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PRÁVNICKÁ FAKULTA

Private International Law

Department of International and European Law

# CZECH PRIVATE INTERNATIONAL LAW

**Naděžda Rozehnalová,  
Klára Drličková et al.**





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## List of Abbreviations

Arbitration Act	Act No. 216/1994 Coll., on arbitration and enforcement of arbitral awards
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 Ibis 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 judgements in civil and commercial matters
Brussels IIbis 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
Charter of Fundamental Rights	Constitutional Act No. 2/1993 Coll., instituting the Charter of fundamental rights and freedoms
CISG	United Nations Convention of 11 April 1980 on contracts for the international sale of goods
Civil Code	Act No. 89/2012 Coll., civil code
CJEU	Court of Justice as a part of the Court of Justice of the European Union
Code of Civil Procedure	Act No. 99/1963 Coll., code of civil procedure
Coll.	Collection of Acts (Czech Republic)

Coll. Int. Conv.	Collection of International Conventions (Czech Republic)
Constitution	Constitutional Act No. 1/1993 Coll., Constitution of the Czech Republic
Convention on Protection of Children	Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children
Court of Justice	Court of Justice as a part of the Court of Justice of the European Union
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
Evidence Regulation	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
Former PILA	Act No. 97/1963 Coll., on private international and procedural law
Hague Protocol	Protocol of 23 November 2007 on the law applicable to maintenance obligations
Insolvency Regulation	Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings

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Lugano Convention	Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters
Lugano II Convention	Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
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
New York Convention	Convention of 10 June 1958 on the recognition and enforcement of foreign arbitral awards
p.	page
pp.	pages
PILA	Act No. 91/2012 Coll., on private international law
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 the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)
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 II)
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

Service Regulation	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
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
TEC	Treaty establishing the European Community
TFEU	Treaty on the functioning of the European Union
Vienna Convention	Vienna Convention of 23 May 1969 on the law of treaties

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# 1 INTRODUCTION - WHAT IS PRIVATE INTERNATIONAL LAW?

Everybody understands that international law means the law, which deals with relationships that go beyond the boundaries of one state. But be careful and do not confuse Private International Law with a part of international law. International law is a public law and consists of rules that determine the rights of independent states in international interaction.

*“The doctrine of Private International Law, too, is basically divided into two major groups of opinion, namely a universalist trend and a trend which may be defined as one of a “national” Private International Law. Both these groups can be, naturally, subdivided, but, on the whole, we may say that in the proper doctrine of Private International Law the opinion has prevailed, that contemporary Private International Law is independent in every state and that, therefore, there are as many Private International Laws in the world, as there are individual states.”*<sup>1</sup>

Hence, Private International Law is a part of domestic law of each country. That is why we usually talk about Czech Private International Law, English Private International Law, French Private International Law and so on.

Private International Law is a special branch of jurisprudence which deals with private law questions including some kind of foreign element.

*“Private International Law (both as a branch of law and as a branch of jurisprudence) occupies in certain aspects a special and unique position among other branches of law and jurisprudence. On the other hand, stress is being laid on its intricate character given by the complexity and extent of the problems it covers, which range from the sphere of public international law to the sphere of municipal, primarily civil, law; this gives private international law the character of a hybrid and extremely complicated field of law.”*<sup>2</sup>

The foreign element comes into play when private natural persons or legal entities of different states interact with one another.

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<sup>1</sup> KALENSKÝ, Pavel. *Trends of Private International Law*. Praha: Academia, 1971, p. 13.

<sup>2</sup> *Ibid.*, p. 127.



Drawing upon particular issues, we can define that the foreign element<sup>3</sup> is given if the link to the abroad lies in:

- The subject of the legal relationship – for instance, the subject of the legal relationship is domiciled or habitually resided abroad, the subject of the legal relationship has foreign status, the legal entity is established under the foreign law or resides abroad;
- A fact legally significant for the creation or existence of a legal relationship – the fact held or will hold place abroad;
- Object of the legal relationship – thing, right and incorporeal result of man's activity relating to the action undertaken by a subject of a legal relationship is located abroad;
- Legal relationship which is legally dependent on other legal relationship which is governed by a foreign law.<sup>4</sup>

The private international relationships can be divided into those with relative foreign element and those with absolute foreign element. If the relationship has the connection to only one foreign country, we talk about private international relationship with a relative foreign element. To that foreign state, this relationship would seem as a domestic one. If the relationship has the connection to two or more foreign states, we talk about private international relationship with an absolute foreign element. That is because to each of those foreign states this relationship would seem to be international. We can conclude that only private international relationships with an absolute foreign element are the appropriate object for Private International Law.<sup>5</sup>

Private International Law is 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. Such choice is made by the so-called connecting factor. Connecting factor is a legal fact

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<sup>3</sup> The notions international element or cross-border element will be also used throughout this book.

<sup>4</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň – Brno: Aleš Čeněk - Doplněk, 2015, pp. 24–25.

<sup>5</sup> *Ibid.*

used in the conflict rule that is supposed to have the narrowest connection to the issue (for example *lex patriae*, *lex domicilii*, *lex situs*, *lex rei sitae*, *lex fori*, *lex loci actus*, *lex loci protectionis*).

Private International Law is formed by a substantive law as well as a procedural law.<sup>6</sup> The procedural part of the Private International Law answers mainly the questions which court is competent to render a judgement in a legal dispute, or if and how a foreign judgement is recognized and enforced in another country. Procedural matters during the proceedings are governed by procedural law of the court (*lex fori*).

This book clarifies the Czech codification of Private International Law, represented especially by the PILA. We also explore its place in the jurisprudence where these days the EU exercises many competences which used to belong to the Member States.

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<sup>6</sup> According to the Czech doctrine the uniform substantive rules form a part of Private International Law as well.



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## 2 THE SOURCES OF PRIVATE INTERNATIONAL LAW

### 2.1 Introduction

In this chapter, we get to know the main sources of law dealing with Private International Law and we study the hierarchy of rules used in Private International Law.

By a source of Private International Law we can understand the resources of knowledge of legal rules contents, which means the formal sources of law. The body of Private International Law sources consists of national laws, international conventions and EU law. The Private International Law is also affected by model laws, legal guides, case law, practice and custom, as well as other documents and instruments that regulate cross-border private relationships, but these do not belong to the formal sources of Private International Law.

### 2.2 The Hierarchy of the Sources of Private International Law

We recognize three basic levels of rules used in Private International Law:

1. International treaties;
2. EU rules;
3. Domestic rules.

At first, we must mention that the Czech Republic entered the EU on 1 May 2004. This step affected the usage of Private International Law rules considerably. Since then the Czech Republic is, as a Member of the EU, obliged to apply the European regulations preferentially. When deciding which rule will be applied in a dispute we proceed from the top to the bottom. That means that at first, we seek European rule applicable to the problem. If there is none, we seek an international treaty with the applicable rules. In the end, if there is no such international treaty, we apply domestic Private International Law rules. It must be bear in mind that some international treaties take precedence over EU regulations.

### 2.2.1 International Treaties

Pursuant to Article 10 of the Constitution which sets out that promulgated international treaty (fulfilling the condition of ratification and approval of the Parliament) which is binding on the Czech Republic have become a part of Czech body of laws and in the case when an international treaty provides something different than the Czech law, we should apply the international treaty. This approach is as well mentioned in PILA, specifically in Section 2 which determines that PILA should be applied within the limits of the provisions of promulgated international treaties by which the Czech Republic is bound. In these Articles the Czech Republic “*expresses the monistic approach to the international law. In other words, certain treaties have direct effect in the Czech Republic and in case of conflict with the Czech law they should take precedence over Czech statutes*”.<sup>7</sup>

If the given issue is covered by both Czech law and international treaty identically, there is no need to apply preferentially the international treaty because the latter will not be violated by the application of Czech law. A potential judicial decision should be based on the provision of Czech law and not the provision of the international treaty.<sup>8</sup>

We need to bear in mind that only the same wording of the Czech law and international treaty provisions does not imply the same interpretation (there can exist different case law or explanatory report etc.). If the application of the Czech law leads to a different result than the application of an international treaty we cannot deduce that the both rules established the same even if the wording was identical.<sup>9</sup>

When deciding certain kind of legal issues with foreign element we can find two or more international treaties, which are binding on the concerned states, relevant to the issue. In that case, we talk about the conflict of conventions (*conflict de conventions*). In many cases, the conflict of conventions is resolved

<sup>7</sup> TOMÁŠKOVÁ, Eva; SEHNÁLEK, David. The Hierarchy of Legal Sources – Relation between International Treaties Concluded with Third States by the EU and by the Member States. *Jóg - Állam – Politika*. Gyor: Universitas Gyor, 2011, No. 3, p. 191.

<sup>8</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVÁDILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 19.

<sup>9</sup> BRÍZA, Petr; BRICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 14.

by the concerned international treaties themselves because the rule for its application is contained in the international treaty. When solving the problem of conflict of conventions, where the rule for application is not given, we must bear in mind that the function, as well as the aims, that are followed by the rule and the position of each international treaty within the legal system are of significance.

We recognise two basic situations when we deal with conflict of conventions:

1. Both concerned states (domestic and foreign) are bound by one of the international treaties, but only one of them (domestic) is bound by the second international treaty. The solution of this problem cannot lead to the violation of any international treaty binding the concerned state. In this case, we must especially respect the provisions of international law on international treaties, specifically the Vienna Convention. Based on Article 30(4)(b) of the Vienna Convention we should prioritise the international treaty to which both states are parties.
2. Both concerned states (domestic as well as foreign) are bound by both of the international treaties. This situation breaks down into two more cases:
  - a) The relationship of international treaties is determined by an express provision included in at least one of the international treaties.
  - b) The relationship of international treaties is not determined.

In such a case, we must first decide whether the subject matter of the concerned international treaties is the same. Then, pursuant to Article 59(1) of the Vienna Convention, we should consider the earlier international treaty as terminated if from the later international treaty it is clear that according to the intent of the parties to the international treaty the subject matter should be governed by the later international treaty, or the provisions of the later international treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time. The provisions of the earlier international convention are then applied only to the extent that its provisions are compatible with the later international treaty (Article 30(3) of the Vienna Convention). If there is no clear intention of the parties to replace the earlier legislation

by the new one, it is possible to use the provisions of the international treaty that lead to the requested result most easily and effectively. This rule is based on the principle *lex specialis derogat legi generali*.

If the subject matter of the concerned international treaties is not the same we will use again the principle *lex specialis derogate generali* but we need to choose which international treaty is specific and which is the general. We should consider these criteria:

1. One of the considered international treaties regulates more closely the particular relationships or legal questions.
2. Two or more states regulate some of the relationships or legal questions differently from the regulation of multilateral international treaty and thanks to the particularities in relations of these states it is clear that such a special regulation should be used.
3. One of the considered international treaties leads to the result easily and more effectively (maximum efficiency principle).
4. One international treaty is a unification of substantive rules and the other one is a unification of conflict-of-law rules – we prioritise the unification of substantive rules.<sup>10</sup>

### 2.2.2 EU Rules

There are three sources of the EU law: primary law, secondary law and supplementary law.

Primary law (also known as the original source of the law of the EU) consists mainly of the founding treaties of the EU. The primary law is not seen as a direct source of the Private International Law. The acts of primary law create especially the competence for the EU bodies to make law in the area of civil law.<sup>11</sup> It is the Article 81 of the TFEU that creates the competence in the area of European Private International Law.

The secondary law forms the foundation for the Private International Law rules with the origin in the EU. Based on Article 288 of the TFEU “to exercise

<sup>10</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 21.

<sup>11</sup> ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, pp. 32–33.

*the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application, it shall be binding in its entirety and directly applicable in all Member States*". The EU has formed a special legal system which has a special status. Regulations are not implemented into Czech law (nor into other Member State law) but they come into effect without any act of the Member State. The special status of regulations - the principle of direct effect and the principle of primacy - is also based on the case law of the Court of Justice, especially cases 26/62 Van Gend en Loos,<sup>12</sup> 6/64 Costa vs. E.N.E.L,<sup>13</sup> C-285/98 Tanja Kreil.<sup>14</sup> We must note that case law is not a source of law in the Czech Republic, not even in the area of Private International Law.

The aim of the EU in the area of Private International Law is unification. The unification means that the legal rules have a unified text. Let us mention the most important regulations of Private International Law that form the basis of European judicial area:

- Insolvency Regulation;
- Service Regulation;
- Brussels I Regulation;
- Evidence Regulation;
- Brussels Ibis Regulation;
- European Enforcement Order Regulation;
- European Payment Order Regulation;
- Small Claims Procedure Regulation;
- Rome II Regulation;
- Rome I Regulation;
- Maintenance Regulation;
- Brussels Ibis Regulation;
- Succession Regulation.

<sup>12</sup> Judgement of the Court of Justice of 5 February 1963. NV Algemene Transport- en Expeditie Onderneming van Gend&Loos vs. Netherlands Inland Revenue Administration. Case 26/62.

<sup>13</sup> Judgement of the Court of Justice of 15 July 1964. Flaminio Costa vs. E.N.E.L. Case 6/64.

<sup>14</sup> Judgement of the Court of Justice of 11 January 2000. Tanja Kreil vs. Bundesrepublik Deutschland. Case C-285/98.



Supplementary law is formed by the international treaties in the area of Private International Law. The first group of such international treaties comprises international treaties concluded pursuant to Article 220 (293) of TEC, specifically Brussels Convention or Rome Convention. The other group includes the international treaties that are concluded by the EU with the third states.<sup>15</sup>

In case of a conflict between international treaty and the EU regulation it is not possible to use the Vienna Convention and we have to find the solution in the relevant case law of the Court of Justice, especially joined cases C-581/10 and C-629/10 Nelson and others<sup>16</sup> and relevant provisions of regulations (Articles 24 and 25 of the Rome I Regulation, Article 28 of the Rome II Regulation, Article 20 of the Service Regulation, Article 69 of the Maintenance Regulation, Article 75 of the Succession Regulation, Article 44 of the Insolvency Regulation, Article 60 of the Brussels Ibis Regulation, Articles 68 to 73 of the Brussels Ibis Regulation).<sup>17</sup> Usually the principle of primacy of the EU rules in relationships between the Member States and the application of the international treaty in relationships with third countries is given. In a situation where the relation to international treaties is not expressly covered by the act of secondary law, we can use Article 351 of TFEU according to which the treaties concluded between a Member State and a third country before its accession to the EU are not affected.<sup>18</sup>

### 2.2.3 Domestic Law

Legal system of the Czech Republic is under the influence of the EU law. The europeanisation of the Czech law results from the supranational character of the EU. Its sources and forms are then examined in detail based

<sup>15</sup> ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, p. 37.

<sup>16</sup> Judgement of the Court of Justice of 23 October 2012. Emeke Nelson and Others vs. Deutsche Lufthansa AG (C-581/10) and TUI Travel plc an Others vs. Civil Aviation Authority (C-629/10). Joined cases C-581/10 and C-629/10.

<sup>17</sup> DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 36.

<sup>18</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 21.

on application principles and special sources of EU law, which are, besides conventional sources (treaties of the primary law, regulations and directives), international treaties concluded by the EU and binding on the Member States, mostly unwritten general principles and, especially, case law of Court of Justice, which has long been very creative in favour of legal and economic integration of the Member States, resulting in arising of the question about the actual extent of the power delegation.<sup>19</sup>

We should not forget to mention the Constitution and constitutional acts as one of the sources of Private International Law. From the Constitution we learn about the public policy. Public policy consists of the fundamental principles of the Czech legal order. Those principles form limits, which cannot be exceeded when applying foreign law and the rule contained in the conflict-of-law rules.

The main source of Czech Private International Law is PILA. In Section 1 of PILA we can find that the purpose of PILA is to determine the law of which state shall govern private-law relations, the legal status of foreigners and foreign legal entities in private law relations, the powers and procedure of courts and other authorities in the treatment conditions of such relationships, taking decisions on them, the recognition and enforcement of foreign decisions, legal assistance in relations with foreign states, certain matters relating to bankruptcy and certain matters relating to arbitration, including recognition and enforcement of foreign arbitral awards.

PILA replaced the former PILA and entered into force on 1 January 2014. The former PILA was not significantly amended since 1963. The need for a new legal act arose in connection with the recodification of private law, which completely changed the body of laws in the Czech Republic. With the total change of the substantive law, the former PILA became outdated because the Private International Law cannot be separated from the substantive law. In this case, the legislator deemed this to be a good opportunity

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<sup>19</sup> TÝČ, Vladimír; KŘEPELKA, Filip; SEHNÁLEK, David. Obecné otázky působení práva EU ve sféře českého právního řádu. *Časopis pro právní vědu a praxi* [online]. 2011, Vol. XIX, No. 4, p. 314 [cit. 18. 10. 2015].

to modernise, modify and come up with new solutions and take into account the development and new trends in Private International Law as well as make the PILA compatible with the law of the EU.<sup>20</sup>

PILA is better structured than the former act used to be. Conflict-of-Law rules and procedural rules are not regulated in separate parts but thematically interlinked within one section. PILA has 125 Sections divided into 9 parts: 1. General Provisions (Sections 1 – 5); 2. General Provisions Pertaining to Procedural International Law (Sections 6 – 19); 3. The General Provisions of Private International Law (Sections 20 – 28); 4. The Provisions For the Individual Types of Private Law Relationships (Sections 29 – 101), 5. Judicial Assistance Abroad (Sections 102 – 110); 6. Bankruptcy Proceedings (Sections 111 – 116); 7. Arbitration Proceedings and the Recognition and Enforcement of Foreign Arbitration Judgements (Sections 117 – 122); 8. The Transitional and Final Provisions (Sections 123 – 124) and 9. Effectiveness (Section 125).

The main benefit of the PILA is that it regulates issues not explicitly addressed in the former act, that up to now have had to be inferred from legal doctrine or often ambiguous case law. For instance, the PILA contains specific conflict-of-law rules on the law applicable to a legal entity's status issues (until now, a general rule under Section 3 of the former PILA did not even distinguish between a natural person and a legal entity), and additionally regulates conflict-of-law rules for trusts, including the recognition of foreign trusts in the territory of the Czech Republic. Contrary to the former act, PILA prescribes principles for determining the jurisdiction and governing law for a registered partnership having an international element. PILA also regulates cross-border bankruptcy law, which is relevant for the practice particularly in respect of bankruptcy with a non-EU factor (i.e. in the area not governed by the Insolvency Regulation). Furthermore, some principles contained in the Czech Arbitration Act relating to arbitration issues with a foreign element and the recognition of foreign arbitration awards have been transposed to PILA (see Sections 117–122). Last but not least, PILA modernized certain connecting factors – e.g. replaced

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<sup>20</sup> Důvodová zpráva k ZMPS [online]. *Nový občanský zákoník*. Ministerstvo spravedlnosti České republiky, p. 3 [cit. 17. 11. 2015].

the criterion of nationality with habitual residence which is a factor that reflects today's high level of mobility. Unfortunately, the legislator was not consistent and did not replace it everywhere where it was possible and advisable. The PILA also attempts to reflect the interest in preserving the validity of legal actions and their effects (by preference of law that upholds the validity of the legal actions) and hence reflect the will of those undertaking the actions.<sup>21</sup>

### 2.3 Examples

#### Example 1

A Czech buyer and an English seller entered into a contract for the purchase of 100 agricultural machines on 15 January 2015. After the delivery of goods to the Czech Republic, a buyer found out that the machines are not in good technical condition as stated in the contract and decided not to pay purchase price. The seller decided to sue the buyer.

1. Help the buyer to decide which rule will be used to find out the court of which state is competent to give a judgement in such case.

First, we look for a rule in the EU law. For the procedural matters we turn to the Brussels Regulation. As the last step, we need to decide which one of the Brussels Regulations we will use. As the contract was concluded on 15 January 2015 we can be sure that the action was filed after 10 January 2015. That is why we conclude that in this lawsuit in procedural matters we will use Brussels Ibis Regulation.

2. In the contract, there was noted that the contract was not governed by the CISG. Help the buyer to decide which rule will be used to find out the law applicable to the dispute.

We again look at first at the rule from the EU law. For conflict-of-law rules we look into one of the Rome Regulations. The contract was concluded on 15 January 2015 and the obligation resulted from the contract. That is why we will use Rome I Regulation.

<sup>21</sup> BŘÍŽA, Petr. A Few Words on the New Czech Act on Private International Law. *Transnational Notes* [online]. Centre for Transnational Litigation, Arbitration and Commercial Law, New York University School of Law [cit. 24. 10. 2015].

### Example 2

A Czech buyer and an English seller entered into a contract for the purchase of 100 agricultural machines on 15 January 2015. After the delivery of goods to the Czech Republic, a buyer found out that the machines are not in good technical condition as stated in the contract and decided not to pay the purchase price. The seller decided to sue the buyer. In the contract there was an arbitration clause.

1. Help the buyer to decide which rule will be used for recognition and enforcement of the arbitral award.

First, we will again look for a rule of the EU origin. As there are no regulations concerning the recognition and enforcement of arbitral awards we need to look for an international treaty. Such international treaty is the New York Convention.

### Example 3

An Italian buyer decided to buy a cottage in the Czech Republic. In the contract, she reserved the right of ownership. Italian buyer did not pay the whole purchase price and claimed that the right of ownership was not validly concluded because under Italian law the reservation must be registered.

1. Help the seller to decide which rule will be used to find out the law applicable to this matter.

First, we will again look for a rule of EU origin. We have a contractual obligation regarding immovable asset. The reservation of the right of ownership is a right *in rem*. Rome I Regulation is not applicable to such rights. So we will try to find some international treaty regarding this matter. There does not exist such international treaty and that is why we will use PILA.

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## 3 METHODS OF REGULATION OF CROSS-BORDER RELATIONSHIPS

### 3.1 Introduction

At the beginning of this chapter, it is necessary to point out that it is not possible to accept that cross-border relationships are without any change governed by the legal rules created for domestic relationships.<sup>22</sup> Therefore, the Private International Law needs to employ specific methods (ways) of regulation of cross-border relationships. The aim of these methods is to determine the legal regime of cross-border relationships, in other words to find which substantive rules are applicable to a particular legal relationship with cross-border element.

In principle, there are two possible ways how to regulate a cross-border relationship. The first one is based on the finding of the applicable national law. The cross-border relationship is then governed by the substantive rules of a national legal order. This way is represented by the conflict-of-law method.

The second way of regulation rests in special substantive regulation of cross-border relationships. This way is represented by uniform (directly applicable) substantive rules.

Therefore, in the Czech Republic, there are two methods of regulation of cross-border relationships: conflict-of-law method and uniform substantive rules.

### 3.2 Conflict-of-Law Method

Each relationship containing a foreign (cross-border) element relates to more than one state and its legal order. In the absence of uniform substantive

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<sup>22</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk – Doplněk, 2015, p. 26.

rules, it is the role of conflict-of-law rules<sup>23</sup> to choose one of the national legal orders as the applicable law to govern the given cross-border relationship.<sup>24</sup> This way of finding governing rules is called the conflict-of-law method.

Conflict-of-Law rules do not, in principle, discriminate between potentially applicable legal orders. By using certain criteria, the so-called connecting factors (see below), they can refer either to domestic, or to foreign law, without any preference as to the content of national substantive rules of any of the legal orders concerned.<sup>25</sup> Generally, it is true that conflict-of-law rules do not take into account the solution under substantive rules of the designated law.<sup>26</sup>

The function of the conflict-of-law method is merely to determine which national law will govern a particular legal relationship with a foreign element. Conflict-of-Law rules do not therefore include any substantive regulations of these relationships.<sup>27</sup>

Contrary to uniform substantive rules, conflict-of-law rules are traditionally reserved to national legislators and contained in national regulations. However, the discrepancies in national regulations of cross-border legal relations have led to the unification efforts first on the international level, later also on the EU level.<sup>28</sup> Currently, there are numerous bilateral and multilateral international conventions, as well as EU measures (mainly regulations) containing unified conflict-of-law rules in certain areas of private law.

<sup>23</sup> Also referred to as “choice-of-law rules“, especially by common law authors. See e.g. COLLIER, John G. *Conflict of Laws*. 2nd ed. Cambridge: Cambridge University Press, 1999, pp. 3–4, 12–13. Consult also GARNER, Bryan, A. (ed.). *Black’s Law Dictionary*. 10th ed. St. Paul: Thomson Reuters, 2014, pp. 294, 363.

<sup>24</sup> KUČERA, Zdeněk. *Struktura a třídění kolizních norem. Studie z mezinárodního práva*. 1982, Vol. 16, p. 43. Also BŘÍŽA, Petr; BŘICHÁČEK, Tomáš; FÍŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 5.

<sup>25</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk – Doplněk, 2015, p. 39.

<sup>26</sup> There are some exceptions though. Certain conflict-of-law rules do take into account the content of substantive regulations when determining the applicable law. These are called materialised conflict-of-law rules. For more details see below.

<sup>27</sup> PAUKNEROVÁ, Monika. *Private International Law in the Czech Republic*. Alphen aan den Rijn: Kluwer Law International, 2011, p. 46.

<sup>28</sup> ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRILIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, pp. 16–17.

### 3.3 Conflict-of-Law Rules

As discussed above, the conflict-of-law rules are specific rules used to determine the applicable law in private relations with a foreign element.<sup>29</sup> In other words, they are the instrument used by conflict-of-law method to provide the answer to the fundamental question in Private International Law, that is “which national law (law of which State) will govern a given cross-border legal relationship in situations where there are no directly applicable substantive rules?”

The term “conflict of laws” originates in the idea as if the potentially applicable national legal orders were in conflict.<sup>30</sup> It is then the sole purpose of conflict-of-law rules to resolve such a “conflict” by setting certain criteria for choosing one of the national legal orders in question which will govern the dispute at hand.<sup>31</sup> However, although firmly established, the term is quite misleading, as the determination of the applicable law does not normally concern conflicting interests, animosity or disagreement between legislators in different countries. “*It is rather a conflict that takes place in the head of a judge rather than between different legal systems.*”<sup>32</sup>

#### 3.3.1 Characteristics of Conflict-of-Law Rules

Unlike uniform substantive rules, conflict-of-law rules do not themselves provide for substantive regulation; that is they do not lay down rights and obligations of the parties to a defined legal relationship with a cross-border element. For example, they do not provide a solution to a controversy whether the seller has breached the contract or not and to what kind of remedies the buyer is entitled.<sup>33</sup>

<sup>29</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk – Doplněk, 2015, pp. 99–101.

<sup>30</sup> GARNER, Bryan, A. (ed.). *Black's Law Dictionary*. 10th ed. St. Paul: Thomson Reuters, 2014, p. 363.

<sup>31</sup> COLLIER, John, G. *Conflict of Laws*. 2nd ed. Cambridge: Cambridge University Press, 1999, p. 5; KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk – Doplněk, 2015, p. 28.

<sup>32</sup> BOGDAN, Michael. *Private International Law as Component of the Law of the Forum. General Course*. The Hague: Hague Academy of International Law, 2012, pp. 71–72.

<sup>33</sup> This is upon the substantive rules under the applicable national law designated by conflict-of-law rules, or – where available – upon uniform substantive rules which will be applied preferably to conflict-of-law rules provided the dispute is within their scope of application.



The aim and the purpose of conflict-of-law rules are limited to finding the governing national law, not to directly regulate the relationship between parties. The rights and obligations of the parties are only ascertained from the substantive norms of the applicable national legal order. This is why it is sometimes said that conflict-of-law rules regulate cross-border legal relationships “indirectly”. They only provide for rights and duties of the parties of such relationships through substantive rules of national law to which they refer.<sup>34</sup>

However, it should be emphasised that the conflict-of-law rules do not themselves specify which national substantive rules shall apply to a particular legal relationship with cross-border implications. They only determine which national law as such shall be the law applicable. It is thus upon the competent authority hearing the case (e.g. the judges) to find within that legal order, by means of classification and interpretation,<sup>35</sup> the appropriate substantive rule or set of rules which provide for regulation of a relationship as is the one at hand.<sup>36</sup>

Further, conflict-of-law rules are often characterized as “value-neutral”.<sup>37</sup> This means that while determining the applicable law, conflict-of-law rules do not “discriminate” (or differentiate) between domestic legal order on the one hand and the foreign one on the other. In other words, the application of domestic legal order is generally not preferred over the application of a foreign legal order; both of them are treated equally when it comes to finding the applicable law to a cross-border private relationship.

This shall be understood in a way that conflict-of-law rules do not – in principle – take into account the outcome of the application of designated national law, i.e. the construction of a conflict-of-law rule does not depend

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<sup>34</sup> BOGDAN, Michael. *Private International Law as Component of the Law of the Forum. General Course*. The Hague: Hague Academy of International Law, 2012, pp. 71–73; KUČERA, Zdeněk. *Struktura a třídění kolizních norem. Studie z mezinárodního práva*. 1982, Vol. 16, pp. 49–54.

<sup>35</sup> For more details on the classification in Czech Private International Law and interpretation of norms in Private International Law see the respective chapters of this book.

<sup>36</sup> How conflict-of-law rules and foreign law designated by conflict-of-law rules are used and applied by Czech courts and other authorities, please see chapters that follow.

<sup>37</sup> BOGDAN, Michael. *Private International Law as Component of the Law of the Forum. General Course*. The Hague: Hague Academy of International Law, 2012, pp. 77–81.

on anticipated solution of a dispute under applicable national substantive rules.<sup>38</sup> The aim of conflict-of-law rules is neither to ensure justice nor to try to find the most favourable solution in terms of substantive law. Conflict-of-Law method, by using neutral connecting factors for determining the applicable law, aims at providing a just solution “only” in conflict-of-law terms.<sup>39</sup>

However, some conflict-of-law rules expressly set out that the content of the substantive regulations and their anticipated outcome shall be taken into account. These are called “materialised conflict-of-law rules” and can be found especially in the regulation of cross-border family matters<sup>40</sup> or in the regulations of contractual relationships where the protection of a weaker party is desired.<sup>41</sup>

In these cases, the conflict-of-law rules consist in two rules, in fact – the primary one and the auxiliary one. For the primary, or basic conflict-of-law rule, all that has been said in preceding paragraphs is true, i.e. it limits itself to determining the applicable national law by using a “value-neutral” connecting factor. Therefore, either the domestic or the foreign law can be applicable based on such a rule. However, the application of the designated national law according to the basic rule can be too strict or too rigid in certain situations. This is why legislators include, especially when it comes to sensitive issues, the auxiliary, materialised conflict-of-law rule which provides – by using a substitute connecting factor – for application of a national law more favourable to the parties (e.g. validating their legal acts).<sup>42</sup> By using materialised conflict-of-law rules, legislators place emphasis on a just solution in substantive law terms, instead of insisting on a value-neutral but unjust solution. It shall be born in mind that materialised conflict-of-law rules are not rare, but still not ordinary.

<sup>38</sup> PAUKNEROVÁ, Monika. *Private International Law in the Czech Republic*. Alphen aan den Rijn: Kluwer Law International, 2011, p. 47.

<sup>39</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk – Doplněk, 2015, p. 29.

<sup>40</sup> See e.g. Section 54(2) of PILA.

<sup>41</sup> See e.g. Article 6(1) and (2) or Article 8 of the Rome I Regulation.

<sup>42</sup> See also, with examples, PAUKNEROVÁ, Monika. *Private International Law in the Czech Republic*. Alphen aan den Rijn: Kluwer Law International, 2011, p. 47.

### 3.3.2 The Structure of Conflict-of-Law Rules

In order to serve their purpose, that is to determine the applicable law to particular legal relationship with cross-border implications, conflict-of-law rules are construed in a special way; and therefore have a structure different from the one of substantive rules or of procedural rules.<sup>43</sup>

The structure of a conflict-of-law rule consists of two main elements. First, it is the scope of its application (sometimes also called “the referring section”).<sup>44</sup> Second, it is the sole rule that determines law of which State will be applicable to a legal relationship that falls within the scope of application.<sup>45</sup>

The referring section of the conflict-of-law rule determines to what kind of legal relationships or legal issues the conflict-of-law rule applies. For example, the referring section can be defined as “the existence and validity of a legal act as well as the consequences of its nullity”,<sup>46</sup> “rights *in rem* in immovable properties as well as in tangible movable properties”,<sup>47</sup> or “legal relations arising out of succession”,<sup>48</sup> etc. For conflict-of-law rules, it is characteristic that their scope is defined widely, by using more abstract legal notions, instead of referring to specific legal relationships. For example, conflict-of-law rules rather use more general notion of “contractual obligations” instead of “sales contract”, “contract on provision of services”, etc. The reason why conflict-of-law rules tend to be more abstract and neutral closely relates to the issue of classification in Private International Law.<sup>49</sup>

The second part of the conflict-of-law rule determines which national law will be applicable to the legal issue which falls within the scope of application of that rule. In order to answer this question, conflict-of-law rules<sup>50</sup> use a specific criterion, the so-called connecting factor. By means of this

<sup>43</sup> KUČERA, Zdeněk. *Struktura a třídění kolizních norem. Studie z mezinárodního práva.* 1982, Vol. 16, pp. 45–49.

<sup>44</sup> See PAUKNEROVÁ, Monika. *Private International Law in the Czech Republic.* Alphen aan den Rijn: Kluwer Law International, 2011, p. 46.

<sup>45</sup> The second part being also labelled as “the connecting section.” Again, see PAUKNEROVÁ, Monika. *Private International Law in the Czech Republic.* Alphen aan den Rijn: Kluwer Law International, 2011, p. 46.

<sup>46</sup> See Section 41 of PILA.

<sup>47</sup> See Section 69 of PILA.

<sup>48</sup> See Section 76 of PILA.

<sup>49</sup> The process of classification (characterization), subsumption, and using of conflict-of-law rules is elaborated on in chapters of this book that follow.

<sup>50</sup> This is only true for the so-called bilateral (or two-sided) conflict-of-law rules.

criterion, conflict-of-law rules choose one of the national legal orders to which the dispute at hand has some relation. Connecting factors are designated and used in a way to ascertain that the applicable law is the law of a state to which the dispute has the closest link.<sup>51</sup>

### 3.3.3 Connecting Factors

Connecting factor can be defined as a legally relevant fact which has a significant connection to the legal dispute in question and which itself determines the law applicable to the given legal dispute covered by the scope of application of the respective conflict-of-law rule.<sup>52</sup>

The purpose of using a connecting factor is not only to determine any applicable law, but to find a national law to which the legal dispute has the most significant connection. What is to be understood by the notion “the most significant connection” and how such a connection shall be determined can differ with respect to various legal issues and legal relationships, as well as in the view of legislators of different States.<sup>53</sup> This is the main reason why national regulations of cross-border legal relationships still vary considerably. Different national legislators simply have different ideas about what the most appropriate and just solution to certain legal issues or relationships is in terms of conflict of laws.

One of the facts used as a connecting factor, or the criterion to determine the applicable law, can relate to various elements of a legal relationship with cross-border implications, or could be otherwise significant to that relationship.<sup>54</sup>

The connecting factor can relate to:

- One of the parties to a relationship or a dispute (it could be e.g. “the seller’s place of business”, “the child’s habitual residence”, “the nationality of the deceased” etc.);

<sup>51</sup> ROGERSON, Pippa. *Collier’s Conflict of Laws*. 4th ed. Cambridge: Cambridge University Press, 2013, pp. 11 – 12.

