantly less discretionary powers to arbitral tribunals interpreting it. This would also naturally necessitate the updating of many older treaties. The second option is to change how arbitral tribunals themselves interpret these clauses, by establishing some sort of common reference point or a universally accepted guide that provides more clear and concise rules on how these "right to regulate" clauses are to be interpreted in general. Both options can also be used in tandem with each other. The key here is that regulatory chill partially occurs (at least in theory) because the host state is uncertain about how an arbitral tribunal would interpret its legislative attempt. By making it clear and obvious what method of legislation and implementation falls under public interest or legitimate public policy objective, it becomes significantly easier for host states to anticipate whether a given measure would be acceptable or unacceptable for an ISDS arbitral tribunal. In our opinion, this alone would significantly ameliorate this potential issue.

However, there are also other complementary issues that need to be solved. For example, in our opinion, enshrining the host states' right to have counterclaims would be a worthwhile endeavor. While it would be likely a too drastic revision of the ISDS framework to allow host states to initiate disputes and act as plaintiffs; ensuring that they have the ability to present counterclaims against the foreign investor's own claims would be utile and reasonable. In order to ensure that this can happen, it is arguably necessary that

treaties should contain explicit provisions providing for it, so as to ensure that arbitral tribunals cannot dismiss without examination counterclaims based on their own discretionary powers. But as noted previously in the article, it is also necessary to provide the necessary substantive provisions that could serve as a basis for the counterclaims, besides the procedural clauses we already discussed. This would significantly level the playing field in our opinion, and would further reduce the threat ISDS arbitration allegedly represents to developing countries. Another element that we think needs to be addressed is the issue of unclean hands. While this is potentially open to abuse by host states, we believe it would be worthwhile if arbitral tribunals (based on BITs and other treaties) allowed unclean hands exceptions and would examine such matters either in the preliminary phases of the ISDS arbitration (potentially opening up the rejection of the claim altogether) or if that is unviable, a thorough examination at least in the merits phase. In our opinion, unclean hands imply that the foreign investor acted in bad faith, and arbitral tribunals should not take such matters lightly. If the arbitral tribunal sides with the "criminal" foreign investor, it logically leads to increased feelings of resentment and anger at the ISDS system by the general public due to the perceived "injustice". Hence, we believe that arbitral tribunals should be extremely careful around these matters.

Another issue that we believe could be solved is third-party access. As explained previously, it is often not only the foreign investor and the host state's government that are affected by an ISDS dispute, but a whole gamut of different entities and communities. Thus, increasing the role and options of *amicus curiae* in the proceedings seems reasonable. It would be worthwhile to give them greater access to evidence, the ability to participate in the oral debates, etc. The source of much of the antipathy against ISDS stems from its perceived exclusionary and privileged nature. By involving affected parties in the proceedings, by giving them a more serious chance to be heard, and by having the arbitral tribunals consider their grievances and concerns more seriously, we can ensure that the image of ISDS in the public's eyes improves. Of course, it would still be necessary to evaluate whether the third-party has the necessary standing and is closely connected enough to the dispute to be involved. For this, we could perhaps draw inspiration from the various

national civil procedural rules, which often cover third-party access to disputes as well.

Furthermore, enhancing the transparency of ISDS would encourage host states to bring decisions in which public interest prevails over political populism. At the same time, arbitral tribunals will be stimulated to take into consideration the before mentioned unclean hand issues. We can also note that greater public awareness of ISDS internal processes, in combination with the above-mentioned increased access of third parties to the dispute proceeding could further enhance transparency's positive effect. Thus, this could create a synergy between transparency and other issues, allowing significant improvements in all affected issues.

In conclusion, we can state that the future of ISDS still hangs in the balance. As time goes on, criticism mounts, public awareness increases, and the architects of the system will eventually have to rethink just what can be kept and what needs to be changed. Some new treaties, like CETA, discarded ISDS entirely and replaced it with a new system. But many still cling to ISDS, so the future remains uncertain. Nevertheless, solutions and ways to mitigate the system's fallings steadily emerge over time. In our opinion, we can be confident that eventually, some kind of balance will be found between public interest and foreign investment. The only questions are what price it will have and how much time it will take.

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