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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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