<sup>52</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk – Doplněk, 2015, pp. 105, 116.

<sup>53</sup> BOGDAN, Michael. *Concise Introduction to EU Private International Law*. 2nd ed. Groningen: Europa Law Publishing, 2012, p. 4.

<sup>54</sup> KUČERA, Zdeněk. Struktura a třídění kolizních norem. *Studie z mezinárodního práva*. 1982, Vol. 16, p. 61.

- An event which gave rise to the legal relationship (e.g. “the place of conclusion of the contract”, “the place where the damage occurred”, “the place where the services were provided or should have been provided” etc.);
- A legal action or omission which is relevant for the legal relationship (e.g. “the place where the work is habitually carried out”);
- A subject matter of a legal relationship (“the place where the property is located”, “the place where the goods were delivered” etc.);
- An underlying legal relationship or an element thereof in case of determining the law applicable to ancillary legal relationship (e.g. “the law applicable to the main obligation” – *lex causae*);
- Other circumstances which provide significant connection to the legal relationship in question (e.g. the will of the parties to choose the applicable law).<sup>55</sup>

Conflict-of-Law rules can use either only one connecting factor or more connecting factors at the same time. In cases where more connecting factors are adopted, the relationship between them must be ascertained. Two or more connecting factors in one conflict-of-law rule can be used either cumulatively (all given connecting factors must point out to national law of one state in order to choose the law of that state as the law governing the relationship), or alternatively (law of any state to which any of the given connecting factors point out can be the applicable law). Finally, two or more connecting factors can be also in a relationship of subsidiarity – if the primary one does not work for any reason (for example, the spouses did not have the same nationality), the conflict-of-law rule puts forward a substitute one (common place of habitual residence of the spouses).<sup>56</sup>

Finally, it should be noted that the connecting factors can be represented either by legal terms or by factual elements. The first set of criteria is generally more rigid and more demanding to apply properly. They require interpretation and classification of factual circumstances of the case, and

<sup>55</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk – Doplněk, 2015, pp. 118–119.

<sup>56</sup> For more details see KUČERA, Zdeněk. *Struktura a třídění kolizních norem. Studie z mezinárodního práva*. 1982, Vol. 16, pp. 64–68. See also PAUKNEROVÁ, Monika. *Private International Law in the Czech Republic*. Alphen aan den Rijn: Kluwer Law International, 2011, p. 66.

their content can differ considerably in different states. On the other hand, factual criteria are easier to apply, as they do not require classification and their content is not tight to a particular legal order. However, they are more demanding in that they require closer inspection of factual circumstances of each case. An example of legal notion used as a connecting factor can be “nationality” (*lex patriae*). On the other hand, “habitual residence” can serve as an example of factual criterion, which is becoming more and more popular in modern Private International Law regulations and codifications, including PILA.

### 3.4 Uniform Substantive Rules

The uniform substantive rules are special substantive rules that are created only for the regulation of cross-border relationships. These rules include the regulation of rights and obligations of parties to cross-border relationships, in other words, they directly regulate cross-border relationships without reference to any national legal order.<sup>57</sup>

Directly applicable substantive rules can be characterized by the following features:

- They directly regulate cross-border relationship, i.e. they include substantive regulation.
- They are directly applicable, i.e. it is not necessary to use the conflict-of-law rules.<sup>58</sup>
- They regulate only cross-border relationships.<sup>59</sup>

These rules are included in international conventions. Thus, in the contracting states, the substantive regulation of particular cross-border relationship is unified. The conventions containing uniform substantive rules become the part of legal orders of the contracting states. If the state makes

<sup>57</sup> PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Rekodifikované mezinárodní právo soukromé*. Praha: Univerzita Karlova v Praze, Právnická fakulta, 2014, p. 30.

<sup>58</sup> However, the set of uniform substantive rules can be applied as a part of applicable national law, i.e. after the use of conflict-of-law rule. See e.g. Article 1(1)(b) of the CISG.

<sup>59</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk – Doplněk, 2015, p. 199.

the convention a part of its legal order, it treats the uniform substantive rules as its own rules. Therefore, the possible problems with the application of foreign law do not exist.<sup>60</sup>

The creation of uniform substantive rules presupposes the interests of the states to overcome the differences between national legal orders. Such an interest exists in particular in the area of economic (commercial) cross-border relationships that enable the development of international economic relations.<sup>61</sup> At present, the uniform substantive rules exist for the regulation of the international sales contract and international transportation contracts. The most successful instrument is the CISG.<sup>62</sup>

### 3.5 The Relationship Between Uniform Substantive Rules and Conflict-of-Law Method

If a particular relationship falls within the scope of the set of uniform substantive rules, these are applicable. Only there where the uniform substantive rules are not applicable, conflict-of-law method comes into play.<sup>63</sup>

Each set of uniform substantive rules (i.e. international convention) has its scope of application.<sup>64</sup> For example, the CISG is applicable only to sales contract. Even though the CISG does not contain the express definition of the sales contract, this definition can be inferred from the Articles 30, 53, 2 and 3 of the CISG. The international element for the purpose of the CISG is then defined in Article 1. The international convention containing the uniform substantive rules can also expressly exclude some questions from its

<sup>60</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk – Doplněk, 2015, p. 44.

<sup>61</sup> *Ibid.*, p. 201.

<sup>62</sup> Other examples: Convention of 9 May 1980 concerning international carriage by rail (COTIF) [online]. *International Rail Transport Committee*. Available from: <http://www.cit-rail.org/en/rail-transport-law/cotif/> (“COTIF”); Convention of 19 May 1956 on the contract for the international carriage of goods by road [online]. *Lex Mercatoria* [cit. 17. 8. 2015]. Available from: <http://www.jus.uio.no/lm/un.cmr.road.carriage.contract.convention.1956/doc.html>

<sup>63</sup> BRÍZA, Petr; BRICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 8.

<sup>64</sup> ROZEHNALOVÁ, Naděžda. *Závazky ze smluv a jejich právní režim (se zvláštním zřetelem na evropskou kolizní úpravu)*. Brno: Masarykova univerzita, 2010, p. 222.

application although they relate to the governed relationship.<sup>65</sup> The relationships outside the scope of the set of uniform substantive rules and the excluded questions are governed by the applicable national law that is determined by the conflict-of-law rules.<sup>66</sup>

The set of uniform substantive rules does not usually expressly regulate all the questions relating to the relationship within the scope of this set, i.e. the set of uniform substantive rules has gaps.<sup>67</sup> In theory, there are three ways how to “fill” these gaps. First, the set of uniform substantive rules can be closed which means the only the general principles of this set are applicable to the gaps. Secondly, the set can be only partly closed, i.e. the gaps are primarily filled by the general principles. If such principles do not exist or they cannot solve the gap, national law determined by the conflict-of-law rules is applicable.<sup>68</sup> Thirdly, the set is open which means that the gaps are governed by national law determined by the conflict-of-law rules.<sup>69</sup>

The last question to be answered is which conflict-of-law rules are applicable to the questions raised in the previous two paragraphs. The set of uniform substantive rules can itself contain conflict-of-law rules that will be applicable.<sup>70</sup> If not, conflict-of-law rule of forum is applicable.<sup>71</sup>

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<sup>65</sup> See e.g. Articles 4 and 5 of the CISG.

<sup>66</sup> KANDA, Antonín. *Mezinárodní kupní smlouva*. Praha: Academia, 1988, p. 24.

<sup>67</sup> HUBER, Peter; MULLIS, Alastair. *The CISG: A New Textbook for Student and Practitioners*. Munich: Sellier European Law Publishers, 2007, p. 34.

<sup>68</sup> See Article 7(2) of the CISG.

<sup>69</sup> KANDA, Antonín. *Mezinárodní kupní smlouva*. Praha: Academia, 1988, pp. 51–53.

<sup>70</sup> See Article 8 of the COTIF.

<sup>71</sup> See Article 7(2) of the CISG.





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## 4 GENERAL PART OF THE PROCEDURAL LAW

### 4.1 Jurisdiction

#### 4.1.1 Universal and Regional Legal Sources of Jurisdiction

The international procedural law concerns, among other things, the question of jurisdiction. Jurisdiction in the meaning of international procedural law presents the issue whether the national court can decide the dispute with an international element.<sup>72</sup> PILA contains the provision on general jurisdiction together with the special jurisdictional provisions and has brought also some changes in the jurisdictional rules, which are worthwhile of further attention. Therefore, the following lines start with a short introduction of international treaties concerning the jurisdiction rules, they continue to the European regulations with the same subject-matter and end with the analysis of the PILA general provisions on jurisdiction.

#### *International Treaties*

The determination of jurisdiction can be done from the view of the international legal sources, European regulations and national law, e.g. PILA. An international treaty, which would govern the question of jurisdiction in all areas of law, has not been created yet.<sup>73</sup> Specific jurisdiction clauses can be found in the legal instruments formed for a particular legal area, e.g. family matters or the transport of goods and will be analysed in the particular chapter. Therefore, it is useful to mention the Convention on Protection of Children. Other conventions are associated with the prorogation clauses, sale of goods or the transport or transit industry: the Convention on choice of court agreements,<sup>74</sup> the Convention on the contract for the international

<sup>72</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 351.

<sup>73</sup> ILLMER, Martin. Jurisdiction. In BASEDOW, Jürgen; HOPT, J. Klaus; ZIMMERMAN, Reinhard; STIER, Andreas (eds.). *The Max Planck Encyclopedia of European Private Law. Volume II*. Oxford: Oxford University Press, 2012, p. 1024.

<sup>74</sup> Convention of 30 June 2005 on choice of court agreements [online]. *Hague Conference on Private International Law*. Available from: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=98](http://www.hcch.net/index_en.php?act=conventions.text&cid=98)

carriage of goods by road,<sup>75</sup> the Convention for the unification of certain rules relating to international carriage by air (Warsaw Convention),<sup>76</sup> the Convention for the unification of certain rules for international carriage by air (Montreal Convention).<sup>77</sup> The list of international conventions is not complete and serves as an example of where it is possible to find the jurisdiction clauses.<sup>78</sup>

Within the European territory, the Lugano Convention and the Brussels Convention were drafted with the series of jurisdictional rules in civil and commercial matters and later the new Lugano II Convention was signed in 2007.<sup>79</sup> The jurisdiction rules of Lugano II Convention are basically the same as in Brussels I Regulation, so the main purpose of its existence is to strengthen the legal protection even in the states outside of the EU which are connected with the EU economically - states of the European Free Trade Association.<sup>80</sup>

The Brussels Convention is the predecessor of the Brussels I Regulation. The text of the Brussels Convention was changing and it was in essence the basis for the Brussels I Regulation and after some time also for the Brussels Ibis Regulation which has the same system of jurisdictions with only small differences.<sup>81</sup>

<sup>75</sup> Convention of 19 May 1956 on the contract for the international carriage of goods by road [online]. *Lex Mercatoria*. Available from: <http://www.jus.uio.no/lm/un.cmr.road.carriage.contract.convention.1956/doc.html>

<sup>76</sup> Convention of 12 October 1929 for the unification of certain rules relating to international carriage by air (Warsaw Convention) [online]. *International Civil Aviation Organization*. Available from: <http://www.refworld.org/publisher/ICAO,48abd581d,0.html>

<sup>77</sup> Convention of 29 May 1999 for the unification of certain rules for international carriage by air (Montreal Convention) [online]. *International Civil Aviation Organization*. Available from: <http://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/>

<sup>78</sup> ILLMER, Martin. Jurisdiction. In BASEDOW, Jürgen; HOPT, J. Klaus; ZIMMERMAN, Reinhard; STIER, Andreas (eds.). *The Max Planck Encyclopedia of European Private Law. Volume II*. Oxford: Oxford University Press, 2012, p. 1024; BŘÍZA, Petr; BŘICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C.H. Beck, 2014, p. 54.

<sup>79</sup> MAGNUS, Ulrich; MANKOWSKI, Peter (eds.). *Brussels I Regulation*. 2nd ed. Munich: Sellier European Law Publishers, 2012, pp. 16–19.

<sup>80</sup> *Ibid.*, pp. 19–20.

<sup>81</sup> *Ibid.*

The other international source - bilateral treaties - are usually treaties on the legal assistance. Some of them govern the jurisdictional provision in several areas of law. The ones which have similar implications as the general provision on jurisdiction and would be applicable in some situations are the ones with the non-EU countries: Ukraine, Moldova, Russia etc.<sup>82</sup>

### ***EU Regulations***

A joint instrument for the general jurisdiction does not exist even in the territory of the EU. Several instruments were created and dedicated to the different types of disputes. The best known is the Brussels Ibis Regulation. Other important regulations are e.g.: the Brussels IIbis Regulation, the Maintenance Regulation or the Succession Regulation. All these regulations will be examined in the further chapters of the book alongside the pertaining area of law.

The Brussels Ibis Regulation concerns the disputes in civil and commercial matters but does not involve every kind of civil or commercial dispute. Article 1(2) excludes several areas of law, e.g. questions of legal capacity, succession matters, maintenance obligation, social securities and arbitration from the regulation's scope.<sup>83</sup> The jurisdiction<sup>84</sup> provisions are divided into different categories. The first is the exclusive jurisdiction rule,<sup>85</sup> which has to be used regardless of the defendant's domicile. Next, the prorogation

<sup>82</sup> BŘÍZA, Petr; BŘICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C.H. Beck, 2014, p. 53.

<sup>83</sup> Brussels Ibis Regulation is applicable 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 (Article 66). For the application of the part on jurisdiction it is in principle necessary that a defendant has his domicile in a Member State. However, the Brussels Ibis Regulation provides for some exceptions (see Article 6).

<sup>84</sup> The interesting side note should be made on behalf of the Czech academic discussion about the true nature of the term "jurisdiction" used in the Brussels Ibis Regulation. The official Czech translation of the regulation used the word "příslušnost" which can be understood as "competence". This situation stirred up the discussion whether the term is not more appropriate to use while examining the jurisdictional provisions. The final discussion settled that the word "příslušnost" should be used for the European regulations, as it represents the role of the provisions to determine the most appropriate court within the territory of the EU, which resembles the national competence rules. The term "jurisdiction" will be reserved for other legal instruments of Private International Law. For more see PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé*. Praha: C.H. Beck, 2008, pp. 133–134.

<sup>85</sup> Article 24 of the Brussels Ibis Regulation.

rule enables the parties to choose a court.<sup>86</sup> The regulation reflects the need for the protection of the weaker party, and accordingly guarantees safeguards in the employment, insurance and consumer disputes.<sup>87</sup> Finally, there are the alternative and general jurisdictions. The general jurisdiction is based on the domicile of the defendant.<sup>88</sup> This rule is also the condition for the usage of the regulation (with exceptions).<sup>89</sup> The alternative jurisdiction rule gives the party the option to choose the more appropriate forum for its dispute according to the type of the dispute e.g. arising out of contract, delict (tort) etc.<sup>90</sup>

#### 4.1.2 PILA and the General Jurisdiction

As discussed above, the EU has created several legal instruments in the area of judicial cooperation. Therefore, the application of the PILA is strongly restricted. Its provisions are used in the situations when no international treaty is applicable and none of the EU regulations can be applied.<sup>91</sup>

The question of jurisdiction has been always present in the examination of Private International Law in the Czech academia. The term “jurisdiction” enabled to explain the fact that a national court should have the power to settle an international dispute. Usually, the term “jurisdiction” has been used in the connection with the national procedural law. However, caution is necessary in the order to understand the real meaning of the word “jurisdiction” used at the level of domestic disputes on the one hand and at the level of international disputes on the other. International disputes have one important fact which makes the difference - the foreign element.<sup>92</sup>

The jurisdiction in the meaning of the national civil procedural law represents the matters which the courts have the power to hear and decide

<sup>86</sup> Article 25 of the Brussels Ibis Regulation.

<sup>87</sup> Articles 10–23 of the Brussels Ibis Regulation.

<sup>88</sup> Article 4 of the Brussels Ibis Regulation.

<sup>89</sup> MAGNUS, Ulrich; MANKOWSKI, Peter (eds.). *Brussels I Regulation*. 2nd ed. Munich: Sellier European Law Publishers, 2012, pp. 77–78.

<sup>90</sup> *Ibid.*, p. 105.

<sup>91</sup> ROZEHNLOVÁ, Naděžda. Určení fora a jeho význam pro spory s mezinárodním prvek. I. část. *Bulletin advokacie*. 2005, No. 4, p. 23.

<sup>92</sup> STEINER, Vilém; ŠTAJGR, František. *Československé mezinárodní civilní právo procesní*. Praha: Academia, 1967, p. 37.

and can be divided on the basis of the different type of judiciary.<sup>93</sup> Usually, the term “competence” comes with the term “jurisdiction”. It also has different meaning, when it is used at the level of national disputes or disputes with the foreign element. It was also a well-known fact that for the identification of the relationship of the courts of one state with another different terms are used: jurisdiction, competence, international competence etc.<sup>94</sup>

The term (international) jurisdiction used within Private International Law means that “*the courts of a particular state as a whole have the authority to rule on a matter according to this state’s body of law*”.<sup>95</sup>

The discussion about the best term to indicate this matter was not held only in the Czech Republic. The same happened at the international level. *Lowenfeld* presented the term “extraterritorial jurisdiction” as an example for expressing the real meaning of the situation, when a national court hears and decides a dispute which is not connected only with its territory.<sup>96</sup>

In order to present the whole picture, it should be stated that the Czech doctrine used the term “international jurisdiction” until the beginning of the membership of the Czech Republic in the EU. When the Czech Republic joined the EU, the above issues relating to the terminology arose. At present, it can be said that the terms should be used accordingly with the connection to the national, international or EU law.<sup>97</sup> The term “jurisdiction” was used in the former PILA<sup>98</sup> and is used also in the new one.<sup>99</sup>

### 4.1.3 Few Words about the Former PILA and PILA

The former PILA included several rules on jurisdiction. These rules were divided into several sections based on the areas of law. Section 37 laid down

<sup>93</sup> WINTEROVÁ, Alena. *Civilní právo procesní: vysokoškolská učebnice*. 4th ed. Praha: Linde, 2006, p. 98.

<sup>94</sup> STEINER, Vilém; ŠTAJGR, František. *Československé mezinárodní civilní právo procesní*. Praha: Academia, 1967, p. 37.

<sup>95</sup> ELLER, Otakar. *Mezinárodní občanské právo procesní*. Brno: Univerzita Jana Evangelisty Purkyně, 1987, p. 47.

<sup>96</sup> LOWENFELD, Andreas F. International Litigation and the Quest for the Reasonable. General Course on Private International Law. In *Collected Courses of the Hague Academy of International Law*. 1994, Vol. 245, pp. 43–44.

<sup>97</sup> BOHŮNOVÁ, Petra. *Koncepce mezinárodní pravomoci národních soudů*. Ph.D. Thesis. Brno: Masarykova university, Faculty of Law, 2011, pp. 32–33.

<sup>98</sup> Section 37 of the former PILA.

<sup>99</sup> Section 6 of PILA.

the jurisdiction of the Czech courts over the property matters. The basic rule was built on the assumption that the Czech courts have the jurisdiction in situations when they have the competence according to the Czech national law. The parties can also determine the jurisdiction by a written agreement. However, the exclusive jurisdiction would not be affected by it. The other jurisdictional rules addressed family disputes, succession disputes, guardianship etc. The basic connecting factor was citizenship with several amendment rules.<sup>100</sup>

The provisions of the new act contain two types of jurisdiction: exclusive and elective. The separation of the jurisdiction is not just an academic or purely theoretical matter but it has great impact in the stage of recognition and enforcement or in the question of *lis pendens*.<sup>101</sup>

Exclusive jurisdiction means that dispute can be heard and decided only by the court of the particular state and no other court of another state has jurisdiction. If the court has the exclusive jurisdiction, the decision in the same dispute from the court of another state will not be recognised and enforced.<sup>102</sup> Such position usually comes with the strong connection of the dispute with the state e.g. declaration of death of a Czech citizen under Section 39(1), a dispute concerning immovables pursuant to Section 68 or succession disputes over immovable under Section 74(2) and the like.<sup>103</sup> The elective jurisdiction allows, in certain circumstances, that the court of the other state can also hold jurisdiction. The text of PILA focuses only on the jurisdiction of the national Czech courts, but sometimes respects that another state court can also hold jurisdiction and thus decide the dispute.<sup>104</sup> Therefore, unlike the exclusive jurisdiction, the decision of a foreign state, in the dispute where courts have elective jurisdiction, can be recognisable in accordance with the requirements of Section 15(1)(a).<sup>105</sup>

<sup>100</sup> Sections 38–46 of the former PILA.

<sup>101</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, pp. 355–356.

<sup>102</sup> BRÍZA, Petr; BRICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C.H. Beck, 2014, p. 41.

<sup>103</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, pp. 355–356.

<sup>104</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 57

<sup>105</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 356.

PILA has a new structure and system different from the former PILA. This is reflected also in the regulation of the jurisdiction. The legislator divided the original procedural norms and placed the general provisions pertaining to procedural international law at the beginning of the PILA in Part II. Part II contains Section 6 dealing with the general jurisdiction and Section 7 dealing with the exemptions from the jurisdiction of Czech courts. Other jurisdictional provisions can be found in the special part of the act paired with the conflict-of-law rules for the particular area of law: family law, contract law, intellectual property rights etc.<sup>106</sup> Therefore, the general rule in Section 6 would be used only in the situation where there is no other special jurisdictional rule applicable.<sup>107</sup>

The general rule embodied in Section 6 does not materially differ from the old provision on jurisdiction of the property disputes. It is more specific and accurate. The jurisdiction of a Czech court is still linked with the identification of the competent court, but now it is more accurate. Therefore, the jurisdiction of the Czech court is given, when the Czech court has the territorial competence according to the Czech procedural law. PILA or other legal source can contain the exceptions to this rule. The presumption for this solution is that if there is a local court competent to hear the dispute, then there exists a strong bond between the dispute and the court of this particular state.<sup>108</sup> As noted above, the relevant international conventions and European regulations take precedence over the general rule in Section 6.<sup>109</sup>

Moreover, as was stated above, the special procedural rules come before the general rule. The general rule is amplified by the provisions over counterclaims. This rule emanates from the Code of Civil Procedure which prefers the procedural economy. Thus, if there is a counterclaim in the same dispute or with the same facts and the Czech court has the jurisdiction over the original dispute, the same goes for the counterclaim.<sup>110</sup>

<sup>106</sup> E.g. Sections 47, 53, 56, 60, 64, 67, 68, 74, 75, 80, 85, 86, 88 of PILA.

<sup>107</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta a kol. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 58.

<sup>108</sup> *Ibid.*, p. 61.

<sup>109</sup> DOBIÁŠ, Petre t al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, pp. 53–54.

<sup>110</sup> *Ibid.*, p. 54.



The fact that a court must have jurisdiction over the dispute is one of the conditions for the proceedings. If the court finds out that it has no jurisdiction over the international dispute (dispute with relevant foreign element), it has to stop the proceedings without any further action such as transfer of the dispute to another court.<sup>111</sup>

As was stated above, the jurisdictional rule in the Section 6 of PILA will be used only as the last option after the exclusion of the application of the other legal instruments or specific jurisdiction. The only disputes covered by Section 6 are: *“General civil and commercial matters, especially contract and other property rights, with the exception of the rights in rem of the immovables, and from other areas among others nonproprietary matters connected with the protection of personal rights.”*<sup>112</sup>

The conditions relevant for the examination of the given jurisdiction are the conditions which existed at the beginning of the dispute, or to be more precise, at the time when the action was filed.<sup>113</sup>

#### 4.1.4 Exemptions from the General Jurisdiction - Section 7

Section 7 addresses several situations in which the Czech Republic exempts its courts from the decisions-making process due to interference with international principles.<sup>114</sup> These principles are based on the public international law and its regime of immunities. Depending on the stage of proceedings, immunities are judicial, executive and in other procedural matters (service).<sup>115</sup>

Section 7(1) governs the functional immunity. Matters which are considered to be an action of the state power are exempt from the jurisdiction of the courts. However, a state can also act outside of its capacity as state as a part of its commercial conduct. These actions are not exempt.

<sup>111</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, pp. 56–57.

<sup>112</sup> BRÍZA, Petr; BRICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C.H. Beck, 2014, p. 43.

<sup>113</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 62.

<sup>114</sup> Důvodová zpráva k ZMPS [online]. *Nový občanský zákoník*. Ministerstvo spravedlnosti České republiky [cit. 18. 9. 2015].

<sup>115</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, pp. 69–70.

The provisions of the former PILA were based on the absolute immunity. However, now the state can also undertake *acta iure gestionis* (as opposed to the *acta iure imperii*).<sup>116</sup>

Section 7(2) is related to the first one, because it creates an exemption within the exemption. There are situations when different legal sources (international conventions or international law) enable to bring an action against one state in the territory of another state. Under such circumstances, a state cannot benefit from its immunity.<sup>117</sup> This provision reflects the existence of the international customs and international conventions.<sup>118</sup>

Besides the states, other subjects with the immunity are individuals, international organizations and institutions. Section 7(3) enables these subjects (parties to the dispute) to exercise immunity under one condition. This condition is the fact that these subjects already have immunity according to the international convention or general international law or Czech law.<sup>119</sup> The representative of the state and supposedly also the international organizations have a functional immunity.<sup>120</sup> The important legal instruments regulating the immunities are e.g. the Vienna Convention on diplomatic relations<sup>121</sup> and the Vienna Convention on consular relations.<sup>122</sup> Those instruments govern the exercise of immunities of diplomats, their families, their administrative staff etc.<sup>123</sup>

Those three subsections of Section 7 are not understood as procedural immunities only. Section 7(4) provides that the states and persons governed

<sup>116</sup> DOBIÁŠ, Petra et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 61.

<sup>117</sup> Section 7(2) of PILA.

<sup>118</sup> DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 62.

<sup>119</sup> Section 7(3) of PILA.

<sup>120</sup> DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 63.

<sup>121</sup> Vienna Convention of 16 April 1961 on diplomatic relations [online]. *International Law Commission*. Available from: [http://legal.un.org/ilc/texts/instruments/english/conventions/9\\_1\\_1961.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf)

<sup>122</sup> Vienna Convention of 24 April 1963 on consular relations [online]. *International Law Commission*. Available from: [http://legal.un.org/ilc/texts/instruments/english/conventions/9\\_2\\_1963.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf)

<sup>123</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 70.

by the first three subsections have also the executive immunities and procedural immunities: delivery of written materials, summoning of witnesses, enforcement of judgements etc.

Section 7(5) is more of a procedural provision. The provision is useful for the situations when the state, person or international organisation does not actually exercise the immunity and acts as the party in the proceeding.<sup>124</sup> If there is a need of delivery to the foreign states, international organisations, institutions or persons with the immunity, the Ministry of Foreign Affairs is responsible for the delivery. The situation when the delivery would be impossible is unlikely to happen.<sup>125</sup> The reason why the ministry is the chosen body is the demand for a high standard of protection.<sup>126</sup>

Finally, the provisions of Section 7 should be used also in the situations when other Czech public bodies than courts decide on any matters regulated by PILA. However, the provisions should be used appropriately.<sup>127</sup> Such a body with the state authority can be e.g. register office.<sup>128</sup>

#### 4.1.5 Conclusion on the Jurisdiction

One of the most important parts or functions of the international procedural law is to determine whether a court has jurisdiction over a case with foreign element. There was discussion and confusion which term is the best to denote this kind of the state power given to the court. However, the Czech legislator used the term “jurisdiction” in PILA.

The provisions on the jurisdiction emanate from the provision of the former PILA but they are not without a change. One of the biggest changes is the structure of the provisions. Section 6 and Section 7 govern the general jurisdiction and its exemptions. However, its provision would be used at the last place after the relevant provisions of the international treaties and European regulations. Further, the specific provision overrides the general

<sup>124</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 71.

<sup>125</sup> DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 63.

<sup>126</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 71.

<sup>127</sup> Section 7(6) of PILA.

<sup>128</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 72.

rule. The jurisdiction of the Czech court is connected with the determination of the local competence according to the national procedural laws. The PILA also creates the possibility for the parties to choose the competent court. Nevertheless, as almost every legal rule, the general jurisdiction has several exceptions. These are based on the public international law and international customs which create the functional immunity for the states, individuals and international organisations. The new provisions reflect the modern changes in the Private International Law.

## 4.2 Recognition and Enforcement of Foreign Judgements

### 4.2.1 Introduction

The recognition and enforcement of a foreign judgement represents one of the main and the most important instruments in Private International Law. Why is this so? The answer lies in the theory of state. A state is characterized by its territory, inhabitants and power.<sup>129</sup> The theory of sovereignty is connected to the state power. According to this theory only a state can use the state power on its own territory.<sup>130</sup> One of the manifestations of the state power is the possibility of resolving disputes in court proceedings through court judgements. Every single state accepts primarily only its own judgements.<sup>131</sup> However, in some cases, an exception may be found – the recognition and enforcement of foreign judgement exist for these purposes.

In this chapter, we will deal with the recognition and enforcement of foreign judgements in the Czech Republic on international, EU and national level. First of all, we need to explain the basic terms: the recognition of a foreign judgement, the declaration of enforceability of a foreign judgement (i.e. *exequatur*) and the enforcement of a foreign judgement.

The recognition of a foreign judgement is a process whereby one state accepts a judgement issued by a court of another state. Thanks to the process

<sup>129</sup> FILIP, Jan; SVATONĚ, Jan. *Státověda*. 5th ed. Praha: Wolters Kluwer, 2011, p. 18.

<sup>130</sup> KÖNIGOVÁ, Lucie. Teorie státní suverenity a praxe intervence. *Mezinárodní vztahy*. 2001, Vol. 36, No. 3, pp. 41–43.

<sup>131</sup> BAUMGARTNER, Samuel P. Understanding the Obstacles to the Recognition and Enforcement of U.S. Judgements Abroad. *New York University Journal of International Law and Politics* [online]. 2013, Vol. 45, pp. 969–974 [cit. 28. 8. 2015].

of recognition of the foreign judgement, the court of the accepting state cannot render another judgement in the case of the claim based on the same facts – the principle of *res iudicata*.<sup>132</sup>

The declaration of enforceability is the next step in the process of the recognition and enforcement of a foreign judgement. The declaration of enforceability represents the verification that nothing can hinder the enforcement of a foreign judgement.<sup>133</sup> At the end of this process the creditor is entitled to file for the enforcement of a foreign judgement.

The last step in the process of the recognition and enforcement of foreign decision is the very enforcement of the foreign judgement. This step involves the enforcement itself against the will of debtor. In case that the debtor does not perform the obligation voluntarily the state authorities are authorised to force her.<sup>134</sup>

#### **4.2.2 Recognition and Enforcement of Foreign Judgements on the International Level**

The regulations of recognition and enforcement of foreign judgements are not well developed on international level. In fact, there is no general international convention or regulation which would complexly regulate the recognition and enforcement of a foreign judgement. The regulations of these instruments are fragmented in bilateral treaties between individual states and in several specialised conventions. Every single specialised convention regulates the recognition and enforcement of a certain kind of judgements.

It is necessary to note the conventions specialised in certain areas of law as these must take precedence over the Czech law:<sup>135</sup>

New York Convention was created for the purposes of international arbitration. The New York Convention is one of the most successful conventions in this regard. More than 140 states from all over the world are Contracting

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<sup>132</sup> Recognition of Foreign Judgements [online]. In *USLegal* [cit. 28. 8. 2015].

<sup>133</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, pp. 104–105.

<sup>134</sup> Postupy při vymáhání soudních rozhodnutí – Česká republika [online]. *European E-justice* [cit. 30. 8. 2015].

<sup>135</sup> Article 10 of the Constitution.

States of this convention,<sup>136</sup> which is an enormous success. The New York Convention in its text recognises two procedures:

- the recognition of the arbitral award and
- the enforcement of the arbitral award.<sup>137</sup>

The New York Convention does not recognise the procedure of the declaration of enforceability. The procedure of recognition of an arbitral award is governed by the law of the state addressed, under conditions set out in the New York Convention.<sup>138</sup> If somebody wants to get recognised an arbitral award she must then supply the duly authenticated original arbitral award or a duly certified copy thereof and the original agreement referred to in Article II of the New York Convention or duly certified copy thereof.<sup>139</sup> The recognition of an arbitral award may be refused only on the grounds which are contained in the New York Convention.<sup>140</sup> The procedure of the enforcement of the arbitral award is governed by the law of the state addressed.<sup>141</sup>

Convention on the recognition of divorces and legal separations<sup>142</sup> is an international tool created for the purposes of the recognition of the divorce-related judgements. This convention does not specify if a special procedure for recognition of the judgement is needed. Under Czech law it is not necessary. For the refusal of recognition the conditions in the convention must be met. This convention is not applied often because the most Contracting States are EU Member States and these apply the EU regulatory framework in their relationships.<sup>143</sup>

<sup>136</sup> *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* [online]. United Nations Commission on International Trade Law (UNCITRAL). [cit. 30.8.2015].

<sup>137</sup> Article IV of the New York Convention.

<sup>138</sup> Article III of the New York Convention.

<sup>139</sup> Article IV of the New York Convention.

<sup>140</sup> Article III of the New York Convention.

<sup>141</sup> *Ibid.*

<sup>142</sup> Convention of 1 June 1970 on the recognition of divorces and legal separations [online]. *Hague Conference on Private International Law*. Available from: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=80](http://www.hcch.net/index_en.php?act=conventions.text&cid=80)

<sup>143</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 349.

European Convention on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children<sup>144</sup> regulates the recognition and enforcement of judgements concerning the custody of children and the restoration of custody of children. This convention does neither introduce a special procedure for the recognition nor for enforcement, however, it solely governs a special procedure of declaration of enforceability of the judgement.<sup>145</sup>

The Convention on protection of children and co-operation in respect of intercountry adoption<sup>146</sup> does not lay down any procedure for recognition and enforcement of the judgements. Pursuant to this convention, the Contracting State must recognise an adoption from another Contracting State, if the adoption body confirms that the adoption was made according to this convention.<sup>147</sup>

Convention on Protection of Children regulates the jurisdiction, applicable law, recognition and enforcement and cooperation in respect of parental responsibility and measures for the protection of children. According to this convention, the measures taken by the authorities will be recognised. The recognition will be governed by the law of Contracting State.<sup>148</sup>

Convention on choice of court agreements is used for the recognition and enforcement of foreign judgements in international cases of exclusive choice of court agreements concluded in civil or commercial matters.<sup>149</sup> This convention binds 29 states most of which are from from the EU. The procedure of the recognition of the foreign judgements is conducted in special

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<sup>144</sup> European Convention of 20 May 1980 on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children [online]. *Council of Europe*. Available from: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/105>

<sup>145</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 401.

<sup>146</sup> Convention of 29 May 1993 on protection of children and co-operation in respect of intercountry adoption [online]. *Hague Conference on Private International Law*. Available from: <http://www.hcch.net/upload/conventions/txt33en.pdf>

<sup>147</sup> Article 23 of the Convention on protection of children and co-operation in respect of intercountry adoption.

<sup>148</sup> Articles 1 and 23 of the Convention on Protection of Children.

<sup>149</sup> Article 1 of the Convention on choice of court agreements.

procedures governed by the convention with the possibility to refuse the recognition. There is no special procedure for the declaration of enforceability, but the judgement cannot be recognised if it is not enforceable.<sup>150</sup>

Lugano II Convention was concluded in 2007 and it is used between EU Member States and Switzerland, Norway and Iceland. This convention is used for recognition and enforcement of judgements in civil and commercial matters. Under this convention a judgement is recognised without any special procedure but there is a special procedure for the declaration of enforceability procedure.<sup>151</sup>

Convention on the international recovery of child support and other forms of family maintenance<sup>152</sup> is the last relevant convention in the area of recognition and enforcement of the foreign judgement on international level. This convention was created as a versatile tool for a successful recovery of maintenance,<sup>153</sup> but currently it can be used only in Europe, since only in European countries this convention entered into force. These are EU and EU Member States, Albania and Bosnia and Herzegovina.<sup>154</sup> The convention introduced several conditions for the recognition and enforcement of a foreign judgement. The convention created a special procedure for the recognition of foreign judgements regulating the recognition and the conditions for its refusal.<sup>155</sup> The procedure of the enforcement of a foreign judgement is governed by the law of the state where the enforcement is sought.<sup>156</sup>

The Czech Republic is bound by all of these international conventions. The New York Convention is the most important and most useful of them

<sup>150</sup> Articles 8 and 9 of the Convention on choice of court agreements.

<sup>151</sup> Articles 1, 33 and 38 of the Lugano II Convention.

<sup>152</sup> Convention of 23 November 2007 on the international recovery of child support and other forms of family maintenance [online]. *Hague Conference on Private International Law*. Available from: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=131](http://www.hcch.net/index_en.php?act=conventions.text&cid=131)

<sup>153</sup> Articles 1 and 2 of the Convention on the international recovery of child support and other forms of family maintenance.

<sup>154</sup> *Status table. Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* [online]. Hague Conference on Private International Law [cit. 8. 9. 2015].

<sup>155</sup> Articles 20–26 of the Convention on the international recovery of child support and other forms of family maintenance.

<sup>156</sup> Article 32 of the Convention on the international recovery of child support and other forms of family maintenance.



because it bounds a large number of states from all over the world and represents the only obligatory legal tool in the area of the recognition and enforcement of foreign arbitral awards.

### 4.2.3 Recognition and Enforcement of Foreign Judgements on the EU Level

The EU and the EU law dispose of a large number of legal tools for the recognition and enforcement of foreign judgements. All of these legal tools are very important because of the Czech Republic membership in the EU. They must be used in relationships between subjects of EU Member States preferentially.

The legal tools for the recognition and enforcement of foreign judgements on the EU level are:

Brussels Convention was created as a legal tool for the recognition and enforcement of judgements in civil and commercial matters between the Member States of the European Economic Community.<sup>157</sup>

The Brussels I Regulation was a successor of the Brussels Convention<sup>158</sup> and it was replaced by the Brussels Ibis Regulation which came into effect on 10 January 2015.<sup>159</sup> The Brussels I Regulation was used, and still is, for the recognition and enforcement in civil and commercial matters with the exceptions listed in Articles 1 and 2.<sup>160</sup> According to this regulation a judgement shall be recognised in other EU Member States without any special procedure being required, but a special procedure for the *exequatur* is required.<sup>161</sup> The enforcement of the judgement is governed by the law of the state where the enforcement is sought.

The Brussels Ibis Regulation regulates the recognition and enforcement of judgements in matrimonial matters and matters of parental responsibility.<sup>162</sup> According to this regulation a judgement shall be recognised in other

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<sup>157</sup> Preamble and Article 1 of the Brussels Convention.

<sup>158</sup> Article 68 of Brussels I Regulation.

<sup>159</sup> Article 81 of the Brussels Ibis Regulation.

<sup>160</sup> Articles 1 and 2 of the Brussels I Regulation.

<sup>161</sup> Articles 33 and 38 of the Brussels I Regulation.

<sup>162</sup> Article 1 of the Brussels Ibis Regulation.

EU Member State without any special procedure being required.<sup>163</sup> Under certain circumstances, there exists the possibility of the refusal of recognition.<sup>164</sup> The regulation applies a special procedure for the declaration of enforceability of a judgement, but just for the judgements in parental responsibility in respect of a child, because only this kind of judgement can be enforced. The *exequatur* can be refused under the same conditions as recognition. A condition for the enforcement of a judgement is its enforceability. The enforcement is then governed by the law of the state where the enforcement is sought.<sup>165</sup>

The European Enforcement Order Regulation was created for the simplification of enforcement of judgements. It can be applied only to uncontested claims.<sup>166</sup> According to this regulation, the judgements shall be recognised and declared enforceable in other EU Member States without any special procedure being required.<sup>167</sup> The recognition cannot be opposed under any condition. Because of this fact the regulation created the minimum standards for judgements which shall be recognised and enforced.<sup>168</sup>

The European Payment Order Regulation was created as a tool to simplify litigation in cross-border cases. It can be applied only to uncontested pecuniary claims.<sup>169</sup> Under this regulation a judgement (the European payment order) is recognised and declared enforceable in another EU Member State without any special procedure being required. There is no possibility to refuse the recognition and *exequatur*,<sup>170</sup> but the debtor can oppose the European payment order itself in a specified period.<sup>171</sup>

The Small Claims Procedure Regulation was created as a tool for simplifying and speeding up litigation of small claims in cross-border cases.<sup>172</sup> Pursuant

<sup>163</sup> Article 2 of the Brussels IIbis Regulation.

<sup>164</sup> Articles 22 and 23 of the Brussels IIbis Regulation.

<sup>165</sup> HERBOZCKOVÁ, Jana. Rodinné a manželské vztahy – mezinárodní pravomoc, uznání a výkon rozhodnutí. In SVOBODOVÁ, Klára et al. *Evropské mezinárodní právo soukromé* [online]. Brno: Masarykova univerzita, 2009 [cit. 6. 9. 2015].

<sup>166</sup> Articles 1 and 2 of the European Enforcement Order Regulation.

<sup>167</sup> Article 5 of the European Enforcement Order Regulation.

<sup>168</sup> Chapter III of the European Enforcement Order Regulation.

<sup>169</sup> Article 1 of the European Payment Order Regulation.

<sup>170</sup> Article 18 of the European Payment Order Regulation.

<sup>171</sup> Article 16 of the European Payment Order Regulation.

<sup>172</sup> Articles 1 and 2 of the Small Claims Procedure Regulation.

to this regulation, a judgement is recognised and enforced in another EU Member States without any special procedure and possibility to oppose recognition. Enforcement is governed by the law of the state where the enforcement is sought.<sup>173</sup>

The Maintenance Regulation is the EU tool for the recognition and enforcement of the maintenance judgements.<sup>174</sup> Under this this regulation, a judgement is recognised in another EU Member State without any special procedure. Regarding the *exequatur*, two rules exist; one for the EU Member States which ratified the Hague Protocol and one for EU Member States which did not. A judgement shall be declared enforceable in another Member State which ratified Hague Protocol without any special procedure. Judgements from EU Member States which did not ratify Hague Protocol need special procedure for declaration of enforceability. The enforcement of a judgement is governed by the law of the state where the enforcement is sought.<sup>175</sup>

The Succession Regulation is a new EU tool in the area of inheritance law. According to this regulation a judgement shall be recognised in another EU Member State without any special procedure.<sup>176</sup> For the process of declaration of enforceability a special procedure is required.<sup>177</sup>

The Brussels Ibis Regulation is the new general EU tool for recognition and enforcement of judgements in civil and commercial matters. According to this regulation a judgement shall be recognised and declared as enforceable in another EU Member State without any special procedure being required.<sup>178</sup> The recognition and enforcement can be refused under several conditions. The enforcement is governed by the law of the state where the enforcement is sought.

All these EU instruments must be applied preferentially in the relationships with the other EU Member States.

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<sup>173</sup> Articles 20 and 21 of the of the Small Claims Procedure Regulation.

<sup>174</sup> Article 1 of the Maintenance Regulation.

<sup>175</sup> Articles 1 and 2 of the Maintenance Regulation.

<sup>176</sup> Article 39 of the Succession Regulation.

<sup>177</sup> Article 43 of the Succession Regulation.

<sup>178</sup> Articles 36 and 39 of the Brussels Ibis Regulation.

#### 4.2.4 Recognition and Enforcement of Foreign Judgement under PILA

Since 1 January 2014, PILA has provided the regulatory framework for the purposes of recognition and enforcement of foreign judgements. The instances of its application are limited because of the EU legislation, which takes precedence over Czech law in relationships between EU Member States. Only when it is not possible to use this legislation, the Czech law can be applied.<sup>179</sup> This limitation stems from the nature of the EU law, but it is incorporated in PILA as well.<sup>180</sup> The EU regulations have limits in its scope. PILA will be applied in situations of the recognition and enforcement of judgements from non-EU Member States, e.g. the U.S., Japan, China, Canada and others. The limitation of PILA's scope of application is extended by the international recognition and enforcement conventions, which must be applied preferentially, too.<sup>181</sup> It is clear from what was mentioned that PILA will be applied in cases, when international conventions and the EU regulations do not regulate the matter.

The regulation of the recognition and enforcement of foreign judgements in PILA is complex in contrast to legal tools on the international and EU levels. PILA deals with all aspects of recognition and enforcement and with all kinds of decisions (judgements, arbitral awards, notarial deed and public deed).<sup>182</sup> It can be said in general that according to PILA it is possible to recognise all kinds of foreign decisions in cases, when it was decided about rights and duties that the Czech courts have the competence to hear.<sup>183</sup>

In PILA's system of recognition and enforcement, there is a general rule for the recognition and enforcement of foreign judgements and then partial

<sup>179</sup> EU Member States' judgements are the most recognised judgements in Czech Republic, due to the strong economic connection between the Czech Republic and other Member States.

<sup>180</sup> Section 2 of PILA.

<sup>181</sup> BŘÍZA, Petr. (Stručný) komentář k zákonu o mezinárodním právu soukromém. *Jiné Právo* [online]. 2014 [cit. 10. 9. 2015].

<sup>182</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, pp. 105–106.

<sup>183</sup> Section 14 of PILA.

rules for the recognition and enforcement of different kinds of foreign judgements. These general and partial rules for judgements are supplemented by the rule for the recognition and enforcement of foreign arbitral awards.

### ***General Rule***

In general, PILA's recognition and enforcement of foreign judgements is designed on the basis of a special procedure<sup>184</sup> with the exception of recognition and enforcement of property judgements. This kind of judgements is recognised on the basis of mutual recognition and enforcement without any special procedure for the recognition of a foreign judgement.<sup>185</sup> A property judgement is recognised automatically. Any other kind of judgement requires special procedure for its recognition unless PILA states otherwise<sup>186</sup> and lastly every judgement must be final.<sup>187</sup>

This general rule sets out the conditions for the refusal of recognition and enforcement. These are:

- The matter falls under the exclusive jurisdiction of the Czech courts.<sup>188</sup> It applies to the declaration of Czech citizen's death or missing judgements, *in rem* judgements and real property judgement.
- Proceedings that are underway before a Czech court with the same legal relations (*lis pendens*).<sup>189</sup> The conditions are: the pending proceedings of the same subject matter and the Czech proceedings were commenced prior to that of the foreign proceedings.
- There exists a prior, valid Czech judgement in the same subject matter.<sup>190</sup> The conditions are: the existence of the valid judgement in the same subject matter issued earlier than the foreign judgement.

<sup>184</sup> Sections 14 and 16(2) of PILA.

<sup>185</sup> Section 16(1) of PILA.

<sup>186</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer 2013, p. 118.

<sup>187</sup> Section 14 of PILA

<sup>188</sup> Section 15(1)(a) of PILA.

<sup>189</sup> Section 15(1)(b) of PILA.

<sup>190</sup> Section 15(1)(c) of PILA.

- The party against which a judgement should be recognised was deprived of the ability to duly participate in the proceedings proceeding, especially if the party was not informed about the initiation of the proceedings.<sup>191</sup>
- The recognition of a foreign judgement would clearly contravene public policy. The recognition of foreign judgements is contrary to public policy if it is contrary to basics principles of the legal order of the Czech Republic.<sup>192</sup>
- Reciprocity has not been guaranteed.<sup>193</sup> That means if Czech decisions are not recognised in foreign country or Czech decisions cannot be declared recognised and enforced, the Czech courts will not recognise judgements from this country.<sup>194</sup>

A court has to assess all these conditions *ex officio*. Only the condition under point 4 must be objected in the court proceedings by the interested party and the conditions under points 2 and 3 must be objected in court proceedings by the interested party only if the court is not familiar with the necessary facts.<sup>195</sup>

The declaration of enforceability of a foreign judgement is another part of the process of recognition and enforcement of foreign judgement. The general PILA's process of recognition and enforcement does not include the special procedure of declaration of enforceability, but in some cases it is used. The declaration of enforceability is employed in cases mentioned in the Part IV of PILA when this declaration is necessary for the recognition and enforcement of a foreign judgement. In Part IV of PILA, there are cases when declaration of enforceability of foreign judgement is required by the EU regulations and international conventions.<sup>196</sup>

The enforcement of a foreign judgement is governed by the Czech law.

<sup>191</sup> Section 15(1)(d) of PILA.

<sup>192</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 112.

<sup>193</sup> Section 15(1)(e) of PILA.

<sup>194</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 113.

<sup>195</sup> Section 15(2) of PILA.

<sup>196</sup> Sections 17–19 of PILA

### ***Partial Rules***

The general rule of recognition and enforcement of foreign judgement is supplemented by the regulation of the relationships which need special treatment. These are:

- The status law;
- The family law;
- The succession law.

All these areas of private law have its own regulation of recognition of foreign judgement. These regulations are in the position of *lex specialis* to the general rule. The status judgements relate to personal rights or status of natural persons. PILA has a special regulation for the recognition and enforcement of judgements relating to legal capacity, guardianship and those declaring persons death or missing.<sup>197</sup> The family law decisions are quite a big group of judgements which deal with different life situations: divorces, relationships between parents and children, maintenance, child custody etc. The special regulation of recognition and enforcement of judgements is analysed in the respective following chapters.

#### **4.2.5 Recognition and Enforcement of Foreign Arbitral Awards under PILA**

The foreign arbitral awards have their own special treatment in the proceedings of the recognition and enforcement of a foreign decision.<sup>198</sup> Foreign arbitral awards are treated as Czech arbitral awards under one condition: reciprocity. The arbitral award from a foreign state will be recognised only if courts of this foreign country recognise Czech arbitral awards.<sup>199</sup> The reciprocity can be established by a decision of the government or the general courts practice. The foreign arbitral awards are recognised without any special procedure.<sup>200</sup>

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<sup>197</sup> Sections 38 and 40 of PILA.

<sup>198</sup> International conventions take precedence over PILA.

<sup>199</sup> Section 120 of PILA.

<sup>200</sup> Section 122(1) of PILA.

Even if the reciprocity exists the recognition or enforcement of foreign arbitral awards can be refused. The conditions for the refusal of recognition or enforcement are:

- The foreign arbitral award is not final or enforceable according to the law of the state of its origin.
- The foreign arbitral award was repealed in the state of its origin or according to the law of the state its origin.
- The foreign arbitral award is defective and this defect warrants a repeal of the arbitral award according to the Czech law.
- The foreign arbitral award contravenes public policy.<sup>201</sup>

The enforcement of foreign arbitral award is governed by the Czech law.<sup>202</sup>

#### 4.2.6 Conclusion on the Recognition and Enforcement

As shown above, the recognition and enforcement of foreign judgements can vary depending on the sources of law, but the differences are not so intense. The sources of law still use the recognition, declaration of enforceability and enforcement. Some sources use all of them, some do not use *exequatur*.

Regarding the recognition and enforcement of judgements, the situation is a bit complicated in the Czech Republic. It is necessary to deal with three different categories of sources of law. The first category comprises the international conventions. They must take precedence over Czech law. The EU law presents another complication. In relationships between the EU Member States, the EU law must take precedence over the national law. Only if it is not possible to use the EU law, the PILA can be applied.

The PILA has a general rule and several partial rules for specific situations dealing with the recognition and enforcement of foreign judgements. These partial rules are in the position of *lex specialis* to the general rule. Pursuant to the general rule for the recognition of foreign judgements a special procedure is necessary, with the exception of recognition of property judgements. Czech law uses the *exequatur* only if the EU law or international conventions require it.

<sup>201</sup> Section 121 of PILA.

<sup>202</sup> Section 122(2) of PILA.





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## 5 GENERAL PART OF CONFLICT-OF-LAW RULES

### 5.1 Introduction

The application of conflict-of-law rules gives rise to a number of issues due to their special structure and purpose and also because they affect legal relationships relating to more than one country. These issues - called “principles” or “general part of conflict of laws” - are usually left for the academia to discuss and decide, or for the courts to resolve through case law. Only some of them are regularly codified or unified. This chapter addresses the ways these issues are dealt within PILA.

What is typical of this new legislation in this regard? Primarily, it provides for a number of legal concepts that were formerly mostly left to jurisprudence and case law: the principle of the application of conflict-of-law rules; the application of law governing private law relationships with an international element; the application of public law in cases where it affects a private law relationship; filling *lacunae* in the conflict-of-law legislation; certain general concepts, such as qualification (in the English literature “classification” or “characterization”), preliminary question, evasion of law etc. These new provisions are now thus laid down in addition to the concepts regulated by former legislation (*renvoi*, public policy).<sup>203</sup>

The regulatory approach concerning the general concepts could be assessed as follows:

- It provides guidance in the sense of making it easier to grasp the conflict-of-law rules and their use.
- There is continuity in the sense of connection to the Czech doctrine of Private International Law as construed in the past decades.<sup>204</sup> Its solutions correspond to those which served as doctrinal background

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<sup>203</sup> To former PILA: PAUKNEROVÁ, Monika. *Private International Law in the Czech Republic*. Alphen aan den Rij: Kluwer Law International, 2011, p. 188.

<sup>204</sup> Concerning the Czech doctrine of Private International Law see: KRČMÁŘ, Jan. *Úvod do mezinárodního práva soukromého. Část I. Propedeutická*. Praha: Bursík a Kohout, 1906, 304 p.; ZIMMERMANN, Michal Arturovič. *Mezinárodní právo soukromé*. Brno: Čs. A.S. Právník, 1933, 446 p.; BYSTRICKÝ, Rudolf. *Základy mezinárodního práva soukromého*. Praha: Orbis, 1958, 558 p.; MÁŠILKO, Vilém; STEINER, Vilém. *Mezinárodní právo soukromé v praxi*. Praha: Academia, 1976, p. 348.

in the basic course on the Private International Law led by the author of the PILA, *Kučera*.<sup>205</sup> Certain predictability of the regulation should be noted along with, in respect of the previous theoretical basis, a certain degree of intuitiveness in terms of its use by the relevant state bodies.

- It attempts to eliminate problems which, as a rule, represent a “burden” to codification of the legislation, i.e. “incorporation” of a certain concept in the law, which then prevents the reflection on future developments or, in other words, implies permanent adoption of one of many possible approaches. This elimination is accomplished mainly through the indication, in some cases, of the basic codified solutions. Nevertheless, the regulation also allows to abandon this solution and choose a different one. This is exemplified, e.g. by Section 20 (qualification), or Section 24(1).

## 5.2 Qualification

### 5.2.1 Definitions and Terminology

The real world and the world of law intersect at the issue of qualification. To “legally qualify” generally means to identify what legal concept (institute) or legal matter is concerned, or whether the given phenomenon is at all legally relevant.

The term “qualification” has multiple meanings both in the general as well as legal language. Furthermore, although it is a notion describing a mental procedure inherent to all legal disciplines, only Private International Law and criminal law explicitly operate with it.

As a term used in Private International Law, it may be defined with the help of the definition introduced in Section 20(1), part of the first sentence (and similarly, the third paragraph of the same section) of PILA:

*“Legal assessment of a certain legal relationship or question for the purpose of identifying the applicable conflict-of-law rule to determine the governing law (...).”*

<sup>205</sup> Eight editions of the basic course on Private International Law have already been published since 1973. The last edition: KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, 430 p.

The legal definition also suggests the methodology: the legal assessment of a certain case (issue or legal relationship) under specific legislation, with the purpose of its subsumption under the scope of some of the conflict-of-law rule. This scope, i.e. the term or concept included, is simultaneously interpreted. Therefore, it can thus be described as a process of three interrelated and, in a specific case, overlapping terms: “qualification” – “subsumption” – “interpretation”.<sup>206</sup> If we are to classify a certain legal relationship or issue, it is necessary to legally assess it on the basis of the specific relevant substantive law. This is due to the usual form of conflict-of-law rules. These usually operate only with general terms such as divorce, contractual obligation, delict or tort, marriage, maintenance, ownership title, pledge, etc. Conflict-of-Law rules do not contain the defining elements of these terms and concepts; these are left to the substantive law.

In the given meaning, qualification is tied to multilateral (bilateral) conflict-of-law rules of national origin. The issue of qualification does not arise with respect to unilateral rules, due to the link to the special construction and the link to *lex fori*. The issue of qualification is different with respect to unified (EU, international) rules. This is especially because while in domestic law the creation of conflict-of-law rules is “derived”, to a certain degree, from the terms and concepts of substantive law,<sup>207</sup> in the unified conflict-of-law rules, the central point lies in the interpretation of the scope of the term. Substantive laws are generally not present in this sphere. If they do exist - see the example of the EU law - they are limited and rare. The said interpretation is autonomous and relates, to a certain extent, to the creation of terms and qualification. However, it is not identical with the process of qualification in the national Private International Law.<sup>208</sup>

<sup>206</sup> ROZEHNALOVÁ, Naděžda. Kolize kolizních norem – aneb k úpravě kvalifikace a zpětného odkazu v zákoně o mezinárodním právu soukromém. *Časopis pro právní vědu a praxi*. 2014, Vol. XXII, No. 4, pp. 304–314.

<sup>207</sup> Of course, it is not entirely fixed to any specific legislation. There exists certain autonomy, which reflects that a question of fact goes beyond the imaginary boundaries of the laws of the given jurisdiction.

<sup>208</sup> BARATTA, Roberto. Process of Characterization in the EC Conflict of Laws. In ŠARČEVIĆ, Petar; VOLKEN, Paul; BONOMI, Andrea (eds.) *Yearbook of Private International Law. Volume VI*. Munich: Sellier European Law Publishers, 2005, pp. 155–169. In Czech literature: ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, pp. 40–46; BRÍZA, Petr; BRICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, pp. 133–135.

The above definition of qualification also specifies the subject of qualification under Czech laws – either a legal relationship or a legal question. Naturally, there also exist other opinions on the subject – the subject may lie in the governing law or legal norm, or a question of fact.<sup>209</sup>

In Czech doctrine, the notion of qualification also entails further terms: a qualification question, qualification status and qualification problem. A qualification question, i.e. qualification as such is a question that is always present where there is a bilateral national conflict-of-law rule. It is therefore also suitable to clarify the basic approach to this issue in the doctrine, law or case law. The notion of qualification status denotes the laws of the jurisdiction under which the given legal relationship or question is classified. Specification of the method used to determine the qualification status is the fundamental question dealt with by the doctrine of Private International Law. Qualification problem is thus a situation where the basic qualification method is not sufficient to resolve a question of qualification and the question therefore must be approached from a different point of view. For example, the given legal concept may be structured in a different manner in *lex fori* and *lex causae* (procedural vs. substantive question – statute of limitations as a concept of procedural or substantive law), or the given concept might not exist in one of the jurisdictions concerned (betrothal as a legal concept in one country and non-existence of this concept in another).<sup>210</sup>

### 5.2.2 Methods Generally Used for Qualification

The doctrine of Private International Law has sought the optimum solution to the problem of qualification since the end of the 19th century. The first method devised was based on *lex fori* – the law of the court seized; the method was first mentioned in the works by the German theorist *Kahn*

<sup>209</sup> MISTELIS, Loukas A. *Charakterisierungen und Qualifikation im internationalen Privatrecht*. Tübingen: Mohr Siebeck, 1999, pp. 224–234; ČERMÁK, Karel. Kvalifikace v mezinárodním právu soukromém. *Právník*, 1999, No. 6, p. 497.

<sup>210</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, pp. 137–151.

and the Frenchman *Bartın*.<sup>211</sup> Their approach set the venue for a debate lasting more than a century. The method via *lex causae* – the law that governs or will likely govern the legal relationship under scrutiny – is somewhat opposite to the above.<sup>212</sup> The autonomy method was the third method used over the next decades in various combinations and with various emphases. It is associated with *Rabel* and accentuates the comparative approach to the notions related to a conflict-of-law rule.<sup>213</sup>

From among other methods, it is instructive to note the functional method,<sup>214</sup> the “*kanalisierten Verweisung*”,<sup>215</sup> primary and secondary qualification,<sup>216</sup> characterization with regards to treaties<sup>217</sup> and *ad hoc* qualification.<sup>218</sup> There are also further methods that are characterised by a relatively flexible approach and procedural treatment.<sup>219</sup>

It might be appropriate to pause here for a moment and further describe the functional method, which is currently explicitly used by Czech law and which serves as a certain corrective for the basic methods. This method is connected with *Neubaus*. Its substance lies in emphasis on the function fulfilled by a substantive legal norm in legal life. That function is then compared with the function of the notion used within the referring section

<sup>211</sup> KAHN, Franz. Gesetzeskollisionen: Ein Beitrag zur Lehre des internationalen Privatrechts. In *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* [online]. 1891, Vol. 30, pp. 80–97 [cit. 18. 12. 2015]; BARTIN, Etienne. *De l'impossibilité d'arriver à la suppression définitive des conflits de lois*. Clunet, 1897, p. 223.

<sup>212</sup> WOLFF, Martin. *Private International Law*. 2nd ed. London: Clarendon Press, 1950, pp. 146 et seq. Also see WOLFF, Martin. *Das Internationale Privatrecht Deutschlands*. 3rd ed. Berlin-Göttingen-Heidelberg: Springer, 1954, pp. 49–59.

<sup>213</sup> RABEL, Ernst. Das Problem der Qualifikation. *Zeitschrift für Ausländisches und Internationales Privatrecht*. 1931, pp. 241–288.

<sup>214</sup> NEUHAUS, Paul Heinrich. *Die Grundbegriffe des Internationalen Privatrechts*. 2nd ed. Tübingen: J.C.B. Mohr (Paul Siebeck), 1962, p. 254.

<sup>215</sup> ČERMÁK, Karel. Kvalifikace v mezinárodním právu soukromém. *Právník*. 1999, No. 6, pp. 510–511; VERSCHRAGEN, Bea. *Internationales Privatrecht. Ein systematischer Überblick*. Wien: Manzsche Verlags- und Universitätsbuchhandlung, 2012, p. 237.

<sup>216</sup> ALLAROUSSE, Veronique. A Comparative Approach to the Conflict of Characterization in Private Interantional Law. *Case Western Reserve Journal of International Law* [online]. 1991, Vol. 23, No. 3, p. 479 et seq [cit. 18. 12. 2015].

<sup>217</sup> KUČERA, Zdeněk. *Mezinárodní právo soukromé*. 2nd ed. Brno: Doplněk, 1975, p. 99.

<sup>218</sup> BYSTRICKÝ, Rudolf. *Základy mezinárodního práva soukromého*. Praha: Orbis, 1958, pp. 90–102; BYSTRICKÝ, Rudolf. Zum Problem der Qualifikation. In *Fragen des Internationalen Privatrechts*. Berlin: Dt. Zentralverl., 1958, pp. 36 et seq.

<sup>219</sup> MISTELIS, Loukas A. *Charakterisierungen und Qualifikation im internationalen Privatrecht*. Tübingen: Mohr Siebeck, 1999, pp. 257–258.

of the conflict-of-law rule. The method is based, not on systemic terms linked with legislation, but rather on terms reflecting the purpose that is to be fulfilled by the norm in social life. Functional qualification, which is based on the function of the given concept, better captures the role of the concept in society and makes it easier to cross the boundaries of the laws of individual jurisdictions compared to qualification using systemic elements and strictly separating qualification statuses.<sup>220</sup>

However, it must also be reiterated that there exist, or rather existed, opinions denying the existence of qualification as a problem. In our legal environment, we should mention in this context the Prague Professor at the German Law Faculty of Charles University, *Neuner*. In his publication *Der Sinn der Internationalprivatrechtlichen Norm - Eine Kritik der Qualifikationstheorie*, he criticised both qualification and its individual methods. *Neuner* sees qualification, as a method used by authors such as *Kahn* and *Bartin*, as an operation involving the terms used by a conflict-of-law rule. He believes that his approach, which clarifies the sense (*Sinn*) of conflict-of-law rules and their corresponding use, can overcome the difficulties that the qualification method strives to avoid using the said operations. *Neuner's* method is very demanding and anticipates an *ad hoc* approach to clarification of the sense of the conflict-of-law rules in question.<sup>221</sup>

### 5.2.3 Czech Regulation

It must be stated primarily that the provisions of Section 20 are in no way random or surprising. In his editions of the course on Private International Law, the author of the PILA, *Kučera*, gradually presented a compact and applicable model of dealing with the question of qualification, which has never been questioned, whether in principle or in practice.<sup>222</sup> Section 20 is not rigid – it itself provides the basic guidance for resolving the question

<sup>220</sup> NEUHAUS, Paul Heinrich. *Die Grundbegriffe des Internationalen Privatrechts*. 2nd ed. Tübingen: J.C.B. Mohr (Paul Siebeck), 1962, pp. 113–132.

<sup>221</sup> NEUNER, R. R. *Der Sinn der Internationalprivatrechtlichen Norm - Eine Kritik der Qualifikationstheorie*. Brünn-Prag-Leipzig-Wien: Verlag Rudolf M. Rohre, 1932, p. 135.

<sup>222</sup> Not only in the mentioned courses, but also: KUČERA, Zdeněk. The Problem of Qualification. In *Miscellany of Papers in International Law*. Brno: Masarykova univerzita, 1991, pp. 99 et seq; KUČERA, Zdeněk; TICHÝ, Luboš. *Zákon o mezinárodním právu soukromém a procesním. Komentář*. Praha: Panoráma. 1989, pp. 51–58.

of qualification, i.e. the starting point. In fact, the provision does not exclude procedures other than those specified therein.

Specifically:<sup>223</sup>

- According to the first paragraph, the qualification is usually carried out on the basis of Czech law (qualification *lex fori*). Consequently, Czech law forms the basic principle and starting point.
- The second option – dealt with in the second paragraph – allows for the functional qualification – where laws of several jurisdictions are to apply to a certain legal relationship or question, the evaluation of these provisions pursuant to the first paragraph may also reflect the function that these provisions play within the given law.
- The third paragraph also provides for possible qualification based on *lex causae* in cases where the governing law has already been determined for the underlying relationship. Consequently, it is anticipated that this method will usually be used to evaluate a certain relationship or question that is connected with the underlying relationship.
- Qualification of movable and immovable assets forms a special case. Pursuant to the second sentence of Section 69(1), this qualification is governed by the law where the given asset is located.

The combination set out in PILA provides certain guidance as to the application of a conflict-of-law rule in basic situations. As stated above, other options are also possible.

The qualification of facts decisive for determining the applicable law (i.e. connecting factors) is also assessed according to Czech law, i.e. using the method of *lex fori*.

It is a fact that Czech case law has in no way elaborated on the question of qualification and has perceived no problem in this respect. The provisions of Section 20 lay down the basic starting point for dealing with a conflict-of-law rule.

<sup>223</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 928; BRÍZA, Petr; BRICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 767.



## 5.3 Renvoi

### 5.3.1 In General

*Renvoi* is a traditional concept that can be found in the general part of various Private International Law acts. It turns on the following question: should foreign law apply as a whole, i.e. including its conflict-of-law rules, or is reference actually made only to substantive law?

In the former case, provided that further conditions are met, a conflict-of-law rule of country A might refer to the laws of country B as a whole, i.e. including its conflict-of-law rules. The applicable conflict-of-law rule could then refer back to the laws of country A (*renvoi* as such) or further to the laws of country C (*double renvoi*). If this situation is not dealt with, one could end up in an “inextricable circle”.<sup>224</sup>

In the latter case, where reference is made only to substantive laws of country B, the above-described situation involving *renvoi* cannot arise. This also rules out any considerations on accepting or not accepting *renvoi*.

The above mentioned further conditions that must be met in any case, along with the type of reference, are as follows:

- The applied domestic conflict-of-law rule has the same referring section as the conflict-of-law rule embodied in the law to which it refers. Nonetheless, the connecting factor is different. In this respect, literature speaks about a clear and open conflict of laws. Typical in this respect are situations where the laws of one jurisdiction use the testator’s *lex patriae* in respect of inheritance, while the laws of another country refer to the testator’s *lex domicilii*.
- The applied domestic conflict-of-law rule has the same referring section and connecting section as the conflict-of-law rule embodied in the law to which it refers. Nonetheless, the term used in the connecting section is construed in different ways. As an example, we could mention the use of the *lex loci delicti* the connecting factor for the obligations arising from delicts (torts) or *lex loci contractus* as the connecting factor in cases where a contract is being made between persons who are not present.

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<sup>224</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, pp. 154–161.

- Different qualification of the facts in *lex fori* and in the law to which the conflict-of-law rule refers.<sup>225</sup>

The question in terms of *renvoi* is whether it should be accepted or not, or in what situations both approaches can be combined. It is true that the arguments put forth by the advocates and opponents of the solution have the same weight: they vary from logical, through dogmatic to entirely pragmatic. The benefits of accepting *renvoi* can be seen in the possibility of returning to domestic substantive laws and, to a certain degree, also achieving external harmony in the decision-making. Drawbacks lie in the fact that a domestic authority has to follow instructions of a foreign conflict-of-law rule and also the possibility of establishing an inextricable circle etc.

In the past, the Czech doctrine and decision-making practice tended to prefer the acceptance of *renvoi* where this was fair and reasonable.<sup>226</sup> This pragmatic approach, advocated for example by *Bystrický*, was also reflected in the former PILA. The assessment of whether or not this should be accepted was, to a certain extent, in judge's discretion.<sup>227</sup> As will be shown below, the new law further elaborated on this approach and adopted a relatively pragmatic stance.

### 5.3.2 Czech Legislation

The Czech legislation differentiates between the general provision in Section 21 and special provisions embodied in the further wording of the PILA. We can thus state the following. According to the first sentence of Section 21(1), *renvoi* is generally accepted. The basic reference to conflict-of-law rules is thus a reference to a foreign law as a whole, i.e. including both substantive and conflict-of-law rules. If a conflict-of-law rule of the foreign jurisdiction to which the Czech conflict-of-law rule refers

<sup>225</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, pp. 154–161.

<sup>226</sup> BYSTRICKÝ, Rudolf. *Základy mezinárodního práva soukromého*. Praha: Orbis, 1958, pp. 83 et seq; DONNER, Bohdan. Zpětný odkaz a československé dědické kolizní právo. *Časopis pro mezinárodní právo*. 1958, pp. 338 et seq.

<sup>227</sup> See ČERMÁK, Karel. Zpětný a další odkaz v mezinárodním právu soukromém. *Právník*. 1998, Vol. 137, No. 10–11, pp. 169–174; KUČERA, Zdeněk; TICHÝ, Luboš. *Zákon o mezinárodním právu soukromém a procesním. Komentář*. Praha: Panoráma. 1989, pp 197–202.

points back to Czech law, the reference (*renvoi*) is accepted. This acceptance only includes Czech substantive rules. This avoids the possible vicious circle. This is where the assessment of the case ends as regards the applicable law. *Renvoi* in the sense of further reference is also permitted pursuant to the second sentence of Section 21(1). However, this is only possible if the conflict-of-law rules of the other jurisdiction refer to its body of laws.

For example, a conflict-of-law rule of country A refers to the laws of country B. The latter use the connecting factor of *lex patriae* and refer to the laws of country C. The latter also use the connecting factor of *lex patriae*. The determination is thus “confirmed”. If this is not so and the conflict-of-law rules of country C refer to a further law, Czech law will apply. This, in substance, “cancels out” all references and Czech law is applicable.

A possible limitation is laid down in Section 21(2) for the law of obligations and labour law. The conflict-of-law rules of a foreign body of laws determined based on a choice of law may be taken into account if the parties so agreed explicitly.

Special provisions are contained in the second sentence of Section 31(1). The case specified therein can be considered a special case of *renvoi*. It is not laid down explicitly; nonetheless, the scheme of the given provision clearly indicates the technical scheme that is otherwise characteristic of *renvoi*. This provision was adopted from an international treaty and from the Act on bills and cheques.<sup>228</sup> In the said case, the capacity of a person to assume obligations in respect of bills and cheques is governed by the laws of the country of which he is a national. If the conflict-of-law rules of this law comprise some other connecting factor (e.g. habitual residence), the law of that other country will apply.

Another special provision – which however, has questionable sense – is stipulated in the second sentence of Section 119 in relation to the provisions on the law applicable in arbitration. It reads: “*Conflict-of-Law rules of the applicable law may be taken into account if this follows from a choice of law made by the parties.*” There can be no doubt that the same result can be achieved on the basis of the general provisions in Section 21(2). It is therefore unclear why the said

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<sup>228</sup> Act No. 191/1950 Coll., on bills and cheques.

provision was included in the PILA in the first place. The Explanatory note remains silent in this respect. The rationale behind this might perhaps lie in the fact that the norm was adopted from the Arbitration Act, where it had its sense, and the norm was merely mechanically transposed.<sup>229</sup>

### 5.3.3 European Private International Law and Renvoi

Czech legislation is applicable in those cases where there is no EU or international regulation. The EU law comprises autonomous provisions. EU regulations approach the concept of *renvoi* in a differentiated manner, depending on what area they concern. Specifically:

- Rome I Regulation provides for *renvoi* in Article 20. It stipulates: “*The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation.*” In our opinion, the special provisions concern all cases where a choice of law is limited in terms of conflict of laws, i.e. contracts on transport and on insurance.
- Rome II Regulation provides for *renvoi* in Article 24: “*The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law.*”
- Rome III Regulation contains the relevant provisions in Article 11 and again excludes *renvoi*: “*Where this Regulation provides for the application of the law of a State, it refers to the rules of law in force in that State other than its rules of private international law.*”
- Succession Regulation adopts a different approach to the acceptance of *renvoi*. It supports *renvoi* in cases where the laws of a non-Member State apply. Specifically, its Article 34 stipulates: “*The application of the law of any third State specified by this Regulation shall mean the application of the rules of law in force in that State, including its rules of private international law in so far as those rules make a renvoi (a) to the law of a Member State, or (b) to the law of another third State which would apply its own law.*” Nonetheless,

<sup>229</sup> ROZEHNALOVÁ, Naděžda. Kolize kolizních norem – aneb k úpravě kvalifikace a zpětného odkazu v zákoně o mezinárodním právu soukromém. *Časopis pro právní vědu praxi*. 2014, Vol. XXII, No. 4, pp. 313–314.

its paragraph 2 excludes *renvoi* in exhaustively listed situations: “No *renvoi* shall apply with respect to the laws referred to in Article 21(2), Article 22, Article 27, point (b) of Article 28 and Article 30.”

International treaties including conflict-of-law rules usually deal with the question of *renvoi*. This is true of both multilateral and bilateral treaties. In this case, *renvoi* is usually excluded.

## 5.4 Preliminary Question

### 5.4.1 Definition

In Private International Law, the notion of preliminary question denotes a situation where the underlying legal relationship or question is governed by foreign law, where the decision on this relationship or question depends on the existence of some other legal fact or relationship. The applicable law must also be determined in respect of this “other” question of law (if it has not been resolved yet) or a decision of a foreign court must be accepted (if the question has already been resolved).<sup>230</sup>

In the former case, we analyse in respect of relationships regulated by Private International Law what conflict-of-law rules will apply in the given situation. Whether these will be the conflict-of-law rules of *lex fori* (i.e. conflict-of-law rules of the court that is to decide on the underlying situation) or the conflict-of-law rules of *lex causae* (i.e. conflict-of-law rules belonging to the legislation applicable to the underlying situation), or whether some other solution will be used.

As an example of preliminary questions in Private International Law, we can refer to succession and the question of whether a certain person is or is not an heir; the determination of alimony and of the obliged person; transfer of the ownership title to a thing and determination of its owner; settlement of the community property of spouses and the question of whether marriage was validly concluded, etc.

<sup>230</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, pp. 161–166; KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, pp. 162–165.

### 5.4.2 Czech Legislation

As already indicated in the introduction, a preliminary question may be resolved in procedural terms or in terms of conflict-of-law rules. The Czech doctrine recognises both these solutions<sup>231</sup> and they are also newly stipulated by law, specifically in Section 22 of PILA. The substantive law solution, where a preliminary question would be directly resolved by the substantive law applicable to the underlying relationship, has been rejected.<sup>232</sup>

Where a preliminary question is resolved with the use of conflict-of-law rules, Section 22(1) allows both the so called “independent” and “dependent” connection of the preliminary question. PILA stipulates the conditions under which one of the two options will be used.

The so called “independent connection” (or *lex fori* approach) denotes a case where the law applicable to the preliminary question is determined using the conflict-of-law rules of the forum. This option is connected in Section 22(1) with the precondition of the existence of jurisdiction on the part of Czech courts, not only in respect of the underlying legal relationship, but also for the preliminary question (*a contrario* the second sentence that deals with non-autonomous connecting section). The independent connection is preferable for reasons of ensuring internal harmony of decision-making.

The so called dependent connection (or *lex causae* approach) is a case where the law applicable to the preliminary question is determined using the conflict-of-law rules of the law applicable to the underlying legal relationship or question (*lex causae*). It is used in situations where the Czech courts would otherwise lack jurisdiction to deal with the preliminary question if the latter was assessed separately (autonomously). The use of dependent connection is preferred where external harmony of decision-making is imperative.

<sup>231</sup> KUČERA, Zdeněk; TICHÝ, Luboš. *Zákon o mezinárodním právu soukromém a procesním. Komentář*. Praha: Panoráma. 1989, pp. 58–61; ROHLÍK, Josef. Preliminary and Incidental Questions in Czechoslovak Private International Law. *Acta Universitatis Carolinae*. 1969, p. 107.

<sup>232</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 164.

In this respect, Czech legislation differentiates between the situations that have a significant link to the Czech territory and those that lack such a link. The criterion for such differentiation lies in the existence of jurisdiction of Czech courts.

As regards the solution in terms of procedure, it is explicitly provided in Section 22(2): *“If a preliminary question has already been resolved through a final decision of a competent Czech public authority or a court or authority of a foreign country whose decisions meet the conditions for recognition in the Czech Republic, the court will proceed in accordance with such a decision.”*

### 5.4.3 EU Law and Preliminary Question

It has already been stated that the notion of preliminary question differs from a preliminary ruling. Nonetheless, a procedural preliminary question as a concept belonging to the general part of conflict-of-law rules has been discussed in terms of EU law.<sup>233</sup> The EU’s conflict-of-law rules also imply two basic solutions – independent connection under *lex fori* and dependent connection based on the law applicable to the underlying issue (*lex causae*). The conclusions mentioned in literature mostly prefer independent approach as a starting point for answering the question. The dependent approach is mostly an exemption. The rationale behind this also includes the fact that the basic interest in EU conflict-of-law rules is the interest in uniform decision-making. That is what prevails. And that is what is ensured, thanks to the unified conflict-of-law rules, precisely by the independent connection.

## 5.5 Partial and Subsequent Question

Further types of questions are also relevant in application of conflict-of-law rules.

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<sup>233</sup> BERNITT, Carmen Ch. *Die Anknüpfung von Vorfragen im europäischen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2010, p. 261; MÄSCH, Gerald. Zur Vorfrage im europäischen IPR. In LEIBLÉ, Stefan; UNBERATH, Hans (eds.). *Brauchen wir eine Rom 0-Verordnung? Überlegungen zu einem Allgemeinen Teil des europäischen IPR*. Jenaer Wissenschaftliche Verlagsgesellschaft. 2013, p. 505; SCHMIDT, Torben S. Incidental Question in Private International Law. In *Collected Courses of the Hague Academy of International Law*. 1992, Vol. 233, pp. 305–416.

Partial questions differ from preliminary questions in that they are a normal and mostly also a necessary part of the underlying question or relationship. In practice, it may be sometimes difficult to distinguish between incidental and partial question<sup>234</sup> and the determination depends on the system of positive Private International Law in every country.

The examples of partial questions are as follows: legal capacity to undertake legal actions and the given legal action itself; the capacity to enter into a contract and the contract itself; capacity to commit a delict (tort) and damages resulting from the delict.

A partial question is an inherent part of the legal relationship. To a certain degree, it can be “factored out”.<sup>235</sup>

The specific legislative solutions may differ. In technical terms, partial questions can form a separate part of legislation. For example, this may take the form of separate provisions on the capacity to enter into a contract and separate provisions on the legal regime of the contract. The legal regulation of partial question is usually set up so that it applies jointly to a number of legal concepts and is subject to a special separate conflict-of-law rule. In a specific case at hand, a partial question will thus be subject to separate legal evaluation and linked to a separate conflict-of-law rule. The conflict-of-law rules of *lex fori* will apply. Sections 29 and 30 of the PILA can be mentioned as an example.

In other cases, a partial question might not be separated in this way and might be subject to the conflict-of-law rule applicable to the underlying question. It is thus part of the status for the underlying question. This may be true, for example, of Section 101 of the PILA. It is possible that a separate conflict-of-law rule will apply to a partial question if the applicable law comprises such a rule.

A subsequent question is somewhat different. This is a question of legal effects specified in the “disposition arrangement” of the substantive legal norm which are dealt with by substantive norms governing some other

<sup>234</sup> SCHMIDT, Torben S. Incidental Question in Private International Law. In *Collected Courses of the Hague Academy of International Law*. 1992, Vol. 233.

<sup>235</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, pp. 165–166.



concept. Adoption is an example mentioned in the literature. Adoption usually results in the creation of a relationship between the adopting parent and the child that is equivalent to the relationship between a parent and a child. It is thus governed by the same substantive rules. The relationship itself is a subsequent question vis-à-vis adoption.

In relationships with an international element, a subsequent question is linked autonomously – i.e. it is governed by the law determined under the conflict-of-law rule of *lex fori* (in the case mentioned above, the conflict-of-law rule determined for the relationships between parents and children).

## 5.6 Reservation of Public Policy

### 5.6.1 Introduction

The application of the conflict rules may lead to unacceptable results from the perspective of the forum because they cannot evaluate the content of the substantive law to which they refer. There are cases when the result of the application of the conflict rule discriminates against members of a particular race or gender or violates human rights in any other way. The application of the law determined under the conflict rules carries a potential risk of unacceptable results. The Private International Law contains explicit or implicit limitation to avoid this risk resulting from the application of foreign law if foreign law is manifestly incompatible with the fundamental principles of the public policy (public order) of the forum. Public policy is intended to protect the fundamental values of the forum such as morality, freedom, justice or decency.<sup>236</sup>

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<sup>236</sup> BOGDAN, Michael. *Private International Law as Component of the Law of the Forum: General Course*. Hague: Hague Academy of International Law, 2012, pp. 214–215.

The reservation of public policy is a traditional concept of the Private International Law.<sup>237</sup> It can be defined as a provision which enables and also binds the forum country to exceptionally refuse the application of a provision of the law of any country applicable under the domestic conflict rules if the effects of such an application are fundamentally unacceptable in the view of the domestic legal order. For the same reasons it is also necessary to refuse the recognition of foreign judgements. The reservation of public policy is a defence against undesirable effects of the application of foreign law.<sup>238</sup> The concept of the public policy embodies the essential interests of a society. The reservation of public policy prevents unacceptable effects of foreign law on the law of the forum. It is a protection where the application of foreign law might contravene public policy.<sup>239</sup>

It is necessary to take into account the difference between the concept of public policy (passive part<sup>240</sup>) and the concept of the overriding mandatory rules (active part).<sup>241</sup> The reservation of public policy is applied after determining the applicable foreign law under the conflict rules. Its function is negative or passive. An overriding mandatory rule of the forum prevents the application of the conflict rules and limits the scope of their application.<sup>242</sup> It takes precedence over the determination and application of the law.

<sup>237</sup> For more details on the reservation of public policy in general, its origin and purpose, legislation in particular national legal orders, relationship of public policy to arbitration and relevant case-law see BĚLOHLÁVEK, Alexander, J. *Rozhodčí řízení, ordre public a trestní právo: komentář. I. díl.* Praha: C. H. Beck, 2008, pp. 348–641; BĚLOHLÁVEK, Alexander, J. Výhrada veřejného pořádku hmotněprávního a procesního ve vztazích s mezinárodním prvkem. *Právník.* 2006, Vol. 145, No. 11, pp. 1267–1301; KAPITÁN, Zdeněk. Teorie veřejného pořádku a kritéria jeho použití. 1. část. *Časopis pro právní vědu a praxi.* 2004, Vol. 12, No. 3, pp. 214–227; KAPITÁN, Zdeněk. Teorie veřejného pořádku a kritéria jeho použití. 2. část. *Časopis pro právní vědu a praxi.* 2004, Vol. 12, No. 4, pp. 302–307.

<sup>238</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé.* 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 191.

<sup>239</sup> ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I).* Praha: Wolters Kluwer, 2013, p. 130.

<sup>240</sup> KROPHOLLER, Jan. *Internationales Privatrecht.* Tübingen: J. C. B. Mohr (Paul Siebeck), 1990, p. 216.

<sup>241</sup> See ROZEHNALOVÁ, Naděžda; TÝČ, Vladimír. Količní smluvní právo, výhrada veřejného pořádku a mezinárodně kogentní normy. *Právník.* 2002, Vol. 141, No. 6, p. 637.

<sup>242</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé.* 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 191.

The reservation of public policy is a subsequent correction which applies after the identification of the applicable law and enables to refuse the application of particular provisions of foreign law.<sup>243</sup> The overriding mandatory rule of the forum is applicable to any situation, irrespective of the content of the applicable law. Public policy protects certain specific interests which are contrary to the applicable law. It is a different mode of safeguarding public interests.

The aim of this section is to analyse the provisions relating to the reservation of public policy. It will first deal with the concept of public policy contained in the international conventions namely in the Rome Convention. Subsequently, it will define provisions concerning public policy regulated by the EU law. They are especially provisions situated in the Rome I Regulation and Rome II Regulation. Finally, it will analyse the reservation of public policy defined in Section 4 of PILA. It will describe the application framework of the reservation of public policy specified in Section 4 of PILA and analyse this instrument.

### 5.6.2 International Conventions

The concept of public policy is a typical provision of the international conventions on the applicable law or recognition and enforcement of judgements. These conventions shall take precedence over PILA.<sup>244</sup> Multilateral conventions on the applicable law regulating the public policy include, for example, the Convention on the law applicable to traffic accidents<sup>245</sup> and the Hague Protocol. They identically provide that the application of the applicable law may be refused only when it is manifestly contrary to public policy. The Rome Convention regulates the public policy in Article 16 and provides *“the application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy of the forum”*. The Rome Convention shall take precedence over PILA in case

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<sup>243</sup> DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 41.

<sup>244</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 42.

<sup>245</sup> Convention of 4 May 1971 on the law applicable to traffic accidents [online]. *Hague Conference on Private International Law*. Available from: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=81](http://www.hcch.net/index_en.php?act=conventions.text&cid=81)

of the contracts signed during the period from 1 July 2006 to 16 December 2009 inclusive.

The examples of the international conventions on the recognition and enforcement of judgements include the Vienna Convention on civil liability for nuclear damage,<sup>246</sup> the Lugano Convention and the Brussels Convention.<sup>247</sup> These conventions do not define the public policy and provide only that a judgement shall not be recognised if such recognition is manifestly contrary to public policy in the state in which the recognition is sought. Public policy is similarly regulated also by the New York Convention. The Convention on Protection of Children includes both substantive and procedural public policy.<sup>248</sup> The Czech Republic also concluded bilateral agreements on legal assistance which contain public policy provisions, for example with the Ukraine or with the Uzbekistan.<sup>249</sup>

### 5.6.3 EU Law

Public policy of a Member State creates the essential principles underpinning the legal order and constitutionally guaranteed fundamental rights and freedoms of individuals. The EU law does not define the public policy, but allows not to apply the provisions of the applicable law only in the case of manifest incompatibility with the public policy of *lex fori*. Public policy is regulated, for example, in the Rome I Regulation, Rome II Regulation, Brussels Ibis Regulation, Brussels IIbis Regulation, Maintenance Regulation, Rome III Regulation, Insolvency Regulation, Succession Regulation.

Section 4 of PILA shall apply only within the framework governed PILA which is hindered by the fact that this area is regulated by the EU law. On the other hand, the concept of public policy contained in PILA exceeds into areas regulated by the EU law. The content of public policy is defined by domestic law; EU law refers only to the internal conception of the public

<sup>246</sup> Vienna Convention of 21 May 1963 on civil liability for nuclear damage [online]. *International Atomic Energy Agency*. Available from: <https://www.iaea.org/sites/default/files/infcirc500.pdf>

<sup>247</sup> BRÍZA, Petr; BRÍCHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 30.

<sup>248</sup> *Ibid.*, p. 30.

<sup>249</sup> DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 47.

policy. The Court of Justice specifies certain limits of the application of the public policy in context of the EU law and examines their compliance. It interprets the public policy as an exception which can be applied only in the cases manifestly incompatible with the essential interests of society. This exception must be interpreted restrictively.<sup>250</sup> The actual content of the public policy is determined primarily by individual Member States which filled it with common European values in accordance with the principle of subsidiarity.<sup>251</sup>

#### 5.6.4 Public Policy in the Rome I Regulation and Rome II Regulation

The definition of public policy of the forum is identical in the Rome I Regulation and Rome II Regulation. Article 21 of the Rome I Regulation and Article 26 of the Rome II Regulation provide that “*the application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum*”. Public policy according to these regulations is applied *ex officio*. The forum is given the discretion for the assessment of the effects of these provisions. Public policy has a strictly protective function in relation to the domestic law. It is an exception from the application of foreign law. It is conceived in general and relates to all provisions of these regulations respectively application of the applicable law according to them.<sup>252</sup> The notion “manifestly incompatible” enables to limit the application of the public policy to exceptional cases only.<sup>253</sup>

Article 21 of the Rome I Regulation and Article 26 of the Rome II Regulation “*refers primarily to the rare cases where the relevant foreign rule (as applied to the particular facts) departs so radically from the concepts of fundamental justice accepted in the forum country that its application would be intolerably offensive to the judicial conscience there, even when all the connecting-factors (except as to the forum seised) are*

<sup>250</sup> BŘÍZA, Petr; BŘICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, pp. 30–31.

<sup>251</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 43.

<sup>252</sup> ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, p. 130.

<sup>253</sup> DOBLÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 46.

*with the country of the rule*".<sup>254</sup> The reservation of public policy affects national law as well as European and international law from the perspective of its content. It is a means not only bound to the European public policy, but it must have a universal extent due to the universal character of the Rome I Regulation and Rome II Regulation.<sup>255</sup>

Both regulations distinguish public policy and the concept of the overriding mandatory rules similarly as the Czech law.<sup>256</sup> It is necessary to evaluate the effect of the application of foreign law on public policy of the forum during the application of the reservation of public policy. The content of the public policy of the forum is compared with the potential consequences of the application of the foreign law provisions. Conversely, the content or effect of the application of foreign law is not relevant in the case of the application of the overriding mandatory rule. Court applies the overriding mandatory rules if a particular relationship falls within their scope.<sup>257</sup> The question is what replaces the foreign law that is ruled out by the reservation of public policy. Sometimes it does not need to be replaced. The foreign law can be replaced by the law of the forum in some cases. It may be alternatively substituted also by the legal order with which the situation has a close connection or *lex causae*.<sup>258</sup>

### 5.6.5 Reservation of Public Policy in the PILA

The reservation of public policy is regulated in Section 4 of PILA which provides "*provisions of a foreign law which is to be applied pursuant to the provisions of this Act shall not be applied if the effects of such application are manifestly incompatible with the public policy. For the same reasons it shall not be possible to recognise foreign judgements, foreign court settlements, foreign notarial acts and other authentic instruments, foreign arbitral awards, to undertake a procedural act based on a request*

<sup>254</sup> STONE, Peter. *EU Private International Law*. 2nd ed. Cheltenham: Edward Elgar Publishing Limited, 2010, p. 339.

<sup>255</sup> ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, pp. 130–131.

<sup>256</sup> BRÍZA, Petr; BRICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 30.

<sup>257</sup> BĚLOHLÁVEK, Alexander, J. *Římská úmluva a Nařízení Řím I: komentář v širších souvislostech evropského a mezinárodního práva soukromého. II. díl*. Praha: C. H. Beck, 2009, p. 1335.

<sup>258</sup> BOGDAN, Michael. *Private International Law as Component of the Law of the Forum: General Course*. Hague: Hague Academy of International Law, 2012, pp. 234–237.

from abroad, or to recognise a legal relation or an event which originated abroad or under a foreign law". PILA refers to public policy within the meaning of the Czech state and Czech legal order. This provision does not require the evaluation of the content of the foreign state legislation. However, it is necessary to evaluate the effects which the application of these rules invokes internally. Section 4 of PILA prevents such effects only when they are contrary, for example, to fundamental principles of the legal order.<sup>259</sup>

The refusal of the application of the provisions of foreign law is exceptional; it does not exclude the application of foreign law as a whole, but only a particular provision which gives rise to unacceptable consequences. The refusal must be assessed with regard to all circumstances of the case to determine whether such situation is given. Relevant to this evaluation will be the intensity of the relationship to the domestic law.<sup>260</sup> Refused can be the application of the procedural as well as substantive provisions of a foreign law or the recognition and enforcement of foreign judgements. The reasons for the refusal may be of different nature. In the procedural law, it may be, for example, the violation of fundamental principles of fair trial.<sup>261</sup> The reservation of public policy can be used generally against the legal effects which occurred abroad or under the foreign law. The term "public policy" is commonly used in the EU legislation and international conventions without further explanation. The reservation of public policy can be defined as an exception applicable if the effects of application of foreign law are inconsistent with good morals<sup>262</sup> or such principles of the Czech law whose observance must be required without exception.<sup>263</sup>

<sup>259</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 37.

<sup>260</sup> *Ibid.*

<sup>261</sup> DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 44.

<sup>262</sup> The definition of good morals is contained, for example in the Decision of the Constitutional Court of the Czech Republic of 26 February 1998, No. II. ÚS 249/97; Decision of the Constitutional Court of the Czech Republic of 7 November 2012, No. I. ÚS 295/10; Decision of the Supreme Court of the Czech Republic of 25 October 2012, No. 29 Cdo 941/2011. See DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, pp. 45, 49.

<sup>263</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 37.

The definition of public policy contained in Section 4 of PILA presumes the continuity with Section 36 of former PILA.<sup>264</sup> “Under Section 36, the legal regulations of a foreign state may not be applied if the effects of such an application are contrary to those principles of the social and governmental system of the Czech Republic and its law, whose observance must be required without exception.”<sup>265</sup> It is related to the fundamental principles of the Czech public order contained particularly in the Charter of Fundamental Rights and the Constitution. Public policy is one of the essential attributes of a democratic law-based state. It permeates the entire body of law and includes the rules on which the legal foundations of the social order are built.<sup>266</sup> The Charter of Fundamental Rights refers to principle of the public policy in Article 14, Article 16, Article 19 and Article 20. The category of public policy is thereby chosen as the criterion limiting the autonomy of the will.<sup>267</sup>

The term “public policy” is also contained in Section 1(2) of the Civil Code, but is not defined. Public policy is one of the essential requirements for a democratic law-based state (Article 9(2) of the Constitution).<sup>268</sup> The scale of values is enshrined in Section 3(2) of the Civil Code which sets out the principles underpinning the private law. The private law stems also from other generally recognised principles of justice and law under Section 3(3) of the Civil Code. These provisions should be the basis for assessing the principles of the social and governmental system of the Czech Republic, whose observance must be required without exception. The discretion and decision, however, will be quite individual, depending on the circumstances of a particular case.<sup>269</sup>

Public policy has defensive character only; it has negative function as an instrument preventing undesirable consequences of otherwise applicable foreign

<sup>264</sup> BŘÍZA, Petr; BŘICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 25.

<sup>265</sup> PAUKNEROVÁ, Monika. *Private International Law in the Czech Republic*. Alphen aan den Rijn: Kluwer Law International, 2011, p. 72.

<sup>266</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 38.

<sup>267</sup> DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu ke 1. lednu 2014*. Praha: Leges, 2013, p. 45.

<sup>268</sup> *Ibid.*, p. 45.

<sup>269</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 39.



law. Conversely, positive public policy is asserted through overriding mandatory rules. The reservation of public policy envisages an entirely exceptional instrument for obstruction of the application of a certain foreign provision. The reservation of public policy is not directed against the content of foreign rules. It is oriented to the consequences of their application. A Czech judge does not assess foreign law he evaluates only the effects of its application to a particular legal relationship whether or not it is contrary to the fundamental principles, whose observance must be required without exception.<sup>270</sup> The overriding mandatory rules shall take precedence over the choice and application of the law. Public policy is a subsequent correction which is applied after the determination of the applicable law whereby the forum can refuse to apply foreign law because it offends the essential social or juridical concept of the forum.<sup>271</sup>

The reservation of public policy must be restrictively conceived which means that not all provisions of foreign law which are different from Czech provisions are contrary to the public policy, but only those provisions whose application is contrary to important principles of the Czech law. For example, these are the regulations discriminating women, on the basis of nationality, race etc. The condition for the application of the reservation of public policy is a sufficient intensity of a particular relationship to the forum state.<sup>272</sup> The question is whether the provision which is contrary to the public policy must be replaced. *“The gap in the applicable law that may appear in such cases, should be substitute by the lex fori, if necessary. In some cases, when a rule of a foreign law has been set aside, it will not be necessary to replace this rule at all.”*<sup>273</sup> It can be substituted also by another law if it has close relation to a particular relationship.<sup>274</sup>

PILA presumes the possibility of use of the reservation of public policy especially in connection with the recognition and enforcement of foreign

<sup>270</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 39–40.

<sup>271</sup> DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 41.

<sup>272</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, pp. 39–40.

<sup>273</sup> PAUKNEROVÁ, Monika. *Private International Law in the Czech Republic*. Alphen aan den Rijn: Kluwer Law International, 2011, p. 73.

<sup>274</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 41.

judgements<sup>275</sup> and arbitral awards. These are embodied in Section 15(1) (e), Section 16(1) and Section 121(d) of PILA. The reason for invoking the reservation of public policy may be generally the violation the right to a fair trial<sup>276</sup> as well as other reasons, especially the circumstances that the fulfilment of obligation required by foreign decision is inconsistent with the mandatory rule of place of enforcement such decision. The reservation of public policy can be used with connection to the recognition of judgement on adoption under Section 63 of PILA. The reservation of public policy is also the ground for refusal of judicial assistance under Section 103(b) and Section 104(1) of PILA, in cases where a Czech court is requested to realise a procedural act which is contrary to public policy.<sup>277</sup> In case the parties agree on a jurisdiction of foreign court, a Czech court shall hear the case if the jurisdiction agreement is contrary to the public policy under Section 86(2)(d) of PILA.<sup>278</sup>

### 5.6.6 Conclusion on Public Policy

This sub-chapter dealt with the reservation of public policy which serves to protect fundamental social values as morality, freedom, justice or decency. Public policy as traditional concept of Private International Law is located in the international conventions, EU law and also national law. In this sub-chapter, we initially analysed the concept of public policy contained in international conventions. There were listed some examples of the international conventions on the applicable law or the recognition and enforcement of judgements. These conventions do not define the public policy; they provide only that the application of the applicable law may be refused if such application is manifestly incompatible with the public policy of the forum or that judgements may not be recognised if such recognition is manifestly contrary to public policy in the state in which the recognition is sought.

<sup>275</sup> Definition of foreign judgements is contained in Section 14 of PILA. See BRÍŽA, Petr; BRICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 28.

<sup>276</sup> Decision of the Constitutional Court of the Czech Republic of 25 April 2006, No. I. ÚS 709/05.

<sup>277</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, pp. 41–42.

<sup>278</sup> BRÍŽA, Petr; BRICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 29.

The following part discussed the reservation of public policy in the EU law. It stated the examples of regulations which contain the provisions relating to public policy and further analyses the provisions of the Rome I Regulation and Rome II Regulation. Both of them enable to refuse the application of a provision of the law of any country only if such an application is manifestly incompatible with the public policy of the forum. The last part dealt with the reservation of public policy regulated by the PILA. Under Section 4 of PILA, the provisions of a foreign law shall not be applied if the effects of such an application are manifestly incompatible with the Czech public policy. For the same reasons it shall not be possible to recognise foreign judgements, foreign court settlements, foreign notarial acts and other authentic instruments, foreign arbitral awards, to undertake a procedural act based on a request from abroad or to recognise a legal relation or an event which originated abroad or under a foreign law.

The reservation of public policy is an exceptional instrument which enables the forum country to refuse the recognition of the foreign judgements or application of foreign law if effects of such application are fundamentally unacceptable. It is an extraordinary means of defence against undesirable effects of the application of foreign law. The reservation of public policy can be defined as an exception applicable if effects of the application of foreign law are contrary to those principles of the society whose observance must be required without exception. It is one of the essential attributes of a democratic law-based state. The reservation of public policy is applied after the identification of the applicable law while not evaluating its content, but only the consequences of its application.

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## 6 OVERRIDING MANDATORY RULES

### 6.1 Introduction

The overriding mandatory rules can be defined as provisions applicable to any situation falling within their scope irrespective of the law otherwise applicable. These are rules which may not be within the limits of their subject matter fundamentally changed or replaced by foreign law. The overriding mandatory rules must be applied within their scope always regardless of which law governing the private law relationship with an international element under the conflict rules. These provisions restrict the scope for an application of the conflict rules and choice of law undertaken by them because they precede the selection of law on the basis of conflict rules.<sup>279</sup> Other terms denoting overriding mandatory rules include “internationally mandatory rules”<sup>280</sup>, “peremptory norms”, “immediately applicable rules” or “super-mandatory rules”<sup>281</sup>.

The overriding mandatory rules protect the essential interests of the state and they pursue the active enforcement of urgent social interests. These are the rules that meet a specific purpose of the political, economic or social nature which the legal order of which they form a part considers to be particularly significant.<sup>282</sup> The overriding mandatory rules influence rights and duties of the parties of private law relationships with an international element fundamentally, however, they do not regulate these relationships directly and do not belong to the Private International Law. They become object of interest of the Private International Law somewhat indirectly when their application is required by the rules of the Private International Law regardless

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<sup>279</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 230.

<sup>280</sup> HARTLEY, Trevor, C. Mandatory Rules in International Contracts: The Common Law Approach. In *Collected Courses of the Hague Academy of International Law*. 1997, Vol. 266, p. 347.

<sup>281</sup> BOGDAN, Michael. *Private International Law as Component of the Law of the Forum: General Course*. Hague: Hague Academy of International Law, 2012, p. 239.

<sup>282</sup> HARTLEY, Trevor, C. Mandatory Rules in International Contracts: The Common Law Approach. In *Collected Courses of the Hague Academy of International Law*. 1997, Vol. 266, p. 346.

of the applicable law. The overriding mandatory rules regulate a wide range of legal relationships so that they set certain limits. These are the rules of the public law mainly but it is not always so. These may be rules of the private law serving to protect the interests of the weaker party to a contract particularly in the area of consumer and employment law.<sup>283</sup>

It is necessary to take into account the differences between the concept of public policy<sup>284</sup> (passive part) and the concept of the overriding mandatory rules (active part<sup>285</sup>) in the course of the application of the overriding mandatory rules.<sup>286</sup> The overriding mandatory rules are applicable to any situation irrespective of the content of applicable law.<sup>287</sup> On the other hand, the reservation of public policy (public order) protects certain specific interests which are contrary to an applicable law. *“It is a method whereby the forum can refuse to apply an otherwise applicable law because it offends against the essential social or juridical concepts of the forum.”*<sup>288</sup> It is a different mode of safeguarding public interest which identifies public character of the overriding mandatory rules. The reservation of public policy comes into play after determining the applicable law. It is primarily of negative character. Overriding mandatory rules are applied directly irrespective of the law otherwise applicable.

The overriding mandatory rules in Private International Law represent the rules of a special character which must be distinguished from

<sup>283</sup> For more details on overriding mandatory rules in general, their origin and kinds see KAPITÁN, Zdeněk. *Nutně použitelné normy v mezinárodním prostředí*. Ph.D. Thesis. Brno: Masaryk University, Faculty of Law, 2004, 163 p.

<sup>284</sup> For more details on institute of public policy see BĚLOHLÁVEK, Alexander, J. *Rozhodčí řízení, ordre public a trestní právo: komentář. I. díl*. Praha: C. H. Beck, 2008, pp. 348–641; BĚLOHLÁVEK, Alexander, J. Výhrada veřejného pořádku hmotněprávního a procesního ve vztazích s mezinárodním prvkem. *Právník*. 2006, Vol. 145, No. 11, pp. 1267–1301; KAPITÁN, Zdeněk. Teorie veřejného pořádku a kritéria jeho použití. 1. část. *Časopis pro právní vědu a praxi*. 2004, Vol. 12, No. 3, pp. 214–227; KAPITÁN, Zdeněk. Teorie veřejného pořádku a kritéria jeho použití. 2. část. *Časopis pro právní vědu a praxi*. 2004, Vol. 12, No. 4, pp. 302–307; ROZEHNALOVÁ, Naděžda; TÝČ, Vladimír. Kolizní smluvní právo, výhrada veřejného pořádku a mezinárodně kogentní normy. *Právník*. 2002, Vol. 141, No. 6, pp. 634–661.

<sup>285</sup> KROPHOLLER, Jan. *Internationales Privatrecht*. Tübingen: J. C. B. Mohr (Paul Siebeck), 1990, p. 216.

<sup>286</sup> See ROZEHNALOVÁ, Naděžda; TÝČ, Vladimír. Kolizní smluvní právo, výhrada veřejného pořádku a mezinárodně kogentní normy. *Právník*. 2002, Vol. 141, No. 6, p. 637.

<sup>287</sup> It depends on the origin of overriding mandatory rules. Their application mode is different than in the case rules directly regulating private relationship.

<sup>288</sup> NYGH, Peter. *Autonomy in International Contracts*. Oxford: Clarendon Press, 1999, p. 206.

mandatory rules. The domestic mandatory rules are characterized generally as rules which cannot be derogated from by contract. The overriding mandatory rules are mostly of public character, they are absolutely mandatory or of strictly coercive nature and they are applied irrespective of the law otherwise applicable.<sup>289</sup> The overriding mandatory rules are “*a far narrower sub-category of mandatory rules: rules which demand to be applied to the issue before the court regardless of any choice of law by the parties or any reference by a local choice of law rule to another legal system. One might describe them as mandatory rules in the international sense to distinguish them from the domestic variety.*”<sup>290</sup>

The aim of this section is to analyse the provisions relating to the overriding mandatory rules of the forum and the overriding mandatory rules of a third country in the Rome Convention, Rome I Regulation, Rome II Regulation and PILA. The overriding mandatory rules of *lex fori* are defined in Section 3 of PILA such as provisions applicable to any situation falling within their scope irrespective of the law otherwise applicable. This conception corresponds to Article 7(2) of the Rome Convention, Article 9(2) of the Rome I Regulation and Article 16 of the Rome II Regulation. The overriding mandatory rules of a third country are regulated in Section 25 of PILA, Article 7(1) of the Rome Convention and Article 9(3) of the Rome I Regulation.

## 6.2 International Conventions

The question of the applicability of the overriding mandatory rules is regulated preferentially and exhaustively by the EU law and alternatively by some international conventions in the present. Section 3 and Section 25 of PILA shall apply only if the question does not fall within material scope of the EU law or international conventions.<sup>291</sup> These include, for example, the Convention on the law applicable to traffic accidents. Article 7 of this convention provides “*whatever may be the applicable law, in determining liability account shall be taken of rules relating to the control and safety of traffic which were*

<sup>289</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 33.

<sup>290</sup> NYGH, Peter. *Autonomy in International Contracts*. Oxford: Clarendon Press, 1999, p. 200.

<sup>291</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 33.

*in force at the place and time of the accident*". These provisions of administrative law are the overriding mandatory rules. This convention is used preferably under Article 28 of the Rome II Regulation.<sup>292</sup>

The overriding mandatory rules are regulated in Article 7 of the Rome Convention.<sup>293</sup> Article 7(1) defines the application of the overriding mandatory rules of a third country. "*When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.*" This Article shall take precedence over Section 25 of PILA whose nature corresponds to Article 7(1) of the Rome Convention, the obvious source of inspiration for the PILA provision.<sup>294</sup>

Article 7(2) of the Rome Convention relates to the overriding mandatory rules of *lex fori*. "*Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.*" The term "mandatory rules" caused terminological problem because it is used for the mandatory rules in domestic sense regulated in Article 3(3) of the Rome Convention and also for the overriding mandatory rules in the Article 7 of the Rome Convention although they represent different concepts.<sup>295</sup> Article 7(2) of the Rome Convention shall take precedence over Section 3 of PILA and sets a generally accepted principle that the court applies always the overriding mandatory rules of its own law.<sup>296</sup>

<sup>292</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 188.

<sup>293</sup> See ROZEHNALOVÁ, Naděžda; TÝČ, Vladimír. Koližní smluvní právo, výhrada veřejného pořádku a mezinárodně kogentní normy. *Právník*. 2002, Vol. 141, No. 6, pp. 655–660.

<sup>294</sup> BRÍZA, Petr; BŘICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 158.

<sup>295</sup> BĚLOHLÁVEK, Alexander, J. *Římská úmluva a Nařízení Řím I: komentář v širších souvislostech evropského a mezinárodního práva soukromého. II. díl*. Praha: C. H. Beck, 2009, p. 1321.

<sup>296</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 36.

### 6.3 EU Law

The application of Section 3 and Section 25 of PILA is excluded for relations regulated by the EU law exhaustively. These provisions shall apply only if the question does not fall within the material scope of the EU law. The Rome I Regulation and Rome II Regulation do not regulate, for example, issues related to personal status, legal capacity of the natural persons, obligations arising out of the family relationships, issues regulated by the company law etc. For all these questions the domestic Private International Law is usually applied inclusive of Section 3 and Section 25 of PILA. These provisions shall also apply to other than obligation relations, for example, to property rights or intellectual property rights etc. The focus of the overriding mandatory rules is undoubtedly in the field of rights of obligations and the reach of PILA is therefore relatively limited.<sup>297</sup>

#### 6.3.1 Overriding Mandatory Rules in the Rome I Regulation

Regarding its temporal scope of application, the Rome I Regulation applies to the contracts concluded in the period from 17 December 2009 inclusive. The overriding mandatory rules set the limitation for the autonomy of the contracting parties. These are provisions of a strictly positive or peremptory nature because they pursue a principle that the overriding mandatory rules take precedence over otherwise applicable law and even over the choice of law expressed by the parties. The overriding mandatory rules must reflect a public, rather than a private interest. These are the rules of the public law usually in the continental concept, but it may also be the rule of private law which is domestically mandatory and overrides the application of foreign law that would be otherwise applicable as *lex causae*. These include traditionally, for example, the provisions regulating the arms trade, antitrust law, import and export restrictions etc. but also provisions of labour law.<sup>298</sup>

<sup>297</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 33.

<sup>298</sup> BĚLOHLÁVEK, Alexander, J. *Římská úmluva a Nařízení Řím I: komentář v širších souvislostech evropského a mezinárodního práva soukromého, II. díl*. Praha: C. H. Beck, 2009, pp. 1319, 1336, 1338.



The overriding mandatory rules are defined in Article 9(1) of the Rome I Regulation such as “*provisions the respect for which is regarded as crucial by a country 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 contract under this Regulation*”. This definition is based on the judgement of the Court of Justice in joined cases C-369/96 and C-376/96.<sup>299</sup> At the same time, in the case of the overriding mandatory rules of a third country “*regard shall be had to their nature and purpose and to the consequences of their application or non-application*”.<sup>300</sup> This approach is problematic because all characters of the overriding mandatory rules should be specified in the definition in Article 9(1) so to avoid any doubts.<sup>301</sup>

The overriding mandatory rules are the provisions applicable irrespective of the law otherwise applicable and must take into account the purpose and character of a certain regulation the aim of which is to protect a public interest and the relation between the factual and legal relationship and territory or other important interests of the forum.<sup>302</sup> The overriding mandatory rules should be interpreted restrictively. Outside of the scope of the Rome I Regulation should be Section 3 of PILA interpreted in the same way as Rome I Regulation.<sup>303</sup> In Article 9 of the Rome I Regulation are distinguished three kinds of overriding mandatory rules: the overriding mandatory rules of the forum, the overriding mandatory rules of another member state and the overriding mandatory rules of non-Member States.<sup>304</sup>

Section 3 of PILA corresponds to Article 9(2) of the Rome I Regulation which regulates the overriding mandatory rules of the forum and shall take precedence over Section 3 of PILA. It enshrines a generally accepted

<sup>299</sup> Judgement of the Court of Justice of 23 November 1999. Jean-Claude Arblade and Arblade&Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Fofrage SARL (C-376/96). Joined cases C-369/96 and C-376/96.

<sup>300</sup> Article 9(3) of the Rome I Regulation.

<sup>301</sup> ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, p. 124.

<sup>302</sup> BĚLOHLÁVEK, Alexander, J. *Římská úmluva a Nařízení Řím I: komentář v širších souvislostech evropského a mezinárodního práva soukromého. II. díl*. Praha: C. H. Beck, 2009, p. 1331.

<sup>303</sup> BRÍZA, Petr; BŘICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, pp. 22–23.

<sup>304</sup> BĚLOHLÁVEK, Alexander, J. *Římská úmluva a Nařízení Řím I: komentář v širších souvislostech evropského a mezinárodního práva soukromého. II. díl*. Praha: C. H. Beck, 2009, p. 1344.

principle that each forum applies the overriding mandatory rules of its own body of laws.<sup>305</sup> Under Article 9(2) “*nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum*”. This Article guarantees the application of the overriding mandatory rules *lex fori*, irrespective of the law otherwise applicable.<sup>306</sup>

Article 9(3) of the Rome I Regulation defines a range of foreign overriding mandatory rules that should be applied to contractual obligations. It provides that “*effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application*”. Section 25 of PILA may be applied only in relation to the obligations which do not fall within the material scope of the Rome I Regulation.<sup>307</sup> Article 9(3) of the Rome I Regulation is more restrictive than Section 25 of PILA whose nature is similar to that of Article 7(1) of the Rome Convention.<sup>308</sup>

The forum is given the discretion whether or not to apply the overriding mandatory rules of a third country under Article 9(3) of the Rome I Regulation. The judicial discretion is particularly relevant when comparing the effects of conflicting overriding mandatory rules of the various legal orders among which is necessary to decide.<sup>309</sup> The possibility of the application of other than overriding mandatory rules of the chosen law or law of the forum is limited to the situation where a contract has to be or has been performed in the territory of the state whose overriding mandatory provisions render the performance of the contract unlawful. In practice, it would

<sup>305</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 36.

<sup>306</sup> DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 40.

<sup>307</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 187.

<sup>308</sup> BŘÍZA, Petr; BŘICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 158.

<sup>309</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 185.

be unfair to force one party to commit the offence, for example, if the law of the place of performance is changed after the conclusion of contract.<sup>310</sup>

### 6.3.2 Overriding Mandatory Rules in the Rome II Regulation

The Rome II Regulation applies to the events giving rise to damage occurring after 11 January 2009.<sup>311</sup> Article 16 of the Rome II Regulation does not contain the definition of the overriding mandatory provisions. The explanatory note refers to the judgement of the Court of Justice in the joined cases C-369/96 and C-376/96. This shows that the overriding mandatory rules have lower relevance for non-contractual than contractual obligations.<sup>312</sup> Article 16 of the Rome II Regulation guarantees the application of the overriding mandatory rules *lex fori* irrespective of the law governing legal relationship.<sup>313</sup> It provides that “*nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.*”

Section 3 of PILA corresponds to the Article 16 of the Rome II Regulation. Article 16 shall take precedence over Section 3 of PILA. It enshrines the generally accepted principle that the court always applies the overriding mandatory provisions of its own law. Rome II Regulation is limited only to the application of the overriding mandatory rules of the forum. The possibility of the application of the overriding mandatory rules of a third country is not given for the non-contractual obligations within the material scope of the Rome II Regulation.<sup>314</sup> Section 25 of PILA shall not apply within the scope of the EU law even when the overriding mandatory rules of a third country are not regulated by it at all. In such case, it must be held that the EU legislature does not allow a national court to take into account

<sup>310</sup> BŘÍZA, Petr; BŘICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 158.

<sup>311</sup> For more details on non-contractual obligations under the Rome II Regulation see VALDHANS, Jiří. *Právní úprava mimosmluvních závazků s mezinárodním prvkem*. Praha: C. H. Beck, 2012, 277 p.

<sup>312</sup> ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, p. 191.

<sup>313</sup> DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 40.

<sup>314</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, pp. 36, 187.

the overriding mandatory rules of a third state.<sup>315</sup> In this respect, however Article 17 of the Rome II Regulation provides more leeway as it regulates the rules of safety and conduct.<sup>316</sup>

Under Article 17 of the Rome II Regulation “*in assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability*”. This provision is similar to Article 7 of the Convention on the law applicable to traffic accidents.<sup>317</sup> The rules of safety and conduct must be taken into account as a matter of fact and the person for whose benefit they are applied must establish the content of these rules. These include, for example, traffic rules, regulation for health and safety in various activities such as building regulations, professional safety etc. The rules of safety and conduct may be the overriding mandatory rules because they pursue a public interest and apply irrespective of the law otherwise applicable. They are a subcategory of the overriding mandatory rules.<sup>318</sup>

### 6.3.3 Succession Regulation

The Succession Regulation does not regulate the overriding mandatory rules but provides special rules imposing restrictions concerning or affecting the succession in respect of certain assets which are *de facto* overriding mandatory rules *lex rei sitae* for certain types of the assets creating inheritance.<sup>319</sup> Article 30 of the Succession Regulation states: “*Where the law of the State in which certain immovable property, certain enterprises or other special categories of assets are located contains special rules which, for economic, family or social considerations, impose restrictions concerning or affecting the succession in respect of those assets, those special rules shall apply to the succession in so far as, under the law of that state, they are applicable irrespective of the law applicable to the succession.*”

<sup>315</sup> BŘÍZA, Petr; BŘICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 157.

<sup>316</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 187.

<sup>317</sup> DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 40.

<sup>318</sup> ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, pp. 191–194.

<sup>319</sup> DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 40.

This exception from the application of the law applicable to the succession requires a strict interpretation in order to remain compatible with the general objective of the Succession Regulation. The special rules imposing restrictions concerning or affecting the succession in respect of certain assets assume their application such as overriding mandatory rules. In the material scope of the Succession Regulation, this shall take precedence over Section 25 of PILA. These include, for example, special provisions protecting certain kinds of land from cleavage, for instance, under the English law, French law and Slovak law.<sup>320</sup>

#### 6.4 Overriding Mandatory Rules in the PILA

The overriding mandatory rules<sup>321</sup> can be divided into domestic and foreign. The overriding mandatory rules of the law of the forum shall take precedence over foreign rules if they have the same subject matter. The overriding mandatory rules of a third country do not apply either if they are contrary to domestic public policy. These rules apply only within the limits of their application scope. They must have a sufficiently close connection to the particular legal relation which usually consists in connection to the territory of the state whose overriding mandatory rules should be applied.<sup>322</sup> The overriding mandatory rules of the law of the forum are defined in Section 3 of PILA as provisions applicable to any situation falling within their scope irrespective of the law otherwise applicable. The overriding

<sup>320</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, pp. 187–188.

<sup>321</sup> For more details on overriding mandatory rules under the Czech law see KALENSKÝ, Pavel. *Právo mezinárodního obchodu a dosah „ius cogens“*. *Právní zpravodaj československého zahraničního obchodu*. 1975, Vol. 20, No. 3, pp. 14–19; KAPITÁN, Zdeněk. *Nutně použitelné normy v mezinárodním prostředí*. Ph.D. Thesis. Brno: Masaryk University, Faculty of Law, 2004, 163 p.; KUČERA, Zdeněk. *Použití tuzemského práva v občanskoprávních vztazích s mezinárodním prvkem*. *Právník*. 1985, Vol. 124, No. 3, pp. 274–286; PAUKNEROVÁ, Monika. *Přímo použitelné administrativně-právní normy a mezinárodní právo soukromé*. *Právník*. 1983, Vol. 122, No. 5, pp. 477–489; PAUKNEROVÁ, Monika. *Kogentní normy v mezinárodní obchodní praxi*. I. část. *Právní praxe v podnikání*. 1994, No. 11, p. 4; PAUKNEROVÁ, Monika. *Kogentní normy v mezinárodní obchodní praxi*. II část. *Právní praxe v podnikání*. 1994, No. 12, p. 22; PAUKNEROVÁ, Monika. *Tzv. nutně použitelné normy před Rozhodčím soudem při HK ČR a AK ČR*. *Právní praxe v podnikání*. 1996, No. 7–8, p. 16.

<sup>322</sup> DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 41.

mandatory rules of a third country are regulated in Section 25 of PILA. For their application PILA provides that there must be a close connection between the situation and third country concerned.<sup>323</sup>

The application of Section 3 and Section 25 of PILA is excluded for relations regulated by the EU law or international conventions exhaustively. These provisions shall apply only if the question does not fall within the material scope of the EU law or international conventions, for example, issues related to personal status, legal capacity of the natural person, obligations arising out of family relationships, issues regulated by company law etc. To all these questions, domestic Private International Law is usually applied, including Section 3 and Section 25 of PILA. These provisions shall also apply to other than obligations-related relations, for example, property rights or intellectual property rights etc. The focus of the overriding mandatory rules is undoubtedly in the field of obligations and PILA's scope of application is therefore relatively limited.<sup>324</sup>

#### 6.4.1 Overriding Mandatory Provisions of the Law of the Forum

Section 3 of PILA states that “*provisions of this Act shall not prevent the application of such provisions of the Czech legal order which are, within the limits of their subject matter, always applicable regardless of which law governs the legal relations that are affected by the application of such provisions*”. These are provisions of internal law which must be applied always unconditionally within the limits of their subject matter. These rules fundamentally influence the rights and obligations of the parties of the private law relationships with a foreign element. Effects of the overriding mandatory rules occur regardless of which legal order governs the private law relationship with the international element.<sup>325</sup>

The overriding mandatory rules must be distinguished from the mandatory rules.<sup>326</sup> The mandatory rules are characterized generally as rules which cannot be derogated from by contract. The overriding mandatory rules are a subcategory of the mandatory rules and must be interpreted

<sup>323</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 33.

<sup>324</sup> *Ibid.*

<sup>325</sup> *Ibid.*

<sup>326</sup> Decision of the Supreme Court of the Czech Republic of 8 December 2008, No. 21 Cdo 4196/2007.

restrictively. The notion “within the limits of their subject matter” suggests that in determining whether a particular rule is overriding mandatory it must be assumed that these rules are subject to their regulation expressly territorially or in person specifically defined, implying an obligation to apply these rules unconditionally, as opposed to the mandatory rules.<sup>327</sup> The concept of the overriding mandatory rules must be also distinguished from the concept of the public policy reservation. The overriding mandatory rules shall take precedence over the selection and application of the law. Public order is a subsequent correction which is applied after determination of the applicable law whereby the forum can refuse to apply the foreign law because it contravenes the essential social or juridical concepts of the forum.<sup>328</sup>

The overriding mandatory rules specified in Section 3 of PILA should correspond to the EU law which defines them as provisions protecting essential public interests the application of which occurs extraordinarily. They protect not only private interest but also always a certain public interest or must reflect a clear intention be applied to the situation with an international element, situation outside the territory of the Czech Republic, even when the Czech conflict rules determine a foreign applicable law. The overriding mandatory rules are enforced imperatively regardless of whether they are a part of the applicable law or not; their application cannot be avoided either by the choice of another law than whose they are a part of. These rules apply to the private law relationships which are included into their spatial scope irrespective of the legal order which is applicable.<sup>329</sup>

The overriding mandatory rules in Section 3 of PILA can be defined as provisions of the Czech legal order which are within the limits of their subject matter applicable always; their application shall not prevent a fact that legal relation which is affected by these provisions is governed by other than Czech law.<sup>330</sup>

327 PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 35.

328 DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 41.

329 PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, pp. 33–34.

330 BRÍZA, Petr; BŘICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 20.

The overriding mandatory rules of the Czech law are applied by the court or other authority automatically for these rules are the part of the domestic law.<sup>331</sup> A Czech court has to apply these rules regardless of the fact that it is a private law relationship with an international element and that the law provides foreign law to govern this relationship. The application of these rules cannot be prevented by a choice of law.<sup>332</sup> The overriding mandatory rules take precedence over the law determined by a conflict rules if the choice of law is not possible or if the parties did not choose the law.<sup>333</sup>

PILA does not specify which rules are overriding mandatory, although a precise legal determination of the overriding mandatory rules would be ideal. In the absence of a statutory definition, the case law should be examined to see whether it has identified some provision to be overriding mandatory. If the case law is silent in this respect, the nature of the rule should be considered. The overriding mandatory rules must represent a public interest. Rules representing an interest of an individual are not overriding mandatory. This interest may be declared by the legislature but this is rare. It is implicit in laws which seek to protect moral values. The overriding mandatory rules are usually found in the public law especially in the administrative, financial, constitutional and criminal law.<sup>334</sup>

On the other hand, mandatory rules contained in the private law are not overriding mandatory. The overriding mandatory rules contained in the public law must intervene in an area regulated by PILA, thus they must have consequences for the participants of the private relationships. For determining whether a particular rule is overriding mandatory it can serve as supporting guidance whether its breach may warrant criminal sanctions.<sup>335</sup> For example, the regulation and control of market and national economy, protection of monetary resources, antitrust laws, protection of national heritage,

<sup>331</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 33.

<sup>332</sup> BRÍZA, Petr; BRICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 20.

<sup>333</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 35.

<sup>334</sup> DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, pp. 39–41.

<sup>335</sup> BRÍZA, Petr; BRICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, pp. 21–22.



import and export restrictions, protection of environment, rules which prohibit discrimination, protection of labour as a limitation of working hours or professional safety and health etc.<sup>336</sup>

A judge has to always carefully examine whether a personal and material scope of the overriding mandatory rule is fulfilled which means she has to be sure that the Czech legal order has the interest in the unconditional application of the overriding mandatory rule in the particular case. Therefore, she examines whether there is a sufficiently close connection between the overriding mandatory rule and the dispute. If there is a sufficiently close connection and the case with an international element falls within the scope of the overriding mandatory rule it must be used directly and application of provision of the law which is contrary to the overriding mandatory rule is excluded. The consequences of the application of overriding mandatory rules may be different - it is mostly the annulment of the offending contract. A court examines the consequences specifically and must always respect the autonomy of the parties of the private law relationship and the principle that the application of the overriding mandatory rules is an exception, not a rule.<sup>337</sup>

#### 6.4.2 Overriding Mandatory Provisions of Other Foreign Law

The overriding mandatory rules of a third country are regulated in Section 25 of PILA. These rules are also regulated in the EU law therefore Section 25 applies only within the scope of PILA that means outside the scope of the EU legislation.<sup>338</sup> Section 25 of PILA states: *“Upon a request of a participant, provisions may be applied of the law of another state which should not be applied under the provisions of this Act, however under the law of which they form a part shall be applied irrespective of which law governs the rights and obligations concerned. The condition for their application shall be that the rights and obligations concerned shall have a sufficiently significant relation to the other state and it shall be fair with respect to the nature of these provisions, their purpose or the consequences which*

<sup>336</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 34.

<sup>337</sup> BRÍZA, Petr; BRICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 22.

<sup>338</sup> *Ibid.*, p. 154.

*would, in particular for the participants, result from their application or non-application. The participant invoking such provisions shall prove the validity and content of these provisions.”*

These provisions are a part of foreign law that should not be applied under the conflict rules which means neither Czech law (*lex fori*) nor foreign applicable law (*lex causae*) under the rules of the Private International Law. These are provisions of a third state. Participant of the proceedings invokes them to justify the impossibility or its inability of the performance. Section 25 does not require the application of these rules, however, it allows only that the court can use them; forum is given discretion.<sup>339</sup> Section 25 of PILA allows the domestic public authority to apply the overriding mandatory provisions of a foreign law which is not applicable to a certain legal relationship, upon a request of a participant. Two conditions are set for the application of the overriding mandatory rules of another foreign law. Firstly, there must be a sufficiently significant connection between a legal relationship and a foreign law a part of which form the overriding mandatory rule. Secondly, the application of the overriding mandatory rules of another foreign law shall be fair with respect to the nature of these provisions, their purpose or consequences.<sup>340</sup>

Section 25 of PILA follows the definition of the overriding mandatory rules contained in Section 3 of PILA and reflects the optional application of the overriding mandatory rules of a third state by the Czech court if this state has a sufficiently significant relation to the assessed situation. The concept of the overriding mandatory rules of another foreign law is identical to Section 3 of PILA with the difference that Section 3 regulates the overriding mandatory rules which are part of the law of the forum, which means the Czech law in terms of PILA, Section 25 relates to the application of the overriding mandatory rules of a third country. As in the case of Section 3 these are rules – under the legal order of which they form a part – that are applicable regardless of which law governs the legal relations.

<sup>339</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 182.

<sup>340</sup> DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 126.

Section 25 reflects that legal order of the forum can determine whether and to what extent the judge takes into account the overriding mandatory rules of a third country.<sup>341</sup>

Section 25 regulates the conditions under which the Czech courts, in addition to the applicable law including the overriding mandatory rules contained therein and the Czech overriding mandatory rules, can use the overriding mandatory rules of a third country. These conditions are formulated restrictively which provides the legal certainty and predictability. The courts should apply the overriding mandatory rules of a third country very rarely and in convincingly substantiated cases only. Provided that the conditions of Section 25 are met, PILA does not exclude the application of the overriding mandatory rules of more than one third country, however such a situation is a rare occurrence in practice.

Overriding mandatory rules of a third country may be applied only upon a request of a participant. The participant also shall prove the validity and content of these rules. This is the fundamental difference in comparison with the determination and application of foreign law which is applicable under the Czech conflict rules where the court ascertains the content of foreign law *ex officio* under Section 23 of PILA.<sup>342</sup>

The effects of the application of the overriding mandatory rule of a third state to a particular private relationship with an international element depend on a specific assessment of the court. Court may infer as a consequence of the relation between third-country overriding mandatory rule and applicable law of a third state, for example, the invalidity of a legal act or the impossibility of performance. The application of the overriding mandatory rule of a third country is excluded if this would violate the Czech overriding mandatory rule applicable under Section 3 of PILA. Overriding mandatory rules of another foreign law identically as overriding mandatory rules *lex fori* include, for example, antitrust law, import and export restrictions, protection of monetary resources, protection of environment or labour etc.<sup>343</sup>

<sup>341</sup> BRÍZA, Petr; BŘICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, pp. 154–155.

<sup>342</sup> *Ibid.*, 156.

<sup>343</sup> *Ibid.*, pp. 155–157.

## 6.5 Conclusion

This section dealt with the overriding mandatory rules of the forum and overriding mandatory rules of a third country. At the outset, it defined the provisions relating to the overriding mandatory rules contained in the international conventions especially in the Rome Convention and Convention on the law applicable to traffic accidents. Subsequently, it analysed the overriding mandatory rules regulated by the EU law. These are principally provisions contained in the Rome I Regulation, Rome II Regulation and Succession Regulation. Finally, it discussed the overriding mandatory provisions of the law of the forum and overriding mandatory provisions of another foreign law regulated by PILA. It described the scope of application of the overriding mandatory rules and analysed the individual provisions relating to these rules contained in the said statutory instruments.

The question of the applicability of the overriding mandatory rules is regulated preferably and exhaustively by the EU law and some international conventions. The application of Section 3 and Section 25 of PILA is excluded for the relations regulated by the EU law and international conventions. These provisions shall apply only if the question does not fall within the material scope of the EU law or international conventions. Thus, Section 3 and Section 25 of PILA shall apply, for example, to issues related to personal status, obligations arising out of the family relationship or property rights. The focus of the overriding mandatory rules is undoubtedly in the field of obligations and the reach of PILA is therefore relatively limited.

The overriding mandatory rules of the law of the forum are defined in Section 3 of PILA as provisions applicable to any situation falling within their scope irrespective of the law otherwise applicable. Rome I Regulation specifies the overriding mandatory rules in Article 9(1). The conception of the overriding mandatory rules *lex fori* contained in Section 3 of PILA corresponds to Article 7(2) of the Rome Convention, Article 9(2) of the Rome I Regulation and Article 16 of the Rome II Regulation. The Succession Regulation does not regulate the overriding mandatory rules, but provides

special rules imposing restrictions concerning or affecting the succession in respect of certain assets in Article 30. These rules are overriding mandatory rules *lex rei sitae* for certain types of the assets creating the inheritance. The overriding mandatory rules of a third country are regulated in Section 25 of PILA. This conception corresponds to Article 7(1) of the Rome Convention. Article 9(3) of the Rome I Regulation in which the application scope of foreign overriding mandatory rules is defined is more restrictive than Section 25 of PILA. This provision gives the effect to the overriding mandatory rules of the law of the country where obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory rules render the performance of the contract unlawful. The Rome II Regulation does not regulate the overriding mandatory rules of a third country. It allows only the application of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability. This provision is similar to Article 7 of the Convention on the law applicable to traffic accidents which is used preferably under the Article 28 of the Rome II Regulation.

Neither PILA nor the regulations and international conventions address the overriding mandatory rules *lex causae*, they deal with the overriding mandatory rules *lex fori* and the overriding mandatory rules of a third country only. A foreign overriding mandatory rule applies if it forms a part of a foreign applicable law (*lex causae*) and consequences of the application shall be governed by that law. These rules should be taken into account according to the argument *a maiori ad minus*.<sup>344</sup> The provisions related to the overriding mandatory rules of the law of the forum and of another foreign law contained in the PILA enshrine a comprehensive solution that does not raise doubts about the intended application of individual types of these rules.

<sup>344</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, pp. 184, 186.

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## 7 APPLICATION OF FOREIGN LAW

### 7.1 Introduction

One of the central aims of the Private International Law is to determine the law applicable to a matter of private law with an international element. The Private International Law does so by means of conflict-of-law rules that in principle<sup>345</sup> choose between the relevant bodies of law. It is not necessary to consider all existing bodies of law but only those which have at least some connection to the particular matter. The principle of connection between the subject matter and a particular territory also governs the international procedural law. Therefore, it is rather common that one of the relevant laws the conflict-of-law rule considers is also the law of the forum, *lex fori*. The critical question, which needs to be answered when the conflict-of-law rule refers to other law than that of the forum, is how the application of foreign law works.<sup>346</sup> In this respect, the following topical areas – or questions<sup>347</sup> – may come up while their answers are mutually interrelated:

- Whether a duty to apply the conflict-of-law rule arises when tackling the question with an international element;
- Whether a duty to apply foreign law arises when the conflict-of-law rule refers to it;
- The nature of such foreign law – whether it has legal or factual nature;
- Once directed to apply the foreign law, whether it is possible to avoid it and refuse to apply it;
- Whether there is a duty to know or at least to become acquainted with such foreign law;
- In what manner the foreign law should be applied, including the issues of interpretation and intertemporal law;

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<sup>345</sup> Except for one-sided conflict-of-law rules.

<sup>346</sup> *Kalenský* denotes the application of foreign law as a technical operation. See KALENSKÝ, Pavel. Podstata a aplikace cizího práva. *Studie z mezinárodního práva soukromého*. 1968, p. 41.

<sup>347</sup> *Kalenský* comes to similar conclusions albeit differently formulated. See *Ibid.*, p. 42.

- What is the scope of application of the foreign law, i.e. whether to take into account the conflict-of-law rules of the *lex causae* or the overriding mandatory rules;
- Whether a party is entitled to appeal when foreign law is applied erroneously.

Before we address the above issues, we would like to point out the following. From the perspective of the Member States, at present the conflict-of-law rules increasingly occur unified in the form of EU regulations.<sup>348</sup> By the same token, we can see the progressive unification of the rules on international jurisdiction and disposition with a judgement in the territory of another Member State. Although these rules extend to new areas, their regulation is to a certain extent casuistic. The manner in which the regulation is used is further determined by the binding interpretation of the Court of Justice, however, the basis for its use is not. As the basis is not addressed within the unified framework the Court of Justice is not competent to rule on these matters. The absence of the unified basis necessarily leads to their search within the national bodies of law – be it in express legal regulation or case law and doctrine. This undertaking may significantly impair the concept of unified conflict-of-law rules and consequently the eventual outcome of the unification.<sup>349</sup> Thus far, this issue was of little concern to the EU and not much was done. However, the adverse consequences to the harmonisation process of the European Private International Law are evident – the unified conflict-of-law rules can perform its function only if they are applied *ex officio*.<sup>350</sup> The same should hold true for the application of the foreign law determined by the conflict-of-law rule. The opposite

<sup>348</sup> We refer to the conflict-of-law issues of contractual obligations (Rome I Regulation), non-contractual obligations (Rome II Regulation), succession (Succession Regulation) and maintenance (Maintenance Regulation).

<sup>349</sup> *Espplugues* argues that this issue is capable of undermining the whole of the harmonisation process. See ESPLUGUES, Carlos; IGLESIAS, José Luis; PALAO, Guillermo. *Application of Foreign Law*. Munich: Sellier European Law Publishers, 2011, p. 5. In Czech doctrine, see ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, pp. 49–51. For a point of view from the then perspective see KALENSKÝ, Pavel. Podstata a aplikace cizího práva. *Studie z mezinárodního práva soukromého*. 1968, p. 41.

<sup>350</sup> ESPLUGUES, Carlos; IGLESIAS, José Luis; PALAO, Guillermo. *Application of Foreign Law*. Munich: Sellier European Law Publishers, 2011, pp. 5–6.

situation that we see can, as *Esplugues* argues, in the end limit the proper functioning of the single internal market by imposing unreasonable requirements on the parties to the proceedings, generate legal uncertainty about the outcome of the dispute and increase costs. It also favours the *lex fori* and consequently leads to *forum shopping*.<sup>351</sup>

## 7.2 The Nature of Foreign Law

It may seem curious to deal with the nature of foreign law at the outset, while it could appear that this question becomes relevant only when it is necessary to apply the law. It is not curious. The nature of foreign law is not relevant only once it should be applied to a private law relationship with an international element, but already when it is being decided whether the foreign law should be applied, or to be more precise, which conditions should be met in order to apply the foreign law.

*Kalenský* refers to this question as the relation of the foreign law to the national law.<sup>352</sup> There are two extreme positions; one acknowledges the foreign law to be a prescriptive system. The fact that the foreign law is not the law of the forum does in no way affect the latter's nature and the foreign law remains unaffected as law even if applied by foreign courts.<sup>353</sup> The contrary view grants the legal nature only to the law of the forum and the other bodies of law are considered to be mere facts. In this respect, *Wolf* aptly points out that in such a case the facts apply to facts.<sup>354</sup> This solution stems from the acquired rights theory, whereby no foreign law is applied but only the rights acquired under foreign law are guaranteed their protection.<sup>355</sup>

<sup>351</sup> ESPLUGUES, Carlos; IGLESIAS, José Luis; PALAO, Guillermo. *Application of Foreign Law*. Munich: Sellier European Law Publishers, 2011, p. 6.

<sup>352</sup> KALENSKÝ, Pavel. Podstata a aplikace cizího práva. *Studie z mezinárodního práva soukromého*. 1968, p. 47.

<sup>353</sup> In Czech doctrine see also KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 186; ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, p. 53; DONNER, Bohdan. Důkaz a použití cizího práva. *Studie z mezinárodního práva soukromého*. 1957, p. 112.

<sup>354</sup> KALENSKÝ, Pavel. Podstata a aplikace cizího práva. *Studie z mezinárodního práva soukromého*. 1968, p. 48.

<sup>355</sup> *Ibid.*



The civil law countries grant the legal nature to the foreign law although several differences may be identified. Conversely, the common law systems treat foreign law as pure facts, including the parties' duty to establish the content of the foreign law. Aside from Great Britain, Ireland, Malta and Cyprus, two other Member States of the EU, Spain and Luxembourg, share the factual approach.<sup>356</sup>

The Baltic states (Lithuania, Latvia) chose a hybrid approach.<sup>357</sup> It turns on the grounds for the application of the foreign law. If the application is based on international convention or national law, the foreign law is treated as law. However, if the foreign law is to be applied by virtue of the will of the parties (choice of law clause) it will be granted a purely factual condition.

The Czech Republic takes the first position which is challenged neither in doctrine<sup>358</sup> nor in the case law of Czech courts. Although there is no express legal provision in this regard, the conclusion can be inferred from Section 23 of PILA which refers to foreign law as law.

### 7.3 The Duty to Apply the Conflict-of-Law Rule and the Law It Refers to

The Private International Law works on the premise that there are different bodies of law that may collide when resolving a private law issue with an international element. A mere thought of a collision of different laws implies the possible application of foreign law to a private law matter (law different from that of the forum). According to *Kalenský*, one of the reasons is to reflect the needs of social life, i.e. the association of subjects of private law relationships from different states.<sup>359</sup> *Rožebnalová*, from a more positivist perspective, justifies the application of the foreign law because the law of the forum deems it fair and reasonable to subject certain legal relationship

<sup>356</sup> ESPLUGUES, Carlos; IGLESIAS, José Luis; PALAO, Guillermo. *Application of Foreign Law*. Munich: Sellier European Law Publishers, 2011, pp. 13–14.

<sup>357</sup> *Ibid.*, pp. 16–17.

<sup>358</sup> Compare the works of *Kučera*, *Kalenský* and *Donner*.

<sup>359</sup> KALENSKÝ, Pavel. Podstata a aplikace cizího práva. *Studie z mezinárodního práva soukromého*. 1968, p. 43.

to foreign law.<sup>360</sup> Similarly, *Kučera* explains that the application of foreign law results from the existence of the conflict-of-law rules, which deems it fair and reasonable to substitute the *lex fori* by foreign law.<sup>361</sup> *Donner* follows the suit and puts forth that a judge has no choice but to rule in line with the conflict-of-law rule. This also implies that the foreign law should not be discriminated against the law of the forum.<sup>362</sup> This brings us to the strong positivist view mainly maintained by the civil law countries<sup>363</sup> and which anticipates the outcome of this process. However, there are marked differences between these states too. The abovementioned positivist approach treats the conflict-of-law rules as mandatory. Therefore, a mere existence of the conflict-of-law rule entails its application once the conditions for its application are met. The Czech positivist position<sup>364</sup> is contested neither in literature nor in case law. Hence, it was not necessary to embody this duty expressly into the recodified regulation.<sup>365</sup> What goes for the conflict-of-law rule's application goes for the application of the law the rule refers to. The law shall be applied regardless of whether it is the law of forum or foreign law. The reasons were discussed above (the notion of fair consideration of the subject matter).

<sup>360</sup> ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, p. 51.

<sup>361</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 184.

<sup>362</sup> DONNER, Bohdan. Důkaz a použití cizího práva. *Studie z mezinárodního práva soukromého*. 1957, p. 112.

<sup>363</sup> For their list, see e.g. ESPLUGUES, Carlos; IGLESIAS, José Luis; PALAO, Guillermo. *Application of Foreign Law*. Munich: Sellier European Law Publishers, 2011, p. 18.

<sup>364</sup> See Section 1(a) of PILA.

<sup>365</sup> The explanatory note on Section 23 of PILA automatically, with no need for explanation, puts forth the application of the conflict-of-law rules and subsequently the applicable law. Aside from the abovementioned works, this solution is neither challenged by *Pauknerová*. See PAUKNEROVÁ, Monika; BRODEC, Jan. Czech Republic and Slovak Republic. In ESPLUGUES, Carlos; IGLESIAS, José Luis; PALAO, Guillermo. *Application of Foreign Law*. Munich: Sellier European Law Publishers, 2011, p. 175. Similarly, *Donner* considers the refusal of the application of the foreign law referred to by the conflict-of-law rule to breach the equality of states under the UN Charter, further arguing that this may cause legal uncertainty of the parties to the proceedings and consequently have adverse effect on international trade. See DONNER, Bohdan. Důkaz a použití cizího práva. *Studie z mezinárodního práva soukromého*. 1957, p. 109.

A contrary view has been adopted by the common law countries where the parties shall propose to the court to use the foreign law. Nevertheless, the mandatory nature is granted to the conflict-of-law rules which are contained in the international conventions and the unified EU regulations.<sup>366</sup> The use of the conflict-of-law rule and reference to foreign law does not automatically entail the application of the foreign law as is the case in the countries taking the positivist stance. In this respect, this issue is closely connected to the nature which is granted to the foreign law. The fact of the matter is whether the foreign law is treated as law despite its foreign origin. In other words, whether it is only the national law which is awarded legal condition and the foreign law is viewed as a mere fact and not law. Unless the parties plead the conflict-of-law rules and provide the foreign law content to the court, the court will treat the dispute as domestic.

Some countries award hybrid nature to foreign law depending on the mandatory/non-mandatory character of the rights at stake. The parties are free to plead the conflict-of-law rules when non-mandatory character of the rights is at stake. Conversely, the court shall apply the conflict-of-law rules when the claim is of mandatory character. This model is adopted for example by France, Romania, Denmark, Finland and Sweden.<sup>367</sup> Similar rules exist for the court's duty to apply foreign law. As for the non-mandatory claim, there is no duty to apply foreign law. This duty arises once a party pleads the conflict-of-law rule (and consequently the application of foreign law). The duty to apply the conflict-of-law rule anticipates the duty to apply the law referred to by the rule.

Even if we accept the concept of applying the conflict-of-law rule and the foreign law *ex officio*, it does not mean that the application of foreign law cannot be avoided. *Kalenský* derives that the application of foreign law pursuant to the imperative contained in the conflict-of-law rule implies that the law of forum is superior to foreign law, i.e. that the latter is derived from the former. This also entails that the foreign law's application can

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<sup>366</sup> From the EU Member States, these are for instance Great Britain, Cyprus but interestingly also Luxembourg. See ESPLUGUES, Carlos; IGLESIAS, José Luis; PALAO, Guillermo. *Application of Foreign Law*. Munich: Sellier European Law Publishers, 2011, p. 19

<sup>367</sup> *Ibid.*, p. 21

be excluded, without prejudice to its legal nature. The concept that may rule out the application of foreign law is the reservation of public policy.<sup>368</sup>

If the foreign law is not excluded, the law of the forum will treat the former as equal law for the purposes of its application.<sup>369</sup> The refusal to apply foreign law by virtue of the reservation of public policy is common to civil law and common law jurisdictions alike.<sup>370</sup> The grounds, such as reciprocity or common ground between the parties as to the non-application of foreign law, are not known.<sup>371</sup> The concept of public policy is analysed above, therefore we will not address it further at this place. A supplementary reason for the refusal, though completely different from the violation of public policy, is the impossibility to ascertain the content of the foreign law. This reason will be discussed below.

#### 7.4 Foreign Law and *Iura Novit Curia*

If a court is to apply foreign law, does it have the duty to know the law or does this duty apply solely with regards to *lex fori* and not to the foreign law? Or can this duty relating to foreign law be possibly modified? It is plain to see that the solution lies in the nature granted to the foreign law. If the foreign law is treated as law, the body that applies the law needs to deal with its contents. However, it would barely be attainable to require the judges to comply with the *iura novit curia* principle.<sup>372</sup> This principle can be transformed into the duty not to know the foreign law, but to familiarise oneself with it. This principle is explicitly embodied in Czech law in Section 23(2) of PILA, which sets out that the contents of the foreign body of laws which is supposed to be applied are ascertained as a matter of official obligation and

<sup>368</sup> KALENSKÝ, Pavel. Podstata a aplikace cizího práva. *Studie z mezinárodního práva soukromého*. 1968, p. 58.

<sup>369</sup> *Ibid.* 1968, pp. 58–59

<sup>370</sup> ESPLUGUES, Carlos; IGLESIAS, José Luis; PALAO, Guillermo. *Application of Foreign Law*. Munich: Sellier European Law Publishers, 2011, pp. 73–74

<sup>371</sup> Hungary is one exception – see *Ibid.*, p. 74.

<sup>372</sup> *Kučera* argues that this principle does not apply in relation to foreign law. See KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽICKÁ, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 184. Similarly *Donner* who maintains that the capacity and duty to apply the foreign law, including the duty to ascertain it, applies instead of the *iura novit curia* principle. See DONNER, Bohdan. Důkaz a použití cizího práva. *Studie z mezinárodního práva soukromého*. 1957, p. 111.

without the requirement of the submission of a motion to do so. The court or the public administration authority which rules on the matters implements all the necessary measures to ascertain the contents of the foreign law. Article 23(3) provides one of these measures - a request for a statement from the Ministry of Justice. The duty, or alternatively the responsibility of the Ministry to ascertain the contents of the foreign law, can be inferred from this provision, provided that it is done by all available means.<sup>373</sup> The aid may be sought in conventions on legal assistance, the European Convention on information on foreign law and its Additional protocol<sup>374</sup> or through contacts within the European Judicial Network in civil and commercial matters. The duty to ascertain the contents of foreign law cannot be transferred to the parties to the proceedings. But this does not change anything on the fact that the parties may be invited to submit the contents of the foreign law, or alternatively that the documents supplied by the parties providing the contents of the foreign law can be relied on.<sup>375</sup> According to the explanatory note, it is in the court's (or other body) discretion to choose the measures. It may ascertain the contents of the foreign law itself or it may request an observation of expert (expert opinion) from the state whose law is to be applied. The abovementioned statement from the Ministry of Justice is just one of the alternatives, which is no more binding on the court than the other ones. The choice between the alternatives should be made with regards to the expected costs and procedural economy. The costs of ascertaining the foreign law are typically incurred by the court, however, under certain circumstances (the party's motion to apply the foreign law) these costs may be required to be paid by the party.<sup>376</sup>

<sup>373</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 172.

<sup>374</sup> European Convention of 7 June 1969 on information on foreign law [online]. *Council of Europe*. Available from: <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680072314>

<sup>375</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 171.

<sup>376</sup> PAUKNEROVÁ, Monika; BRODEC, Jan. Czech Republic and Slovak Republic. In ESPLUGUES, Carlos; IGLESIAS, José Luis; PALAO, Guillermo. *Application of Foreign Law*. Munich: Sellier European Law Publishers, 2011, p. 179 and the decision of the Supreme Court of the Czech Republic, No. R 26/87 mentioned therein.

The Czech law provides for a situation where the contents of the foreign law are unable to be ascertained in a reasonable time or if this proves to be impossible. The substitute for the foreign law is the Czech law.<sup>377</sup> The reasonableness of the period to ascertain the foreign law is determined by several facts. One of them is the nature of the considered legal question and the difficulty of the regulation, others include its proximity (even the territorial one) and the diversity (civil law vs. common law, language difficulty)<sup>378</sup> and we cannot forget its social topicality (family law vs. ordinary civil law matter).

Markedly less welcoming are those fora that treat foreign law as a pure fact. From this statement alone, it can be implied that in such a case the decision-making body remains completely passive in ascertaining the contents of the foreign body of laws. It does not have the duty to ascertain the foreign law and the parties have to plead it as a matter of fact. Otherwise, the question is considered as purely domestic.<sup>379</sup>

## 7.5 Manner and Scope of Application of the Foreign Law

Also in these instances, the solution turns on the nature granted to the foreign law. The fora that grant the foreign law a legal nature treat the foreign law as such, i.e. they treat it the same way as the forum of its origin would.<sup>380</sup> In the states where foreign law is considered to be pure facts the foreign law is applied only if the court finds it to be sufficiently established – the same goes for its contents.

Czech PILA addresses this issue expressly. Its Section 23(1) sets out that it is necessary to apply the provisions of foreign law in the way that it is used in the territory to which it applies. To properly use this provision, or rather to properly apply the foreign law,<sup>381</sup> the decision-making body should take

<sup>377</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 187.

<sup>378</sup> Accordingly see PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 170.

<sup>379</sup> ESPLUGUES, Carlos; IGLESIAS, José Luis; PALAO, Guillermo. *Application of Foreign Law*. Munich: Sellier European Law Publishers, 2011, p. 45

<sup>380</sup> *Ibid.*, pp. 64–67.

<sup>381</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 186.

into account the given law's doctrine as well as case law (especially that of the higher courts) and possibly the intertemporal provisions. The provisions of the body of laws which would be used in the territory to which the said foreign law applies are used to rule on the matter regardless of the systematic classification of the foreign law or its public law nature.

This part of Section 23(1) of PILA unequivocally resolves the scope of application of the foreign body of laws. All provisions necessary to rule on the matter should be used. Consequently, the issue of application of the mandatory overriding rules of *lex causae* is also dealt with. An exception would be a situation in which the foreign law would be at odds with the overriding mandatory rules of the forum, i.e. those of the Czech Republic. This reason supplements the possibility of inapplication of the foreign law due to its conflict with the forum's public policy. A detailed analysis of the overriding mandatory rules is subject of a previous chapter in this monograph. The conflict-of-law rules of the particular state should be used as well. The issue of *renvoi* and *double renvoi* is also discussed above in this monograph.

## 7.6 Appeal in Cases Where Foreign Law was Applied

The Czech doctrine of Private International Law does not doubt that the breach of foreign law can be appealed in the same way as the breach of *lex fori*. *Kučera* considers incorrect legal assessment under foreign law to be incorrect legal assessment of a certain matter.<sup>382</sup> *Rozebnalová* does not contest this conclusion and fully endorses it.<sup>383</sup> *Pauknerová* adopts the same approach.<sup>384</sup> Similar approach appears in other Member States of the EU.<sup>385</sup>

<sup>382</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 186.

<sup>383</sup> ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, p. 54.

<sup>384</sup> PAUKNEROVÁ, Monika; BRODEC, Jan. Czech Republic and Slovak Republic. In ESPLUGUES, Carlos; IGLESIAS, José Luis; PALAO, Guillermo. *Application of Foreign Law*. Munich: Sellier European Law Publishers, 2011, p. 181.

<sup>385</sup> Viz analysis in ESPLUGUES, Carlos; IGLESIAS, José Luis; PALAO, Guillermo. *Application of Foreign Law*. Munich: Sellier European Law Publishers, 2011, pp. 75–78.

## 7.7 Conclusion

The application of foreign law is one of the essential moments when resolving a private law issue with an international element. Due to the absence of its regulation on the EU and international level, it presents a question regulated by national law and also by national doctrine and case law. A unified determination of the law applicable remains to be a desired and not yet an attained aim of the EU regulation of the Private International Law.





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## 8 LEGAL PERSONALITY AND CAPACITY

### 8.1 Introduction

Czech law distinguishes the legal personality and the legal capacity of natural persons and legal personality and legal capacity of legal entities (entities other than natural persons). The aim of this chapter is to analyse and describe the conflict-of-law rules for determining the law applicable to legal personality and the capacity of both natural persons and legal entities. The question of jurisdiction of Czech courts will be also addressed.

### 8.2 Law Applicable to Legal Personality and Capacity of Natural Persons

According to the Czech substantive law, every natural person has legal personality (capability to have rights and duties), generally from their birth to death. Also *nasciturus* (unborn child) can have the legal personality with the condition that the child is born alive. The legal personality is terminated by the death (and there is a special rule for missing persons who can be declared dead).<sup>386</sup> The regulation of foreign bodies of law can be different. And there are more differences in regulation of legal capacity (capability to legal acts). Thus, it is necessary to determine the law which is applicable for the issues of legal personality and the capacity of the person.

#### 8.2.1 International Conventions

There is no multilateral international convention regulating legal personality or capacity of natural persons. The Czech Republic is the Contracting State to the Convention of the international protection of adults.<sup>387</sup> Under Article 1, the convention applies to the protection in international situations of adults who, by reason of an impairment or insufficiency of their personal

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<sup>386</sup> Sections 23–28 of the Civil Code.

<sup>387</sup> Convention of 13 January 2000 on the international protection of adults [online]. *Hague Conference on Private International Law*. Available from: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=71](http://www.hcch.net/index_en.php?act=conventions.text&cid=71)

faculties, are not in a position to protect their interests. The convention does not regulate the law applicable to capacity or limitations of capacity. It regulates the measures directed to the protection of the person or property. In this regard, it contains the rules of jurisdiction, applicable law and recognition and enforcement. Concerning the applicable law, the authorities of the contracting states that have jurisdiction under the convention apply their own law. However, in so far as the protection of the person or the property of the adult requires, they may exceptionally apply or take into consideration the law of another state with which the situation has a substantial connection.<sup>388</sup>

There are some bilateral agreements concluded between the Czech Republic and other states containing the conflict-of-law rules for legal personality and capacity of natural persons.<sup>389</sup> These agreements employ the nationality (*lex patriae*) of natural persons.<sup>390</sup> Within the scope of their application these agreements take precedence over PILA and if concluded with non-Member States of the EU they take precedence over the EU regulations.

### 8.2.2 EU Regulations

EU regulations do not deal with the regulation of the legal personality or capacity as a whole.<sup>391</sup> However, there are some special provisions.

Article 13 of the Rome I Regulation<sup>392</sup> regulates the incapacity of a natural person. This person may invoke his incapacity resulting from the law of another country, in a contract concluded between persons who are in the same country (in which both have legal capacity) only if the other

<sup>388</sup> See Article 15 of the Convention on the international protection of adults.

<sup>389</sup> See e.g. Notice of the Ministry of Foreign Affairs No. 123/2002 Coll. Int. Conv., on Agreement between the Czech Republic and Ukraine on legal assistance in civil matters (“Notice No. 123/2002”); Regulation of the Ministry of Foreign Affairs No. 42/1989 Coll., on Agreement between Czechoslovak Socialist Republic and the Polish People’s Republic on legal assistance and settlement of relations in civil, family and criminal matters (“Regulation No. 42/1989”); Notice of the Ministry of Foreign Affairs No. 133/2003 Coll. Int. Conv., on Agreement between the Czech Republic and the Republic of Uzbekistan on legal assistance and legal relations in civil and criminal matters (“Notice No. 133/2003”).

<sup>390</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, pp. 247, 249.

<sup>391</sup> Article 1(2)(a) of the Rome I Regulation.

<sup>392</sup> The same provision is contained in Article 11 of the Rome Convention.

party was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence. The condition that the other party must be aware of the incapacity of the acting person should protect the contractual party which entered into a contract in good faith. It is not considered appropriate for one of the parties to be knowledgeable of the law which governs the other party's legal capacity.<sup>393</sup> But if the party was aware of the incapacity of the other one, there is no reason to protect the first party. If the second party invokes his incapacity then the contract is not valid.

To be able to invoke the incapacity, the contract must be concluded by persons in the same country. This means that the provision is not applicable to the distance contracts. In these situations, the parties should take into account the law of the state of the nationality or habitual residence of the other party or of the state from which the other party acts.

Rome II Regulation<sup>394</sup> states that the law applicable to non-contractual obligations governs “*the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them*“. The connecting factor is *lex causae*. This means that the delict (tort) liability is governed by the same law as the basic non-contractual obligation.

The Succession Regulation contains special conflict-of-law rules for the capacity to conclude agreements as to succession and capacity to make other dispositions of property upon death.<sup>395</sup>

### 8.2.3 PILA

#### ***General Rule – Section 29(1)***

The rules in PILA are applicable only to those situations that are not covered by the international conventions or EU regulations. The basic rule in Section 29(1) lays down that: “*Legal personality and capacity shall be governed by the law of the state in which a person is habitually resident.*” The same rule is used

<sup>393</sup> BĚLOHLÁVEK, Alexander J. *Římská úmluva a Nařízení Řím I: komentář v širších souvislostech evropského a mezinárodního práva soukromého*. Praha: C. H. Beck, 2009, pp. 1532–1533.

<sup>394</sup> Article 15(a) of the Rome II Regulation.

<sup>395</sup> See Articles 24–26 of the Succession Regulation.

for the capacity of a foreigner to be a party to court proceedings and to his procedural capacity.<sup>396</sup> For a declaration of a person to be dead or missing, Czech courts apply Czech law.<sup>397</sup>

PILA uses the connecting factor of habitual residence that has replaced the criterion of nationality that was used in the former PILA. Especially in the EU, the connecting factor of the habitual residence is more appropriate. It is caused by increased mobility. The habitual residence should better express the connection between person and the state where that person resides (often, the person has closer connection to another state than the state of its nationality). The criterion of the habitual residence is a compromise between the traditional connecting factors – the domicile in common law and the nationality in continental law.<sup>398</sup>

The problem of the habitual residence as a connecting factor is that there is no definition of this term, neither in Czech nor in the EU law. This concept is included in all major EU regulations of Private International Law - Rome I Regulation, Rome II Regulation, Brussels IIbis Regulation, Succession Regulation and others. The Czech legislation came closer to the international legislations. To define habitual residence also the case law of the Court of Justice should be relevant for the Czech courts. The discussed provision is inspired by the EU law which means that the interpretation of this term should be uniform.<sup>399</sup>

It seems we should differentiate the habitual residence of an adult and a child. The Court of Justice set out some criteria which should be taken into account in determining the habitual residence of a child. The term “habitual” implies that the residence must have a certain permanence or regularity; the habitual residence is linked to the best interests of the child. It corresponds to the place that reflects some degree of integration of the child in a social and family environment. Particular attention should be paid to the regularity, conditions and reasons for the stay on the territory of a Member State and the family’s move to that State, the child’s nationality, the place and

<sup>396</sup> Section 9 of PILA.

<sup>397</sup> Section 39 of PILA.

<sup>398</sup> PFEIFFER, Magdalena. Obvyklý pobyt v evropském rodinném právu. *Soudní rozhledy*. 2013, No. 3, p. 87.

<sup>399</sup> BRÍZA, Petr; BRICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C.H. Beck, 2014, p. 181.

conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State. Moreover an adequate degree of permanence is also necessary and child's age should be taken into account.<sup>400</sup> The term "habitual residence of the child" was interpreted by the Court of Justice within the meaning of Brussels IIbis Regulation and the Convention on the civil aspects of international child abduction.<sup>401</sup> These instruments assume just one habitual residence of the child. The habitual residence is a factual concept, not legal. Thus, we have to consider all the circumstances specific to each individual case. A number of factors, that affect the habitual residence, could result in some degree of legal uncertainty and unpredictability. Despite this fact it is the discretion of the courts to determine in which state the habitual residence of the child is.

The Czech courts interpret the habitual residence of the child consistent with the Brussels IIbis Regulation.<sup>402</sup>

According to the practice of the Court of Justice we could define the habitual residence of the adult as the place where the habitual centre of his interests is situated. To determine that place we have to take into account the family situation, the reasons which led him to move or stable job. The length or continuity of residence is also important and moreover, so is the intention of the person.<sup>403</sup> It is possible to say that the child is more dependent on its family relationships (especially babies). To determine the adult's habitual residence, the intention and the will of the person is very important. As in the case of the habitual residence of the child, even here it is upon the court's discretion to determine in which state the adult has his habitual residence.<sup>404</sup>

<sup>400</sup> Opinion of Advocate General Maciej Szpunar delivered on 24 September 2014. Case C-376/14 PPU; Judgement of the Court of Justice of 2 April 2009. A. Case C-523/07; Judgement of the Court of Justice of 22 December 2010. Mercredi. Case C-497/10 PPU.

<sup>401</sup> Convention of 25 October 1980 on the civil aspects of international child abduction [online]. *Hague Conference on Private International Law*. Available from: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=24](http://www.hcch.net/index_en.php?act=conventions.text&cid=24)

<sup>402</sup> Decision of the Supreme Court of the Czech Republic of 24 April 2014, No. 30 Cdo 715/2013.

<sup>403</sup> *Důvodová zpráva ke zákonu č. 91/2012 Sb., o mezinárodním právu soukromém*. Olomouc: ANAG, 2012, p. 20; PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, pp. 217–229.

<sup>404</sup> ROGERSON, Pippa. Habitual Residence: The New Domicile? *International and Comparative Law Quarterly*. 2000, Vol. 49, No. 1, p. 90.

### ***Subsidiary Rule – Section 29(2)***

The subsidiary rule in Section 29(2) states: “*Unless otherwise stipulated, it shall be sufficient when a natural person undertaking a legal act has legal capacity under the law applicable at the place where the legal act is undertaken.*” Thanks to this provision it is possible to maintain the validity of legal actions although the person does not have the legal capacity under the law of the state of his habitual residence. It is sufficient that the person has the legal capacity under the law of the state where that person carried out the legal action.

Article 29(2) is not applicable to the cases in which PILA has a special regulation. These are the capacity to enter into marriage,<sup>405</sup> capacity to make a disposition of property upon death,<sup>406</sup> capacity to enter into registered partnership<sup>407</sup> and the capacity to bind oneself by a bill or by cheque.<sup>408</sup> These special norms are analysed in the relevant chapters below.

### ***Section 29(3)***

The last paragraph of Section 29 regulates a modification of the name of a natural person. It is governed by the law of the state of which the person is a national. The nationality is the general connecting factor, but there is also subsidiary rule which provides that the person may invoke an application of the law of the state where he has the habitual residence. If the person lives in the state different from the state of his nationality it could be better and more appropriate to regulate the modification of the name according to local law.<sup>409</sup>

### ***Limitation of Capacity and Custody***

The issues of limitations of capacity and custody are covered by Sections 34-37. The conditions of the limitation of capacity and the conditions of establishment and termination of custody are governed by the law of the state where a person who is under custody has his habitual residence. The obligation to accept and exercise the custody is governed by the law

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<sup>405</sup> Section 48 of PILA.

<sup>406</sup> Section 77 of PILA.

<sup>407</sup> Section 67 of PILA.

<sup>408</sup> Section 31 of PILA.

<sup>409</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 250.

of the state where a custodian has the habitual residence. The legal relationship between a custodian and a person who is under custody is governed by the law of the state in which the custody court is located.

### 8.3 Law Applicable to Legal Personality and Capacity of Legal Entities

Fictive persons like legal entities and persons other than a natural person may have legal personality and capacity to the extent in which they are granted by law. Different systems of law regulate it in different ways. The conflict-of-law rules determine what law governs the legal personality and capacity of legal entities.

Besides the legal personality and capacity of legal entities, the analysed provision (Section 30 of PILA) provides the regulation of entities other than a natural person. This expression is important because in the body of law of some states, there are entities which are not considered as legal entities within the meaning of the Czech law. However, for the needs of the international trade it is necessary to recognise them.<sup>410</sup> It is important to determine which law is applicable to determine whether the entity has legal personality and capacity.

#### 8.3.1 International Conventions

The Czech Republic is not a contracting state of any multilateral international convention which would regulate the legal personality or legal capacity of legal entities. Some bilateral agreements regulate also legal personality and capacity of legal entities. They mostly use the same connecting factor that is used in PILA.<sup>411</sup>

<sup>410</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, pp. 230–231; *Důvodová zpráva k zákonu č. 91/2012 Sb., o mezinárodním právu soukromém*. Olomouc: ANAG, 2012, p. 55.

<sup>411</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 252.



### 8.3.2 EU Regulations

The EU law regulates supranational forms of legal entities. These are: the European Public Limited-liability Company,<sup>412</sup> the European Economic Interest Grouping<sup>413</sup> and the European Cooperative Society.<sup>414</sup> These forms of legal entities are regulated by the directly applicable EU regulations. The Czech law is used only in a subsidiary manner for the regulation of the EU legal entities which have their seat in the Czech Republic.<sup>415</sup>

Rome I Regulation and Rome II Regulation explicitly state that they are not concerned with the legal capacity of legal entities.<sup>416</sup>

### 8.3.3 PILA

There are two basic theories for the determination of the personal status of a legal entity – the theory of seat and the theory of incorporation.<sup>417</sup> The Czech Private International Law is based on the theory of incorporation. This means that the legal personality and capacity of the legal entity is governed by the law of the state under which it was established. This theory should better reflect the link between the legal entity and the state of origin. The disadvantage is that the law of the state of incorporation can be different from the real seat from which the legal entity is really controlled. Therefore it does not reflect the actual situation.

<sup>412</sup> Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE). In *EUR-lex* [legal information system]. EU Publication Office. Available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:294:0001:021:en:PDF>

<sup>413</sup> Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG). In *EUR-lex* [legal information system]. EU Publication Office. Available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31985R2137:en:HTML>

<sup>414</sup> Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE). In *EUR-lex* [legal information system]. EU Publication Office. Available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:207:0001:0024:en:PDF>; Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees. In *EUR-lex* [legal information system]. EU Publication Office. Available from: <http://eur-lex.europa.eu/legal-content/EN/TEXT/HTML/?uri=CELEX:32003L0072&from=EN>

<sup>415</sup> BRÍZA, Petr; BRÍCHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C.H. Beck, 2014, pp. 191–193.

<sup>416</sup> Article 1(2)(f) of the Rome I Regulation; Article 1(2)(d) of the Rome II Regulation.

<sup>417</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽICKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, pp. 251–252.

The provision of Section 30 of PILA provides that the law under which a legal entity was established (incorporated) shall also govern “...*a trading name or a name and internal relations of such an entity, the relations between such an entity and its partners or members, mutual relations of its partners or members, a responsibility of its partners or members for liabilities of such an entity, a person responsible for acting on behalf of such an entity, as well as its winding up*”. The legal personality and capacity of a legal entity established in the Czech Republic and also other issues related to the fact that this entity is a subject of law are governed by the Czech law. In the Czech Republic it is not allowed to establish the legal entity governed by foreign law.

Legal personality and capacity of relocated foreign entity is governed under the law of the state of its establishment. It can be deduced that relocated legal entity which was established under the Czech law is still governed under this law. “*The incorporation theory allows the founders of a company to freely choose for the legal system they think most appropriate: once the choice is made, it can be maintained throughout the company’s life.*”<sup>418</sup>

The subsidiary rule in Section 30(2) sets out that to be bound by its usual acts, it is sufficient when the entity has legal capacity under the law of the place where the legal act was undertaken. Thus, similar to the case of natural persons, it is possible to maintain the validity of legal actions although the entity does not have the legal capacity under the law of its incorporation. It is sufficient that the legal entity has the legal capacity under the law of the state where that entity acts. Opposite to the regulation of natural persons there is the condition that it must be usual acting. It is on the discretion of the court to determine what is usual for a particular legal entity. Generally, the usual act is such which does not deviate from normal actions of an entity.<sup>419</sup>

<sup>418</sup> Section 30(3) of PILA; WYMEERSCH, Eddy. The Transfer of the Company’s Seat in European Company Law (March 2003). *ECGI – Law Working Paper* [online]. 2003, No. 8. [cit. 21. 10. 2015].

<sup>419</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, pp. 230–237.

## 8.4 Jurisdiction and Recognition and Enforcement

### 8.4.1 International Conventions

As was stated above, the Czech Republic is a Contracting Party to the Convention on the international protection of adults which applies to the protection in international situations of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests. The convention regulates the jurisdiction of the authorities to determine the measures directed to the protection of the person or property. Generally, the jurisdiction is given to the authorities of the state where a person has his habitual residence (Article 5). The convention also regulates the recognition and enforcement of the measures in other contracting states.

Several bilateral agreements contain the rules of jurisdiction in the matters of limitations of capacity and custody and governs jurisdiction to declare a person to be dead or missing.<sup>420</sup> The bilateral agreements also regulate the recognition and enforcement of judgements in these matters.<sup>421</sup> Thus, in the particular case it is necessary to find out if any of the bilateral agreements applies and if it contains the rules on jurisdiction and recognition and enforcement.

### 8.4.2 EU Regulations

Brussels Ibis Regulation does not apply to the status or legal capacity of natural persons. On the other hand, Article 24(2) provides for the exclusive jurisdiction in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons. In such proceedings, the courts of the Member State in which the company, legal person or association has its seat have jurisdiction. Brussels Ibis Regulation is also applicable to recognition and enforcement of judgements arising out of such proceedings.

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<sup>420</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, pp. 250, 261.

<sup>421</sup> *Ibid.*, p. 383.

### 8.4.3 PILA

PILA does not have a general jurisdiction rule in matters relating to legal status of natural persons and legal entities. Under Section 33(1), Czech courts have jurisdiction in matters of limitations of capacity and custody if a person has his habitual residence in the Czech Republic or if he is a Czech national. If a Czech national has the habitual residence abroad, Czech courts need not commence the proceedings if the measures taken abroad are sufficient for the protection of rights and interest of the Czech national. If Czech courts do not have jurisdiction they limit themselves to the measures necessary for the protection of the person and his property and inform the bodies of a state where the person has the habitual residence.<sup>422</sup>

Section 39 of PILA states that Czech courts have exclusive jurisdiction to declare a Czech national to be dead or missing. Czech courts have jurisdiction to declare a foreigner to be dead or missing only with the effects for Czech nationals, persons with the habitual residence in the Czech Republic and for the property located in the Czech Republic. In both cases, Czech courts apply Czech substantive law.

The recognition and enforcement of judgements in these matters are covered by Sections 38 and 40 of PILA. Section 38 states that foreign judgements in matters relating to limitation of capacity and custody of a foreigner which have been rendered by the courts of a state whose nationality the foreigner has or where the foreigner has the habitual residence are recognised without a necessity of the special proceedings. The same applies to foreign judgements declaring a foreigner to be dead or missing (Section 40).

## 8.5 Conclusion

To determine whether a natural person or a legal entity has the capability to have rights and duties or to legally act it is necessary to find out what law is the applicable one. To these ends, Private International Law uses connecting factors.

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<sup>422</sup> See Section 33(2) of PILA. Section 33(3) provides for the exception from the duty to inform.

Under the Czech law, the basic rule for determining the law according to which legal personality and capacity of natural person is governed is the habitual residence of that natural person. This term is not defined but even so, it is possible to lay out some factors according to which courts can determine it – the natural person should really reside in the state for a longer period (the temporary residence is irrelevant), the person has the social and family relations there and the person intends to live there. If the natural person has his habitual residence in some state, it is more appropriate to apply the law of that state because courts do not have to inquire about the content of foreign laws and the person has closer relationship to that state. The rule for determining personal status of legal entity is based on the theory of incorporation which means the law of the state under which the entity was established. For regulation of natural persons and legal entities there are even subsidiary rule which use the connecting factor of the place where the person or entity act.

Besides national regulation we have to take into account the international conventions and EU regulations by which the Czech Republic is bound and which take precedence over Czech domestic law. However, for the determination of legal personality and capacity of natural persons and legal entities PILA is relatively important because EU law does not regulate these questions much and there are no multilateral agreements with other states. Thus, in many cases it will be necessary to apply PILA.

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## 9 VALIDITY OF LEGAL ACTS, REPRESENTATION AND LIMITATION

### 9.1 Introduction

Legal acts cause certain legal consequences which are expressed in it, or which arise from the law, good manners, usages or from the practice which the parties have established between themselves. A legal act may be carried out explicitly or implicitly (without a doubt about the person's intention).<sup>423</sup>

To legally act, the person must have a legal capacity. Who does not have legal capacity or whose capacity was limited, must be represented by an agent. Whether or not the person has legal capacity is governed by the law determined by using the conflict-of-law rules.<sup>424</sup>

### 9.2 Law Applicable to Material Validity of Legal Acts

In order for a legal act to give rise to the intended consequences it must be valid. And to be valid it must comply with certain requirements. These requirements can be different according to the applicable law. Because of that it is necessary to determine the governing law at first and then consider the validity according to that law.

#### 9.2.1 International Conventions

The Czech Republic is the Contracting State to the CISG which contains uniform substantive rules for international sales contracts. However, the CISG explicitly states that it is not concerned with the validity of the contract or of any of its provisions.<sup>425</sup> On the other hand, the CISG covers the formation of the sales contract. There are no other conventions dealing with the material validity of legal acts except of Rome Convention. The regulation in the Rome Convention corresponds to the Rome I Regulation.

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<sup>423</sup> Sections 545–546 of the Civil Code.

<sup>424</sup> See the previous chapter.

<sup>425</sup> Article 4 of the CISG. SCHLECHTRIEM, Peter. *Uniform Sales Law – The UN Convention on Contracts for the International Sale of Goods* [online]. Vienna: Manz, 1986, pp. 32–34 [cit. 5. 11. 2015].

### 9.2.2 EU Regulations

Article 10 of the Rome I Regulation<sup>426</sup> contains special conflict-of-law rule that covers consent of parties and material validity of a contract within the scope of the regulation. Under this rule, the existence and validity of a contract shall be determined by the law which would govern the contract if the contract was valid.<sup>427</sup> There is the presumption of validity. The connecting factor is *lex causae* (i.e. law applicable to the contract that was chosen by the parties or determined under other rules of the Rome I Regulation). This provision covers not only the validity of the contract but also the validity of unilateral the legal acts arising during the formation process (e.g. offer, acceptance).

Under Article 3 of the Rome I Regulation parties are free to choose the applicable law. Article 3(2) enables the parties to change the applicable law. The question is if such a change of the applicable law has a retrospective effect. The applicable law determines the validity of the contract; thus, under the changed applicable law the contract could become invalid.<sup>428</sup> The similar problem is with the additional choice of law (Rome I Regulation does not regulate it but it is possible to deduce that it is also allowed). The time until which it is possible to choose or to change the applicable law is regulated by national procedural laws. According to Rome I Regulation it is possible to change the applicable law any time but it shall not prejudice formal validity of the contract under Article 11 or adversely affect the rights of third parties.<sup>429</sup>

The provision of Article 10(2) of the Rome I Regulation contains one exception from the general rule that the existence and validity of a contract are governed by the law applicable to the contract. If it appears that it would not be reasonable to determine the effect of a party's conduct in accordance with the *lex causae*, the party may rely upon the law of the country in which

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<sup>426</sup> The same provision was contained in Article 8 of the Rome Convention.

<sup>427</sup> Article 12 of the Rome I Regulation provides that the law applicable to the contract shall govern the consequences of nullity of the contract.

<sup>428</sup> NORTH, Peter. *Essays in Private International Law*. Oxford: Clarendon Press, 1993, pp. 58–59.

<sup>429</sup> DIAMOND, Aubrey L. Harmonization of Private International Law Relating to Contractual Obligations. In *Collected Courses of the Hague Academy of International Law*. 1986, Vol. 199, pp. 261–264.

he has his habitual residence in order to establish that he did not consent. Thus, if the application of the *lex causae* would not be appropriate, the party is allowed to achieve the application of the law of his habitual residence. But, under this law it is possible to determine just the lack of the consent, not the material invalidity as a whole.<sup>430</sup> However, if the consent is missing, the contract is invalid too.

Besides the Rome I Regulation conflict-of-law rules concerning the validity of legal acts can be found in the Succession Regulation. This regulation contains special conflict-of-law rules for the substantive validity of agreements as to succession and other dispositions of property upon death.

### 9.2.3 PILA

PILA is applicable to the validity of legal acts that are not covered by the above mentioned regulations. Section 41 of PILA states that: “*The existence and validity of a legal act as well as the consequences of its nullity shall be governed by the same law as the legal relation established thereby if the act or the nature of the matter do not direct otherwise.*” The general connecting factor is *lex causae*. Thus, the material validity is considered according to the same system of law as the basic legal relationship. The aim is to make the entire legal relationship ruled by the same law.

*Lex causae* is not applicable if PILA states otherwise or if the nature of the matter provides otherwise. PILA contains special conflict-of-law rules for the capacity (see the previous chapter) and the question of the formal validity of legal acts.<sup>431</sup> Moreover, PILA contains special conflict-of-law rules for the validity of specific legal acts (e.g. conditions of validity of marriage, validity of establishment of parentage, validity of dispositions of property upon death) that will be analysed in the following chapters.

<sup>430</sup> BĚLOHLÁVEK, Alexander J. *Římská úmluva a Nařízení Řím I: komentář v širších souvislostech evropského a mezinárodního práva soukromého*. Praha: C. H. Beck, 2009, p. 1440.

<sup>431</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, pp. 275–279.



### 9.3 Law Applicable to Formal Validity of Legal Acts

By the formal validity of a legal act is understood the external requirements which are placed upon the form of the legal act. As an example we can provide Section 560 of the Civil Code which states that legal act establishing or transferring a right in immovable property requires a written form. Unless restricted in the choice of forms of agreement or by law, everyone has the right to choose any form of legal acts.<sup>432</sup> Thus, it is necessary to determine the applicable law and then according to that consider the formal validity.

#### 9.3.1 International Conventions

The formal validity of legal act is regulated by several international conventions binding for the Czech Republic. First, it is necessary to mention the CISG which contains the substantive regulation of form of sales contracts within its scope. The CISG is based on the principle of informality. Under Article 11 a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. Article 29(1) states that a contract may be modified or terminated by the mere agreement of the parties. These provisions are not applicable in two instances. First, if one of the parties has his place of business in a Contracting State which has made a reservation under Article 96.<sup>433</sup> Secondly, if there is a different agreement of the parties to a sales contract. Article 29(2) states that a contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement.<sup>434</sup> For the purposes of the CISG “writing” includes telegram and telex.<sup>435</sup> By the way of interpretation it is deduced that “writing” also includes e-mail and other electronic means of communication. The conflict-of-law rules for the formal validity of legal acts are contained in some bilateral agreements between the Czech Republic and

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<sup>432</sup> Sections 559–564 of the Civil Code.

<sup>433</sup> See Article 12 of the CISG.

<sup>434</sup> However, the second sentence of Article 29(2) provides for the exception from this rule.

<sup>435</sup> Article 13 of the CISG. SCHLECHTRIEM, Peter. *Uniform Sales Law – The UN Convention on Contracts for the International Sale of Goods* [online]. Vienna: Manz, 1986, pp. 46–47 [cit. 5. 11. 2015].

non-Member States.<sup>436</sup> These rules take precedence over the conflict-of-law rules in the EU regulations and PILA.

### 9.3.2 EU Regulations

The formal validity of contracts is regulated by Article 11 of the Rome I Regulation.<sup>437</sup> This provision distinguishes between contracts concluded between persons who, or whose agents, are in the same country at the time of their conclusion and contracts concluded between persons who, or whose agents, are in different countries at the time of their conclusion. In the former case the contract is formally valid if it satisfies the formal requirements of the law which governs it in substance under the regulation (*lex causae*) or of the law of the country where it is concluded. In the latter case the contract is formally valid if it satisfies the formal requirements of the law which governs it in substance under the regulation (*lex causae*), or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time. In both cases it is enough for the contract to be formally valid if it meets the requirements of any of these laws. These rules thus clearly reflect the principle *favor negotii*.

Article 11(3) covers the formal validity of unilateral legal act intended to have legal effect relating to an existing or contemplated contract (e.g. offer, acceptance, avoidance of the contract). Such an act is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under the regulation (*lex causae*), or of the law of the country where the act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time. Again, the principle *favor negotii* is employed.

Articles 11(4) and 11(5) contain special regulation of the formal validity of consumer contracts and of contracts subject matter of which is a right *in rem* in immovable property or a tenancy of immovable property.

<sup>436</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 258.

<sup>437</sup> Article 9 of the Rome Convention contains similar provision.

Article 21 of the Rome II Regulation regulates the formal validity of a unilateral act intended to have a legal effect and relating to a non-contractual obligation. Such an act shall be formally valid if it satisfies the formal requirements of the law governing the non-contractual obligation in question or the law of the country in which the act is performed. But, the question of formal validity in non-contractual obligations is relatively rare.<sup>438</sup>

Also other regulations cover the formal validity of specific legal acts. For example, the Succession Regulation regulates formal validity of dispositions of property upon death made in writing and validity as to form of a declaration concerning an acceptance or waiver of succession.<sup>439</sup> Brussels Ibis Regulation regulates the form of choice of court agreements in favour of courts of Member States.<sup>440</sup>

Although the EU regulations do not contain general conflict-of-law rules which would regulate the form of legal acts, individual regulations regulate the formal validity of a considerable amount of acts.<sup>441</sup> Thus, EU law is quite significant in this area.

### 9.3.3 PILA

Section 42(1) of PILA employs the principle *favor negotii*.<sup>442</sup> It offers more connecting factors in order to keep the formal validity a legal act. A contract or another legal act is formally valid if its form complies with the law:

- Governing the contract or the legal act established thereby;
- Of the state where one of the parties expressed his intent;
- Of the state where one of the parties has habitual residence or seat, or;
- Of the state where immovable property to which the legal act relates is located.

<sup>438</sup> PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé*. 2nd ed. Praha: C. H. Beck, 2013, p. 194.

<sup>439</sup> Articles 27 and 28 of the Succession Regulation.

<sup>440</sup> Article 25 of the Brussels Ibis Regulation.

<sup>441</sup> BRÍZA, Petr; BŘICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C.H. Beck, 2014, p. 228.

<sup>442</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 257.

The regulation in PILA is very similar to that contained in the Rome I Regulation. It is also sufficient for the legal act to be valid according to one of the possible laws. In doubts, it is assumed that the contract or legal act is valid.<sup>443</sup>

Section 42(2) provides for a limitation of the rule in the first paragraph. Sometimes, it is necessary to observe the requirements on the form which are needed according to the law governing the contract or the law of the state in which the immovable property is located. If that law requires a certain form of the contract to be formally valid then the form must be respected. Section 42 is the general rule concerning the formal validity of legal acts. PILA contains special conflict-of-law rules for the formal validity of special legal acts (e.g. form of marriage in Section 48(2), form of power of attorney in Section 44(4), form of choice of court agreements in Sections 85, 86 and 88, form of arbitration agreement in Section 117(2)).

## 9.4 Law Applicable to Representation

The question of validity of a legal act also includes the question if the legal act made by another person (representative) has legal effects for a party.<sup>444</sup> We distinguish between statutory and contractual representation. A representative is a person who is legally authorized to act on behalf of another. Although it is the representative who acts, the rights and obligations arise to the represented person.<sup>445</sup> The represented person cannot or do not want to act by himself and for these situations there is representation.

### 9.4.1 International Conventions

The Czech Republic is bound by the Convention on the international protection of adults. The convention contains the conflict-of-law rules to determine the law applicable to representation of the adult. The basic rule states that the powers of representation granted by an adult are governed by the law of the state of the adult's habitual residence at the time

<sup>443</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, pp. 280–285.

<sup>444</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 258.

<sup>445</sup> Section 436 of the Civil Code.

of the agreement. Moreover the adult has the possibility to choose the law of the state of which he is a national or of his former habitual residence or of the state in which property of the adult is located. The third party is protected by Article 17, if the adult's representative is entitled to act under the law of the state where the transaction was concluded, but not under the law designated by the convention, the third party cannot be held liable because of it.

The Czech Republic is also the Contracting State to the Convention on Protection of Children which contains conflict-of-law rules for the statutory representation of minors (see the following chapter).

### 9.4.2 EU Regulations

Article 1(2)(g) of the Rome I Regulation<sup>446</sup> excludes from the scope of the regulation the question whether an agent is able to bind a principal, or a body to bind a company or other body corporate or unincorporated, in relation to a third party. However, the relationships between an agent and principal and between an agent and a third party are not excluded.<sup>447</sup>

Article 11 of the Rome II Regulation contains the conflict-of-law rule for *negotiorum gestio*, i.e. non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person. If such a non-contractual obligation is closely connected to a relationship existing between the parties, it shall be governed by the law that governs that relationship. Where the law applicable cannot be determined on this basis and the parties have their habitual residence in the same country when the event giving rise to the damage occurs, the law of that country shall apply. Where the law applicable cannot be determined on any of the previous basis, the non-contractual obligation shall be governed by the law of the country in which the act was performed. Article 11(4) then contains the escape clause.<sup>448</sup>

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<sup>446</sup> Article 1(2)(f) of the Rome Convention.

<sup>447</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 259.

<sup>448</sup> DIAMOND, Aubrey L. Harmonization of Private International Law Relating to Contractual Obligations. In *Collected Courses of the Hague Academy of International Law*. 1986, Vol. 199, p. 273.

### 9.4.3 PILA

Section 44 of PILA covers only the so called direct representation (the agent acts on behalf of the represented one).<sup>449</sup> Section 44(1) regulates the statutory representation. It can be the representation by operation of law (e.g. representation of minors by parents) or by virtue of a decision of a court or other authority (e.g. custody of persons with limited capacity). The governing law is the law which includes the provision on the representation (in the case of the representation by operation of law) or the law of the state whose courts have rendered the judgement on the representation (in the case of representation by virtue of a decision of a court or other authority). Besides, in the case of ordinary acts, it is sufficient for their legal effects if the acts comply with the law of the state where the act was undertaken. This should protect third persons who are not required to detect the content of foreign law.

Others paragraphs of Section 44 cover the regulation of contractual agency. A legal act undertaken by the agent for the principal has legal effects if it complies with one of the following laws:

- Law of the state where the agent undertook the act;
- Law of the state where the principal or the agent has a seat or habitual residence;
- Law of the state where the immovable property is located if the act relates to this immovable property;
- Law of the state whose law governs the relationship established by an agent's act.

The same rules are applicable to the formal validity of a power of attorney. The power of attorney is also formally valid if it complies with the law of the state where it was issued.

The relationship between an agent and a third person, if the agent exceeds his authority, is governed by the law applicable in place where the agent has a seat or habitual residence. The same rule applies to the relationship between a person who acted without due authority and a third person. Third person is protected in these cases in that way that he may invoke the application

<sup>449</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, pp. 293–299.

of the law of the state where the act was undertaken. Thus, if someone acts without authority or the agent exceeds the authority, he should not benefit from it to the detriment of a third party.

Section 45 contains special conflict-of-law rules for procuracy and for delegation of authority in running a business establishment. The acts undertaken under the procuracy are effective for the principal if they correspond to the law of the state where the principal has his seat or habitual residence. The acts based on the delegation of authority have effects for the principal if they correspond to the law of the state where the establishment is located. However, it is sufficient if the effects correspond to the law of the state where the proctor or the authorised person acted with a third person.

## 9.5 Prescription (Time Limitation)

In the sphere of civil law systems, the prescription is a concept of substantive law. This is also true in the Czech substantive law. Therefore, in the case of cross-border relationships, it is necessary to use uniform substantive rules or the conflict-of-law rules and to determine the applicable law to prescription.

The Czech Republic is a Contracting Party to the Convention on the limitation period in the international sale of goods.<sup>450</sup> This convention contains uniform substantive rules for prescription. It is applicable only to international sales contracts. The convention has introduced the general four years prescription period. Also the conventions in the area of international carriage contain uniform regulation of prescription.<sup>451</sup>

The Rome I Regulation has a conflict-of-law rule for the prescription of rights arising out of contracts. Under Article 12(1)(d) prescription is governed by the law applicable to the contract (*lex causae*). Rome II Regulation

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<sup>450</sup> Convention of 14 June 1974 on the limitation period in the international sale of goods [online]. *United Nations Commission on International Trade Law (UNCITRAL)* Available from: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1974Convention\\_limitation\\_period.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_limitation_period.html)

<sup>451</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 260.

states that the prescription of the right arising out of non-contractual obligation is governed by the law applicable to non-contractual obligation (Article 15(h)).

PILA contains conflict-of-law rule for the prescription in Section 46. Under this provision the prescription is governed by the law applicable to the rights which is subject of prescription. Similarly as in the Rome I and Rome II Regulations, PILA employs *lex causae* as the connecting factor.

## 9.6 Conclusion

The regulation of the material and formal validity in PILA is of limited importance. It is because other international or EU instruments contain substantive and conflict-of-law rules for these questions. These instruments have the application priority. Thus, PILA can be used only in the remaining cases in which neither the international conventions nor EU regulations are applicable. The same is true for the question of prescription.

PILA contains detailed regulation of representation which is, however, applicable only in those cases that are not covered by the international conventions and EU regulations. PILA distinguishes between statutory and contractual representation. It also contains special conflict-of-law rules for procuracy and for delegation of authority in running a business establishment.





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## 10 FAMILY LAW

### 10.1 Introduction

In this chapter, we will present and analyse the regulation of jurisdiction, applicable law, recognition and enforcement of foreign decisions in family matters with cross-border implications.

In comparison to the former PILA, the PILA provides more detailed regulation concerning family matters with a cross-border element. The regulation is contained in Sections 47–67 of PILA. These provisions stipulate rules on jurisdiction, applicable law, recognition and enforcement of decisions regarding relationships between spouses, parents and children, adoption regimes and guardianship and curatorship regimes involving an international element. In addition, contrary to the previous act, PILA establishes rules for registered partnerships with an international element.<sup>452</sup>

Considering the principle of primacy of international and EU law over national law, the application of PILA is limited with respect to the existence of several international instruments and directly applicable provisions of EU law in the sphere of family matters.<sup>453</sup>

### 10.2 Marital Regimes

The facilitation of the free movement of persons within an area without internal frontiers results in the increase of couples composed of citizens of different states who can be habitually resident and can acquire property situated in more than one state. Taking into account these implications, it is sufficient to establish rules considering the situations with a cross-border element. As regards the marital regimes, we will analyse rules on jurisdiction, law applicable as well as recognition and enforcement.

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<sup>452</sup> See Section 67 of PILA.

<sup>453</sup> Důvodová zpráva k ZMPS [online]. *Nový občanský zákoník*. Ministerstvo spravedlnosti České republiky [cit. 17. 8. 2015].

### 10.2.1 Jurisdiction

Respecting the principle of primacy, the jurisdiction rules contained in PILA are applicable only if an international convention or directly applicable provision of EU law do not stipulate otherwise. The relevant rules on jurisdiction for proceedings on matrimonial matters are contained in the Brussels IIbis Regulation. The general rule for the determination of jurisdiction in matters relating to a divorce, a legal separation or a marriage annulment is laid down in Article 3. It establishes the combination of jurisdiction criteria of habitual residence and nationality.<sup>454</sup>

Jurisdiction rules are contained also in several bilateral agreements on legal assistance. For example, the Czech Republic is bound by agreements on legal assistance with some former Soviet Union countries,<sup>455</sup> Ukraine<sup>456</sup> and Mongolia.<sup>457</sup> The Brussels IIbis Regulation takes precedence over agreements on legal assistance with other Member States of the EU.<sup>458</sup> The Czech Republic is not bound by any multilateral agreement regulating jurisdiction in matrimonial matters.

In case the aforementioned international treaties or directly applicable provisions of the EU law shall not apply, it is sufficient to establish

<sup>454</sup> For further explanation of the general rule see e.g. MAGNUS, Ulrich; MANKOWSKI, Peter (eds.). *Brussels IIbis Regulation*. 2nd ed. Munich: Sellier European Law Publishers GmbH, 2012, pp. 89–94.

<sup>455</sup> Regulation of the Ministry of Foreign Affairs No. 95/1983 Coll., on Agreement between Czechoslovak Socialist Republic and the Union of Soviet Socialist Republics on mutual legal assistance and settlement of relations in civil, family and criminal matters (“Regulation No. 95/1983”).

<sup>456</sup> Notice of the Ministry of Foreign Affairs No. 123/2002 Coll. Int. Conv., on Agreement between the Czech Republic and Ukraine on legal assistance in civil matters (“Notice No. 123/2002”).

<sup>457</sup> Regulation of the Ministry of Foreign Affairs No. 106/1978 Coll., on Agreement between Czechoslovak Socialist Republic and the People’s Republic of Mongolia on legal assistance and settlement of relations in civil, family and criminal matters (“Regulation No. 106/1978”).

<sup>458</sup> For example Regulation of the Ministry of Foreign Affairs No. 42/1989 Coll., on Agreement between Czechoslovak Socialist Republic and the Polish People’s Republic on legal assistance and settlement of relations in civil, family and criminal matters (“Regulation No. 42/1989”); Regulation of the Ministry of Foreign Affairs No. 63/1990 Coll., on Agreement between the Czechoslovak Socialist Republic and the People’s Republic of Hungarian on legal assistance and settlement of relations in civil, family and criminal matters (“Regulation No. 63/1990”); Regulation of the Ministry of Foreign Affairs No. 3/1978 Coll., on Agreement between Czechoslovak Socialist Republic and the People’s Republic of Bulgarian on legal assistance and settlement of relations in civil, family and criminal matters (“Regulation No. 3/1978”).

the jurisdiction of the Czech courts. The scope of jurisdiction rule stipulated by Section 47(1) of PILA covers the following matrimonial matters: a) divorce; b) marriage annulment; c) declaring whether a marriage exists or not. In comparison to the Brussels Ibis Regulation, the jurisdiction rules contained in PILA are based on different principles. Concerning the importance of personal matters, it is desirable to provide Czech citizens with access to the Czech courts.<sup>459</sup> PILA establishes jurisdiction of the Czech courts for proceedings on defined matters, if one of the spouses is a citizen of the Czech Republic or the defendant is habitually resident in the Czech Republic.<sup>460</sup>

PILA states special rule on matters where the spouses are foreigners and the defendant is not habitually resident in the Czech Republic or in any other Member State of the EU (except Denmark), or the defendant is not a citizen of any of these Member States and does not have domicile in the United Kingdom of Great Britain and Northern Ireland. In these cases, jurisdiction of the Czech courts is established if at least one of the following conditions is met: a) both spouses had and the plaintiff still has habitual residence within the Czech Republic; b) the plaintiff has habitual residence within the Czech Republic and the other spouse joined the petition; or c) the plaintiff has had habitual residence within the Czech Republic for at least one year before filing the action.<sup>461</sup>

The matters relating to maintenance obligations are covered by the Maintenance Regulation. This regulation provides rules on jurisdiction, applicable law as well as recognition and enforcement of decisions in maintenance obligations arising from family relationships, parentage, marriage or affinity.<sup>462</sup> The main objective of the Maintenance Regulation

<sup>459</sup> Důvodová zpráva k ZMPS [online]. *Nový občanský zákoník*. Ministerstvo spravedlnosti České republiky [cit. 17. 8. 2015].

<sup>460</sup> See Section 47(1) of PILA.

<sup>461</sup> See Section 47(2) of PILA; the concept of “habitual residence” within Czech law is analysed e.g. in MRÁZEK, Josef. *Matrimonium claudicans a uzavírání manželství s cizincem nebo v zahraničí*. *Právní rozhledy*, 2007, No. 9, pp. 314–315 or in HAŤAPKA, Miloš. K pojmu „obvyklý pobyt“ v mezinárodním práve súkromnom a procesnom. *Justičná revue*, 2001, Vol. 53, No. 2, pp. 183–188.

<sup>462</sup> See Article 1 of the Maintenance Regulation.

is to ensure effective and swift recovery of maintenance claims in cross-border situations and thereby to support the free movement of persons within the EU.<sup>463</sup>

In accordance with Article 3 of the Maintenance Regulation, jurisdiction in cross-border maintenance matters between spouses and former spouses lies with: a) the court for the place where the defendant has his habitual residence; or b) the court for the place where the creditor has his habitual residence; or c) the court which has jurisdiction to decide upon status matters of a person if the maintenance matter relates thereto and simultaneously the jurisdiction in the status matter was not established solely on the nationality of one party.<sup>464</sup>

### 10.2.2 Applicable Law

In this part, we will analyse the conflict-of-law rules concerning the question of capacity of a person to conclude marriage, conditions for its validity, its form, personal and property relations between spouses, maintenance obligations between spouses and former spouses, as well as the question of divorce, annulment of marriage and determining whether a marriage exists or not. Under Czech law, the governing law shall be determined in accordance with Sections 48–50 of PILA.

#### *Capacity, Conditions for Validity and Form*

With regard to law applicable to the capacity of a person to conclude a marriage as well as the conditions for its validity and the form of a marriage, the Czech Republic is bound by several agreements on legal assistance.<sup>465</sup> The conflict-of-law rules contained in these instruments use the same connecting factors as the national regulation.<sup>466</sup>

Section 48 of PILA establishes conflict-of-law rules for the capacity of a person to conclude a marriage, the validity of a marriage and the form

<sup>463</sup> See Recital 45 of the Preamble to the Maintenance Regulation.

<sup>464</sup> The jurisdiction rules contained in the Maintenance Regulation are analysed e.g. in WALKER, Lara. *Maintenance and Child Support in Private International Law*. Oxford: Hart publishing, 2015, pp. 52–72.

<sup>465</sup> E.g. Regulation No. 63/1990; Regulation No. 3/1978.

<sup>466</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 329.

of a marriage. This provision provides also rules for a consular marriage and special cases of celebration of a marriage abroad.

Conflict-of-Law rule for the capacity of a person to conclude a marriage covers the age limit for a marriage, impediments to a marriage and related conditions for validity of a marriage.<sup>467</sup> These questions shall be governed by the law of the state of which the person is a citizen.<sup>468</sup> In case the spouses are citizens of different states, the capacity is to be considered individually pursuant to the relevant legal order at the moment of conclusion of the marriage.<sup>469</sup>

The form for concluding a marriage shall be governed by the law of the state where such a marriage is being concluded.<sup>470</sup> Citizens of the Czech Republic may conclude a marriage also abroad before a diplomatic mission or consular authorities of the Czech Republic.<sup>471</sup> Contrary to the former PILA,<sup>472</sup> Section 48(3) of PILA expressly subordinates the conclusion of a marriage abroad to the Czech law.<sup>473</sup> A detailed regulation is contained in consular

<sup>467</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 325.

<sup>468</sup> See Section 48(1) of PILA.

<sup>469</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 325.

<sup>470</sup> See Section 48(2) of PILA.

<sup>471</sup> See Section 668 of the Civil Code. Conditions for conclusion of such marriage are analysed in detail in BĚLOHLÁVEK, Alexander. Uzavírání sňatků v zahraničí. *Právní rádce*. 2006, No. 7, pp. 4–10; PAUKNEROVÁ, Monika. Případ italsko-českého kulhajícího manželství: řešení nabízí evropské parvo. *Právní rozhledy*. 2007, No. 16, pp. 597–603 or in MRÁZEK, Josef. Matrimonium claudicans a uzavírání manželství s cizincem nebo v zahraničí. *Právní rozhledy*. 2007, No. 9, pp. 309–317. For further analysis of speculative marriages with foreigners see KRÁLÍČKOVÁ, Zdeňka. Právní aspekty spekulativních sňatků s cizinci. *Právní rozhledy*. 2000, No. 6, pp. 246–250.

<sup>472</sup> Conflict-of-Law rules for marital regimes were contained in Sections 19–22 of the former PILA.

<sup>473</sup> Důvodová zpráva k ZMPS [online]. *Nový občanský zákoník*. Ministerstvo spravedlnosti České republiky [cit. 20. 8. 2015].

agreements to which the Czech Republic is a party.<sup>474</sup> However, Czech citizens cannot validly conclude a marriage at any foreign embassy in the Czech Republic.<sup>475</sup>

### ***Personal Relations***

Personal relations between spouses cover their mutual rights and obligations. Traditionally, they are supposed to be faithful to each other, to live together, to respect each other, to help each other and to represent each other.<sup>476</sup> In some legal orders, these relations include also the question of surname,<sup>477</sup> the question of consent with some acts undertaken by one of the spouses, prohibition of some legal acts between spouses, etc.<sup>478</sup>

The regulation of personal relations between spouses is contained in several agreements on legal assistance to which the Czech Republic is a party. The agreements operate with common citizenship of spouses or their common habitual residence.<sup>479</sup>

Under provisions contained in PILA, personal relations between the spouses shall be governed by the law of the state of which both of the spouses are citizens. If the spouses are citizens of two different states, the governing law is the law of the state where both of the spouses have habitual residence. If there is no such common habitual residence, the Czech law shall apply.<sup>480</sup>

### ***Property Relations***

Law applicable to property relations between spouses is regulated by bilateral agreement on legal assistance concluded between the Czech Republic

<sup>474</sup> E.g. Vienna Convention of 24 April 1963 on consular relations [online]. *United Nations Treaty Collection*. Available from: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mdtsg\\_no=III-6&chapter=3&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mdtsg_no=III-6&chapter=3&lang=en); PAUKNEROVÁ, Monika. *Private International Law in the Czech Republic*. Alphen aan den Rijn: Kluwer Law International, 2011, p. 153.

<sup>475</sup> See Section 48(4) of PILA.

<sup>476</sup> Concerning the Czech family law, the personal relations between spouses are regulated by Section 687 et seq. of the Civil Code.

<sup>477</sup> See also Section 29(3) of PILA under which a person may invoke application of the law of the state in which he/she is habitually resident.

<sup>478</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 330.

<sup>479</sup> *Ibid.*, pp. 331–332.

<sup>480</sup> See Section 49(1) of PILA.

and Russia<sup>481</sup> which use following hierarchy of connecting factors: a) common habitual residence; b) common citizenship; c) last common habitual residence; d) *lex fori*.<sup>482</sup>

The former PILA stated one rule in order to determine law applicable to personal as well as property relations between spouses.<sup>483</sup> PILA establishes the special rule for the property regimes.<sup>484</sup> The key connecting factor is the common habitual residence. If the spouses are habitually resident in different states, the governing law is the law of the state of which both of the spouses are citizens. If they are citizens of different states, the property regimes are determined pursuant to the Czech law.<sup>485</sup> Section 49(4) of PILA enables the spouses to choose the law applicable to their property relations. They may choose one of the laws which have the nearest connection with the situation: a) law of the state of which one of the spouses is a citizen; b) law of the state where one of them has his habitual residence; c) law of the state where the immovable property is situated; d) *lex fori*.<sup>486</sup>

### ***Divorce, Annulment and Determining whether the Marriage Exists or Not***

The scope of Brussels IIbis Regulation does not cover conflict-of-law rules in order to determine the law applicable to a divorce, an annulment and determining whether a marriage exists or not.<sup>487</sup> The agreements on legal assistance binding for the Czech Republic operate with the connecting factor of common nationality of the spouses, or alternatively *lex fori*.<sup>488</sup> Under national law, a divorce is governed by law applicable to the personal relations of the spouses. The decisive moment is the initiation of the proceedings.<sup>489</sup>

<sup>481</sup> Regulation No. 95/1983.

<sup>482</sup> See Article 25 of the Regulation No. 95/1983.

<sup>483</sup> See Section 21(1) of the former PILA.

<sup>484</sup> Důvodová zpráva k ZMPS [online]. *Nový občanský zákoník*. Ministerstvo spravedlnosti České republiky [cit. 21. 8. 2015].

<sup>485</sup> Section 49(3) of PILA.

<sup>486</sup> The Czech regulation of agreements on matrimonial property is contained in Section 716 et seq. of the Civil Code.

<sup>487</sup> It stipulates only the rules on jurisdiction and recognition and enforcement of judgments in these matters.

<sup>488</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav at al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 332.

<sup>489</sup> See Section 50(1) of PILA.



When invalidating the marriage or determining whether the marriage exists or not, the capacity of the spouses as well as the form of the conclusion of the marriage must be considered pursuant to law applicable to these questions at the time the marriage was concluded.<sup>490</sup>

### ***Claims of Unmarried Mothers***

Claims of unmarried mother to the father to whom she is not married include the recovery of maintenance and expenses related to pregnancy and childbirth.<sup>491</sup> The conflict-of-law rules for these claims are contained in the Hague Protocol. If the Hague Protocol does not apply, the applicable law shall be determined pursuant to conflict-of-law rules stipulated by PILA. Under its provisions, these claims are governed by the law of the state in which the mother was habitually resident at the time of the birth of the child. However, she may invoke the application of the law of the state of which she was a citizen at the time of birth. In case the woman is still pregnant, her claims are governed by the law of the state in which she is habitually resident at the time of application for an action. She may also invoke the application of the law of the state of which she is a citizen at the time of the application for an action.<sup>492</sup>

### **10.2.3 Recognition of Foreign Judgements**

As stated above, the issues of a divorce, a legal separation, an annulment and determining whether a marriage exists or not are regulated by the Brussels IIbis Regulation. Under this regulation, the Czech courts may recognise only decisions rendered in other Member State (except Denmark). The Brussels IIbis Regulation requires no special procedure for recognition of such decisions.<sup>493</sup> However, any party to the proceeding may apply for a decision on non-recognition.<sup>494</sup>

<sup>490</sup> Pursuant to Section 50(3) of PILA.

<sup>491</sup> See Section 920 of the Civil Code; KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 341.

<sup>492</sup> See Section 59(1) of PILA.

<sup>493</sup> See Article 21(1) of the Brussels IIbis Regulation; see NÍ SHÚILLEABHÁIN, Máire. *Cross-border Divorce Law: Brussels II bis*. Oxford: Oxford University Press, 2010, pp. 243–245.

<sup>494</sup> See Article 21(3) of the Brussels IIbis Regulation; see NÍ SHÚILLEABHÁIN, Máire. *Cross-border Divorce Law: Brussels II bis*. Oxford: Oxford University Press, 2010, p. 244.

The regulation of these matters is contained also in the Convention on the recognition of divorces and legal separations. This convention is not applicable in relation to decisions issued in Member States of the EU (except Denmark).<sup>495</sup> In order to determine the conditions for recognition, the convention refers to the law of the state in which the proceeding was instituted. The Czech Republic is bound by several agreements on legal assistance concerning the matters of recognition. Some of them differ from the mentioned concept and require special procedure as a condition for recognition.<sup>496</sup>

Contrary to the Brussels IIbis Regulation, the national law states more requirements. The judgements in matters of a divorce, a legal separation,<sup>497</sup> an annulment and declaring whether a marriage exists or not in which at least one of the parties is the Czech citizen may be recognised only on the basis of a separate judgement, if it is not expressly precluded in Section 15(1) (a)–(e) of PILA.<sup>498</sup> The jurisdiction to decide on the recognition was given to the Supreme Court of the Czech Republic. Any person who proves a legitimate interest may file an application for such recognition.<sup>499</sup>

### 10.3 Registered Partnership and Similar Regimes

Contrary to the former PILA, PILA establishes special rules on jurisdiction, law applicable and recognition and enforcement of decisions regarding registered partnership or other similar relationships. The term “similar relationships” covers kinds of relationships recognised by foreign legal orders, which can differ from the Czech regulation of registered partnership.<sup>500</sup>

<sup>495</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 349.

<sup>496</sup> E.g. Regulation of the Ministry of Foreign Affairs No. 80/1981 Coll., on Agreement between Czechoslovak Socialist Republic and the Republic of Cuba on mutual legal assistance in civil, family and criminal matters (“Regulation No. 80/1981”); Agreement between the Czechoslovak Republic and Switzerland on mutual legal assistance in civil and commercial matters, published under No. 9/1928 Coll.

<sup>497</sup> The „legal separation“ corresponds with the terminology of instruments of EU law.

<sup>498</sup> See Section 51(1) of PILA.

<sup>499</sup> See Section 51(2) of PILA.

<sup>500</sup> Důvodová zpráva k ZMPS [online]. *Nový občanský zákoník*. Ministerstvo spravedlnosti České republiky [cit. 26. 8. 2015].

### **10.3.1 Jurisdiction**

If the partnership was registered in the Czech Republic or one of the partners is a Czech citizen with habitual residence in the Czech Republic, the Czech courts have jurisdiction to decide on termination, annulment or non-existence of this registered partnership or similar relationship.<sup>501</sup>

### **10.3.2 Applicable Law**

Section 67(2) of PILA stipulates conflict-of-law rules for the registered partnership or similar relationship and their effects, capacity of the partners, form of the registered partnership and its termination, annulment and non-existence as well as personal and property relations between partners. These questions are governed by the law of the state in which the partnership is being or was registered.

### **10.3.3 Recognition of Foreign Judgements**

PILA does not require any special procedure for recognition of foreign judgements on termination, annulment or non-existence of this registered partnership or similar relationship issued in the state in which the partnership or similar relationship was registered or in which these judgements were recognised.<sup>502</sup>

## **10.4 Parent - Child Regimes**

The following subchapter is devoted to legal regimes between children and their parents and some other relating regimes. These regimes cover matters of establishing and contesting parentage, matters of maintenance, custody and care of minors. Taking into account the limited legal capacity of children, the regulation of matters related to children aims to provide them with a sufficient protection of their rights and legal expectations. The interest of a child is to be primarily superior to any other interest. In light of this aim, the regulation of parent-child regimes is a subject of many international treaties as well as directly applicable provisions of EU law. The national regulation concerning such relationships is contained in Sections 53 – 66

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<sup>501</sup> See Section 67(1) of PILA.

<sup>502</sup> See Section 67(3) of PILA.

of PILA. It provides also separate regulation of rights of unmarried mothers in Section 59. In this subchapter, we will analyse the regulation of jurisdiction, law applicable as well as the recognition and the enforcement.

#### 10.4.1 Matters of Establishment and Contesting of Parentage

##### *Jurisdiction*

The Czech Republic is not bound by any multilateral convention that regulates the matter of establishment and contesting of parentage. However, the Czech Republic is a party to several agreements on legal assistance operating with different jurisdiction criteria. For example, the bilateral agreement with Ukraine establishes jurisdiction of courts of the state where a child has his habitual residence.<sup>503</sup> On the other hand, the bilateral agreement with Cuba establishes alternative jurisdiction of a) courts of a contracting state of which a child is a citizen; or b) courts of a contracting state where a child has his habitual residence.<sup>504</sup> The aforementioned Brussels Ibis Regulation expressly excludes these matters from its scope of application.<sup>505</sup>

Under national law, the jurisdiction of the Czech courts shall be established if the defendant has his general court in the Czech Republic. Pursuant to Czech procedural law, the term “general court” means the court of a habitual residence.<sup>506</sup> If the defendant does not have a general court in the Czech Republic, the jurisdiction of the Czech courts is established when the plaintiff has a habitual residence in the Czech Republic. Otherwise, the jurisdiction of the Czech courts shall be established when one of the parents of a child has the Czech citizenship.<sup>507</sup>

##### *Applicable Law*

With regard to the establishment or contesting of parentage, there is neither multilateral convention nor directly applicable provision of the EU law concerning the conflict-of-law rules. The conflict-of-law rules contained in some

<sup>503</sup> See Article 33(2) of the Notice No. 123/2002.

<sup>504</sup> See Article 22(4) of the Regulation No. 80/1981.

<sup>505</sup> See Article 1(3)(a) of the Brussels Ibis Regulation.

<sup>506</sup> See Sections 84 and 85 of the Code of Civil Procedure (see DAVID, Ludvík et al. *Občanský soudní řád: komentář*. Praha: Wolters Kluwer, 2009, pp. 396–400).

<sup>507</sup> See Section 53 of PILA.

agreements on legal assistance, concluded between the Czech Republic and some former Soviet Union countries, operate with the connecting factor of the place of birth of a child.<sup>508</sup>

In accordance with Section 54(1) of PILA, the main connecting factor for the determination of the law applicable to these matters is the nationality of a child (*lex patriae infantis*). In order to prevent any “mobile conflict”, the connecting factor is expressly fixed to the moment of birth.<sup>509</sup> In case of multiple nationalities, Czech law shall apply without reference to whether one of nationalities is Czech.<sup>510</sup>

Compared to the previous regulation,<sup>511</sup> the conflict-of-law rule in Section 54 of PILA takes into account the interest of a child when determining the governing law. In this respect, it states that the law of the state in which a mother of a child had a habitual residence at the time of the conception of a child shall be applied if it is in the interest of a child.<sup>512</sup> This new provision aims to determine law having the nearest connection to the real social conditions.<sup>513</sup>

Contrary to the general conflict-of-law rule, Section 54(2) of PILA extends the application of Czech law. Pursuant to the cited provision, Czech law shall be applied to the matters of the establishment and contesting of parentage if two conditions are met simultaneously: 1) a child has his habitual residence in the Czech Republic; and 2) the application of Czech law is in the interest of a child (e.g. *lex patriae* does not regulate the determination of paternity or the regulation is limited).<sup>514</sup>

There is no need to initiate the proceedings on establishing paternity when the parentage was sufficiently established in compliance with the law

<sup>508</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 336.

<sup>509</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 364.

<sup>510</sup> Section 54(1) second sentence of PILA; Section 28 of PILA, the general rule for a question of multiple or indeterminate nationality, does not apply.

<sup>511</sup> See Section 23 of the former PILA.

<sup>512</sup> See Section 54(1) last sentence of PILA.

<sup>513</sup> Důvodová zpráva k ZMPS [online]. *Nový občanský zákoník*. Ministerstvo spravedlnosti České republiky [cit. 25. 8. 2015].

<sup>514</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 336.

of the state in which the recognition of the parentage was declared.<sup>515</sup> The Czech legal order recognises the concept of affirmative declaration of a mother and a father of a child before a competent authority.<sup>516</sup>

### ***Recognition of Foreign Judgements***

The national regulation of the recognition of foreign judgements in such matters is contained in Section 55 of PILA. The judgements on establishing or contesting of parentage can be recognised if at least one of the parties to the proceeding was a citizen of the Czech Republic in accordance with Section 51 of PILA that regulates the recognition of judgements in matters of divorce, legal separation, annulment of marriage and declaring whether a marriage exists or not.<sup>517</sup> The decisive time is the time of rendering the judgement.<sup>518</sup>

## **10.4.2 Relations between Parents and Their Children**

### ***Jurisdiction***

The regulation of jurisdiction in matters of maintenance, custody and care of minors is laid down in Section 56 of PILA. This provision shall not be applied when the matter is covered by the Brussels IIbis Regulation, the Maintenance Regulation or an international convention. The Czech Republic is a Contracting State to the Convention on Protection of Children. The jurisdiction rules are contained also in several agreements on legal assistance.<sup>519</sup>

**Matters of Maintenance:** The general rule on jurisdiction in the maintenance matters was already analysed in relation to maintenance obligation between spouses and former spouses in the previous subchapter. Unless the Maintenance Regulation or any international convention states otherwise, the Czech courts shall have jurisdiction if a minor is habitually resident

<sup>515</sup> See Section 54(3) of PILA.

<sup>516</sup> Section 779 of the Civil Code (see ŠVESTKA, Jiří et al. *Občanský zákoník: komentář*. Praha: Wolters Kluwer, 2014, pp. 295–298).

<sup>517</sup> See Section 55(1) of PILA.

<sup>518</sup> KUČERA, Zdeněk; GAŇO, Jiří. *Zákon o mezinárodním právu soukromém: komentované vydání s důvodovou zprávou a souvisejícími předpisy*. Brno: Doplněk, 2014, p. 104.

<sup>519</sup> E.g. Regulation No. 95/1983.

in the Czech Republic or a citizen of the Czech Republic.<sup>520</sup> The Czech courts shall have jurisdiction also in the maintenance proceedings in which annulment or modification of a judgement issued by the Czech court is being proposed against the maintenance creditor habitually resident abroad.<sup>521</sup>

**Parental Responsibility and Protection of a Person or Property of a Child:** The Brussels Ibis Regulation<sup>522</sup> takes precedence over the provisions of the Convention on Protection of Children if a child has its habitual residence in a Member State of the EU or in the case of the recognition and the enforcement of a judgement of a court of a Member State in any other Member State.<sup>523</sup> Under Article 8 of the Brussels Ibis Regulation, the courts of a Member State shall have jurisdiction in these matters over a child who has habitual residence in this Member State.<sup>524</sup> Article 5 of the Convention on Protection of Children uses the same criterion to determine the jurisdiction to take measures directed to the protection of the child's person or property.

Unless the Brussels Ibis Regulation or any international convention states otherwise, the Czech courts shall have jurisdiction if a minor is habitually resident in the Czech Republic or a citizen of the Czech Republic.<sup>525</sup> PILA enables the embassy of the Czech Republic to take care of a minor citizen of the Czech Republic if a child has his habitual residence abroad and nobody exercises the parental responsibility toward him or her.<sup>526</sup>

Under Section 56(3) of PILA, the Czech courts have jurisdiction to decide upon modifications or annulment of their own decisions in maintenance obligations where the creditor is a Czech citizen. It aims to ensure the efficiency of the procedure.<sup>527</sup> A debtor may apply for modifications and annul-

<sup>520</sup> See Section 56(1) of PILA.

<sup>521</sup> See Section 56(3) of PILA.

<sup>522</sup> For commentary of the Brussels Ibis Regulation see e.g. MAGNUS, Ulrich; MANKOWSKI, Peter (eds.). *Brussels Ibis Regulation*. Munich: Sellier European Law Publishers GmbH, 2012.

<sup>523</sup> DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 213.

<sup>524</sup> See MAGNUS, Ulrich; MANKOWSKI, Peter (eds.). *Brussels Ibis Regulation*. Munich: Sellier European Law Publishers GmbH, 2012, pp. 109–116.

<sup>525</sup> See Section 56(1) of PILA.

<sup>526</sup> See Section 56(2) of PILA.

<sup>527</sup> DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 216.

ment of the decision on maintenance, unless he has his habitual residence in the state where the decision was rendered.<sup>528</sup>

### ***Applicable Law***

PILA establishes two separate conflict-of-law rules for the matters of maintenance obligations and the parental responsibility matters.

**Matters of Maintenance:** Section 57(1) of PILA refers to conflict-of-law rule for maintenance obligations between parents and their children stipulated by the directly applicable provision of EU law – the Maintenance Regulation. Article 15 of the Maintenance Regulation further refers to conflict-of-law rules stipulated by the Hague Protocol. In accordance with Article 3 of the Hague Protocol, the governing law to all types of maintenance matters shall be law of the state in which the creditor is habitually resident.<sup>529</sup> If the creditor is unable to obtain the maintenance from the debtor under law of the state of his habitual residence, *lex fori* shall apply.<sup>530</sup> If the creditor initiated the maintenance proceedings in the court of the state in which the debtor has his habitual residence, the law of the forum shall be the governing law irrespective of the general rule in Article 3 of the Hague Protocol. However, if the creditor is not able to obtain the maintenance by virtue of this law, then the law of the state in which the creditor is habitually resident would apply under the general rule in Article 3.<sup>531</sup> In case the creditor is unable to obtain the maintenance under none of the previous laws, the governing law would be the law of the state of the common nationality of the debtor and the creditor.<sup>532</sup>

<sup>528</sup> See Section 56(4) of PILA.

<sup>529</sup> For reasons for this connection see e.g. BONOMI, Andrea. The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations. In ŠARČEVIČ, Petar; BONOMI, Andrea; VOLKEN, Paul (eds.). *Yearbook of Private International Law*. Vol. X. Munich: Sellier European Law Publishers, 2008, pp. 29, 31.

<sup>530</sup> BONOMI, Andrea. The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations. In ŠARČEVIČ, Petar; BONOMI, Andrea; VOLKEN, Paul (eds.). *Yearbook of Private International Law*. Vol. X. Munich: Sellier European Law Publishers, 2008, pp. 36, 37.

<sup>531</sup> BRÍZA, Petr; BRICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C.H. Beck, 2014, p. 299.

<sup>532</sup> See Article 4(2) - (4) of the Hague Protocol. For commentary of these provisions see BONOMI, Andrea. The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations. In ŠARČEVIČ, Petar; BONOMI, Andrea; VOLKEN, Paul (eds.). *Yearbook of Private International Law*. Vol. X. Munich: Sellier European Law Publishers, 2008, pp. 39, 41.



**Parental Responsibility and Protection of a Person or Property of a Child:** The parental responsibility may be defined as a sum of rights and obligations including care for health, physical, emotional, intellectual and moral development of a child, ensuring his upbringing and education, protection of a child, legal representation of a child and administration of his property.<sup>533</sup>

In order to determine the law applicable to these parental rights and obligations and measures to protect person or property of a child, Section 57(2) of PILA refers to conflict-of-law rules stipulated by the Convention on Protection of Children. The Convention on Protection of Children applies only to minors (the child after his birth until the age of 18 years).<sup>534</sup> Its provisions deal in particular with the attribution, exercise, termination or restriction of parental responsibility, rights of custody, guardianship, curatorship, placement in a foster family or institutional care, supervision of persons having charge of a child and administration of property of a child.<sup>535</sup> In the scope of its application, the Convention on Protection of Children replaced national law.<sup>536</sup> Generally, the authorities shall apply *lex fori* in exercising their jurisdiction.<sup>537</sup> According to its conflict-of-law rules, the attribution or extinction of parental responsibility as well as its exercise shall be governed by law of the state in which a child is habitually resident.<sup>538</sup>

The conflict-of-law rules for parental responsibility matters are contained in several agreements on legal assistance that use the connecting factors of the nationality of a child<sup>539</sup> or the habitual residence of a child.<sup>540</sup>

<sup>533</sup> See Section 858 of the Civil Code (For commentary of this provision see e.g. ŠVESTKA, Jiří et al. *Občanský zákoník: komentář*. Praha: Wolters Kluwer, 2014, pp. 446–450).

<sup>534</sup> See Article 2 of the Convention on Protection of Children.

<sup>535</sup> See Article 3 of the Convention on Protection of Children.

<sup>536</sup> Důvodová zpráva k ZMPS [online]. *Nový občanský zákoník*. Ministerstvo spravedlnosti České republiky [cit. 25. 8. 2015].

<sup>537</sup> See Article 15(1) of the Convention on Protection of Children.

<sup>538</sup> See Articles 16(1) and 17 of the Convention on Protection of Children.

<sup>539</sup> E.g. Article 28(3) of the Regulation of the Ministry of Foreign Affairs No. 207/1964 Coll., on Agreement between the Czechoslovak Socialistic Republic and the Socialist Federal Republic of Yugoslavia on regulation of legal relationships in civil, family and criminal matters.

<sup>540</sup> E.g. Article 30(1) of the Regulation No. 95/1983 .

### *Recognition of Foreign Judgements*

Application of national rules on the recognition is limited by the existence of international instruments and directly applicable provisions of EU law.

**Matters of Maintenance:** The recognition and enforcement of judgements on defined maintenance matters issued in a Member State of the EU are governed by Articles 16, 17, 23–25 of the Maintenance Regulation. According to this regulation, judgements rendered in another Member State which is simultaneously a contracting state to the Hague Protocol may be recognised in another Member State without any further procedure being required or without possibility to oppose the recognition.<sup>541</sup> For the purposes of the enforcement of these judgements, Article 20 of the Maintenance Regulation requires the claimant to provide the court with certain documents.

**Parental Responsibility:** Final judgements in matters of parental responsibility issued in a Member State of the EU are to be recognised and enforced under provisions of the Brussels IIbis Regulation. Under its Article 21, these judgements shall be recognised without any further proceedings being required.<sup>542</sup> The recognition of the judgement may be challenged in the court for some reasons for non-recognition specified in Article 23 of the Brussels IIbis Regulation.<sup>543</sup> The courts are precluded from reviewing the judgement as to its substance (e.g. whether governing law was applied properly etc.).<sup>544</sup> The enforcement of judgements generally requires previous declaration of enforceability.<sup>545</sup>

In the sphere of international law, the recognition is covered by the aforementioned Convention on Protection of Children, the Convention on the civil aspects of international child abduction and the European convention on recognition and enforcement of decisions concerning custody

<sup>541</sup> See Article 17 of the Maintenance Regulation.

<sup>542</sup> MAGNUS, Ulrich; MANKOWSKI, Peter (eds.). *Brussels IIbis Regulation*. Munich: Sellier European Law Publishers GmbH, 2012, pp. 256–261.

<sup>543</sup> *Ibid.*, pp. 275–286.

<sup>544</sup> VAŠKE, Viktor. *Uznání a výkon cizích rozhodnutí v České republice*. Praha: C.H. Beck, 2007, p. 324.

<sup>545</sup> See Articles 28 and 29 of the Brussels IIbis Regulation (for commentary see MAGNUS, Ulrich; MANKOWSKI, Peter (eds.). *Brussels IIbis Regulation*. Munich: Sellier European Law Publishers GmbH, 2012, pp. 293–298).

of children and on restoration of custody of children. We should mention also the existence of relevant agreements on legal assistance with former Soviet Union countries.<sup>546</sup>

The national regulation shall be applied to judgements issued in states outside of the EU that are not bound by any of the relevant international instruments.<sup>547</sup> Section 58 of PILA requires no special procedure in order to recognise final foreign judgements in matters of maintenance, custody and care of minors, if the judgements were rendered in a state of which a child is of foreign nationality or in which a child has his habitual residence.<sup>548</sup>

## 10.5 Adoption

Under Czech family law, the adoption establishes the same legal relationship between an adoptee and his adopter(s) that would exist if a child had been born to them.<sup>549</sup> Therefore, its effect should be consistent, it should not be affected e.g. by the change of nationality.<sup>550</sup>

The issue of intercountry adoption represents one of the spheres of law which is not regulated by the EU law. The Brussels IIbis Regulation expressly excludes decisions on adoption, other measures preparatory to adoption as well as the annulment or revocation of adoption.<sup>551</sup>

The Czech Republic is a Contracting State to the Convention on protection of children and co-operation in respect of intercountry adoption (“Convention on Intercountry Adoption”) establishing a system of co-operation in matters of intercountry adoption. The Convention on Intercountry Adoption aims to ensure the performance of adoption in the best interests of a child and with respect for his fundamental rights.<sup>552</sup>

<sup>546</sup> BRÍZA, Petr; BRICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C.H. Beck, 2014, p. 307.

<sup>547</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 397.

<sup>548</sup> *Ibid.*, pp. 401–402.

<sup>549</sup> See Sections 832–836 of the Civil Code (for commentary of these provisions see e.g. ŠVESTKA, Jiří et al. *Občanský zákoník: komentář*. Praha: Wolters Kluwer, 2014, pp. 402–404).

<sup>550</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8<sup>th</sup> ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 367.

<sup>551</sup> See Article 1(3) of the Brussels IIbis Regulation.

<sup>552</sup> See Article 1 of the Convention on Intercountry Adoption.

The Czech Republic is a contracting state to few agreements on legal assistance concerning adoption matters.<sup>553</sup>

### 10.5.1 Jurisdiction

The aforementioned agreements on legal assistance prescribe rules for determining jurisdiction for adoption involving an international element. Most of them establish jurisdiction of courts of a state of which an adopter is a citizen at the moment when the proceedings was commenced.<sup>554</sup>

Unless some of the international agreements state otherwise, the Czech courts shall have jurisdiction for adoption matters in which an adopter is a citizen of the Czech Republic.<sup>555</sup> In accordance with Section 60(3) of PILA, the Czech courts shall have exclusive jurisdiction to decide on an adoption of a minor with the Czech nationality who is habitually resident in the Czech Republic. The regulation of exclusive jurisdiction aims to ensure the protection of the interest of minors living in the Czech Republic by the nearest possible authorities. The judgement issued by a court wrongly seized in breach of exclusive jurisdiction shall not be recognised.<sup>556</sup>

Unless an adopter or one of adopting spouses is a citizen of the Czech Republic, the Czech courts shall have jurisdiction if: a) an adopter or at least one of adopting spouses is a resident in the Czech Republic and the decision may be recognised in states of which they are citizens (“home state”); or b) an adopter or one of adopting spouses has habitual residence in the Czech Republic.<sup>557</sup>

### 10.5.2 Applicable Law

Neither any multilateral international convention nor any EU instrument stipulates the conflict-of-law rules for determining the law applicable to intercountry adoptions. The aforementioned agreements on legal

<sup>553</sup> E.g. Regulation No. 95/1983; Regulation No. 3/1978; Regulation No. 63/1990; Regulation No. 42/1989.

<sup>554</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 415.

<sup>555</sup> See Section 60(1) of PILA.

<sup>556</sup> See Section 63(1) of PILA.

<sup>557</sup> See Section 60(2) of PILA.

assistance concerning matters of adoption operate generally with the connecting factor of the nationality of the adopter. Some of them require consent of the state of which the child is a citizen.<sup>558</sup>

Under national law, the adoption shall be governed by the law of the state of which an adopter is a citizen.<sup>559</sup> In case the adopting spouses are citizens of two different states, the conditions required for adoption stipulated by laws of both of these states and by law of the state of which an adopter is a citizen must be fulfilled.<sup>560</sup>

Section 62 of PILA prescribes special conflict-of-law rules for determining the law applicable to the effects of adoption and for relations between parties to adoption.

The effects are subordinated to law of a state of which all parties are citizens. If there is no common citizenship, law of the state in which all parties are habitually resident shall apply. Even if there is no such common habitual residence, the subsidiary connecting factor is the citizenship of an adoptee. The decisive moment for consideration of the connecting factor is the time of adoption.<sup>561</sup>

Taking into account the character of the relationship between an adopter and an adoptee, the conflict-of-law rule determining the law applicable to relationships comprising parental rights and obligations, custody and maintenance refers to provision regulating law applicable to relationships between parents and their children.<sup>562</sup>

### 10.5.3 Recognition of Foreign Judgements

Also with regard to the recognition of foreign judgements on adoption, there are no uniform rules of EU law.

<sup>558</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 343.

<sup>559</sup> See Section 61(1) of PILA.

<sup>560</sup> See Section 61(2) of PILA.

<sup>561</sup> See Section 62(1) of PILA. KUČERA, Zdeněk; GAŇO, Jiří. *Zákon o mezinárodním právu soukromém: komentované vydání s důvodovou zprávou a souvisejícími předpisy*. Brno: Doplněk, 2014, pp. 118–119.

<sup>562</sup> See Section 62(2) of PILA. KUČERA, Zdeněk; GAŇO, Jiří. *Zákon o mezinárodním právu soukromém: komentované vydání s důvodovou zprávou a souvisejícími předpisy*. Brno: Doplněk, 2014, p. 119.

The Convention on Intercountry Adoption obliges Contracting States to recognise adoptions realized in accordance with its provisions and certified by competent authority of the state of adoption.<sup>563</sup> In the Czech Republic, the authority competent to certify intercountry adoption to foreign countries is the Office for International Legal Protection of Children.<sup>564</sup>

The Convention on Intercountry Adoption does not affect the application of any international agreement including the regulation of same matters to which contracting states are parties, unless a contracting state made a contrary declaration with respect to such international agreement.<sup>565</sup> The examples of such instruments are agreements on legal assistance concluded with the Union of Soviet Socialist Republics, Bulgaria, Hungary, Poland etc.<sup>566</sup> These agreements do not require any further proceedings for recognition of judgements in adoption matters.

The national regulation of the recognition of foreign judgements on adoption differs depending on the nationality. In case an adopter or an adoptee was a citizen of the Czech Republic at the time of adoption, the foreign judgement on adoption may be recognised when three required conditions are met: a) the foreign judgement is not incompatible with the public policy of the Czech Republic; b) the foreign judgement is not inconsistent with exclusive jurisdiction of the Czech courts;<sup>567</sup> c) the foreign judgement is not in conflict with Czech substantive law.<sup>568</sup> These requirements were adopted in order to preclude circumventing the Czech laws by carrying out adoption abroad.<sup>569</sup>

With regard to the adoption proceedings in which all parties were at the decisive time foreigners, the judgement may be recognised in the Czech Republic

<sup>563</sup> See Article 23 of the Convention on Intercountry Adoption.

<sup>564</sup> See Section 35(2) letter i) of the Act No. 359/1999 Coll., on social and legal protection of children.

<sup>565</sup> See Article 39 of the Convention on Intercountry Adoption.

<sup>566</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 428.

<sup>567</sup> See Section 60(3) of PILA.

<sup>568</sup> The issue of adoption is regulated by Sections 794–854 of the Civil Code (for commentary of these provisions see e.g. ŠVESTKA, Jiří et al. *Občanský zákoník: komentář*. Praha: Wolters Kluwer, 2014, pp. 332–438).

<sup>569</sup> DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 244.

without further proceedings if two fundamental conditions are fulfilled: a) the foreign judgement is not incompatible with the public policy and concurrently; b) the foreign judgement is recognised in home states of all parties.<sup>570</sup>

## 10.6 Guardianship and Curatorship of Minors

In this subchapter, we will introduce the regulation of jurisdiction, law applicable as well as the recognition and the enforcement relating to matters of the guardianship and the curatorship. The regulation is contained in directly applicable provisions of the EU law, international conventions and national law.

### 10.6.1 Jurisdiction

With respect to the principle of priority, jurisdiction in matters of the guardianship and the curatorship of minors with habitual residence in a Member State of the EU (except Denmark) shall be governed primarily by the Brussels IIbis Regulation. For the purpose of the application of this regulation, the guardianship and curatorship regimes may be qualified as “parental responsibility”.<sup>571</sup> Therefore, we refer to the commentary on jurisdiction in matters of the parental responsibility in the previous subchapter.

When the Brussels IIbis Regulation does not apply, the jurisdiction shall be established under PILA. Section 64(1) of PILA refers to provision regulating jurisdiction in matters of maintenance, custody and care of minors. The cited provision shall be applied *mutatis mutandis* also for the determination of jurisdiction in other matters of care of minors (e.g. award of the custody of a child or the institutional rehabilitation).<sup>572</sup> If jurisdiction of the Czech courts is not established pursuant to Section 64(1) of PILA, the Czech courts shall proceed in compliance with the general rule stipulated in Section 33(2) and (3) of PILA *mutatis mutandis*.<sup>573</sup> For further explanation, we refer to the previous subchapter.

<sup>570</sup> See Section 63(2) of PILA.

<sup>571</sup> See Article 1(2) letter b) of the Brussels IIbis Regulation

<sup>572</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, pp. 429–430.

<sup>573</sup> See Section 64(2) of PILA.

### 10.6.2 Applicable Law

With regard to applicable law, the abovementioned Convention on Protection of Children shall take the precedence over national legislation. The Convention on Protection of Children qualifies the matters of the guardianship and the curatorship also as “parental responsibility”. In compliance with its conflict-of-law rules, the measures relating to the guardianship and the curatorship shall be governed by *lex fori*.<sup>574</sup> For further explanation of the conflict-of-law regime laid down in the Convention on Protection of Children, we refer to the subchapter devoted to the parental responsibility. The conflict-of-law rules regarding the guardianship and the curatorship are contained also in the agreements on legal assistance.<sup>575</sup>

Under national law, the matters of the guardianship and the curatorship of minors shall be governed by the law of the state whose authority or court has decided upon the concrete matter.<sup>576</sup> However, Section 65(2) of PILA establishes an escape clause which enables the Czech courts to apply other law with substantial connection to the situation in question.<sup>577</sup> Section 65(3) of PILA expressly excludes *renvoi* for the purpose of application of cited conflict-of-laws rules for the guardianship and the curatorship.

The application of the conflict-of-law rules in PILA is limited due to provisions of the aforementioned Convention on Protection of Children. The convention is generally applicable (*lois uniformes*) in all signatory states and replaces national conflict-of-law rules to matters of the guardianship and the curatorship of minors.<sup>578</sup>

### 10.6.3 Recognition of Foreign Judgements

The national regulation of the recognition of foreign judgements on guardianship and curatorship of minor matters shall be applied if it is not possible to proceed pursuant to an international instrument or an instrument of the EU law. In the sphere of EU law, the Brussels IIbis Regulation

<sup>574</sup> See Article 15 of the Convention on Protection of Children.

<sup>575</sup> E.g. Regulation No. 95/1983; Regulation No. 3/1978.

<sup>576</sup> See Section 65(1) of PILA.

<sup>577</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 247.

<sup>578</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 336.



contains directly applicable provisions on the recognition. The regulation was analysed already above in the subchapter devoted to the parental responsibility.

If the foreign judgement does not fall within the scope of any of the mentioned European or international instrument, the recognition would proceed pursuant to national law.<sup>579</sup> Section 38 of PILA states that final foreign judgements on the guardianship of a foreigner which were issued by the authorities or courts of his home state or state of his habitual residence do not require any further proceeding for their recognition.

## 10.7 Conclusion

In this chapter, we introduced the regulation of family matters with cross-border implications. The family matters include marital regimes, registered partnership and similar relationships, parent-child regimes, adoption, guardianship and curatorship. With regard to these relationships, we presented and analysed the rules on jurisdiction, applicable law, recognition and enforcement of foreign decisions. We presented the regulation stipulated by directly applicable provisions of the EU law as well as international conventions and the national regulation contained in PILA. Generally, the regulation of family matters tends to protect children and to give priority to their interests over others. We may conclude the regulation is primarily based on connecting factors of nationality and also habitual residence reflecting the modern high level of mobility of persons.

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<sup>579</sup> See Section 66 of PILA.

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# 11 RIGHTS IN REM

## 11.1 Introduction

Rights *in rem* represent absolute proprietary rights, which are effective *erga omnes*, i.e. towards all third parties. The third parties are obliged to refrain from doing something what can interfere with the exercise of proprietary rights. The object of the rights *in rem* is a thing in the legal sense.

Under Section 489 of the Civil Code a thing in the legal sense is everything that is different from persons and serves the needs of persons. We can distinguish between tangible and intangible things and movable and immovable things. “Tangible things are governable parts of the outside world, which have a character of independent subjects. Intangible things are things the nature of which it admits and other things without material substance.”<sup>580</sup> Under the Civil Code, pieces of land and underground buildings with a separate purpose specification as well as rights *in rem* to them are immovable things. If special legislation lays down that a specific thing is not a part of the piece of land and it is impossible to move the thing from place to place without damage, such thing is immovable property. Other things are movables.<sup>581</sup> The Civil Code contains an exhaustive list of rights *in rem* which cannot be expanded by any means. The list includes ownership, right of possession of the thing by a person other than its owner and rights in another person’s things, i.e. *iura in re aliena*.

There are differences between national legal orders concerning the definitions of things and the list of the rights *in rem*. In cross-border relations it is therefore necessary to know what law is applicable to the rights *in rem*.

Rights *in rem* are inseparably connected to a thing. Special importance of the thing as an object of legal relations emphasises the importance of the place where the thing is. The place where the thing is located is mostly a well identifiable fact for the parties to legal relations. The place of a thing’s position (*lex rei sitae*) is used as a connecting factor in relation to immovable things for centuries. In relation to movable things

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<sup>580</sup> Section 496 of the Civil Code.

<sup>581</sup> Section 498 of the Civil Code.

the connecting factor has developed from the owner's nationality (*lex patriae*) to *lex rei sitae*.<sup>582</sup>

## 11.2 Jurisdiction in Proceedings Concerning Rights in Rem

In this part, we focus on jurisdiction rules for proceedings which have as their object rights *in rem*. We reiterate that rules of PILA are applied only within the limits of the EU regulation (especially the Brussels Ibis Regulation) and international conventions, in particular bilateral agreements on legal assistance.

### 11.2.1 International Conventions

The Czech Republic is not bound by any multilateral convention regulating the jurisdiction in proceedings which have the rights *in rem* as their subject matter. The bilateral agreements on legal assistance concluded with other Member States containing jurisdiction rules in these matters are replaced by the Brussels Ibis Regulation. Only the bilateral agreements concluded with third states are still applicable because they take precedence over Brussels Ibis Regulation.<sup>583</sup>

### 11.2.2 Brussels Ibis Regulation

Article 24(1) of the Brussels Ibis Regulation provides for the exclusive jurisdiction in proceedings which have as their object rights *in rem* in immovable property. Under this provision, only the courts of the Member State in which the property is situated have jurisdiction. The exclusive jurisdiction shall apply whenever the set conditions are met and regardless of the parties' domicile. The reason for a determination of the exclusive jurisdiction is the close connection between the dispute and the state in whose territory the competent court is and also the fact that these legal issues are usually subject to regulation of mandatory rules of the state.<sup>584</sup> The notion "proceedings which have as their object rights *in rem* in immovable property"

<sup>582</sup> POLÁČEK, Bohumil. Kolizní úprava věcných práv. *Ad Notam*. 2014, No. 2, p. 3.

<sup>583</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 446.

<sup>584</sup> ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, p. 285.

is interpreted restrictively by the CJEU.<sup>585</sup> The provision is applicable only to the proceedings that concern the existence of ownership, right of possession or other rights *in rem*, their scope or content.<sup>586</sup>

Concerning the proceedings which have as their object rights *in rem* in movable property the exclusive jurisdiction is not given. Therefore, the general rule of jurisdiction in Article 4 of Brussels Ibis Regulation applies. The courts of the Member State in which the defendant is domiciled shall have jurisdiction. The parties may also choose the courts or court of a Member States in accordance with Article 25. In such a case, the general rule would not apply. The rule in Article 26 is also applicable here. Under this provision, a court of a Member State before which a defendant enters an appearance shall have jurisdiction.

### 11.2.3 PILA

Section 68 gives the exclusive jurisdiction to the Czech courts or other authorities to decide on *rights in rem* to immovable things located in the Czech Republic. However, if we take into account the provision of Article 24(1) of Brussels Ibis Regulation, there is no space for the application of Section 68.<sup>587</sup>

PILA does not contain a special provision on jurisdiction in relation to proceeding which have as their object the rights *in rem* to movable things. For this reason, it is necessary to apply the general jurisdictional rule contained in Section 6 of PILA. This rule was analysed above.

## 11.3 Law Applicable to Rights in Rem

### 11.3.1 International Conventions and EU Regulations

The Czech Republic is bound by several bilateral agreements that contain conflict-of-law rules in this area.<sup>588</sup> It is also bound by several multilateral

<sup>585</sup> For the analysis of these cases see e.g. KYSELOVSKÁ, Tereza; ROZEHNALOVÁ, Naděžda et al. *Rozhodování Soudního dvora EU ve věcech příslušnosti (analýza rozhodnutí dle Nařízení Brusel Ibis)*. Brno: Masarykova univerzita, 2014, pp. 358–392.

<sup>586</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 445.

<sup>587</sup> *Ibid.*

<sup>588</sup> E.g. Regulation No. 95/1983; Regulation No. 207/1964; Regulation No. 80/1981; Regulation No. 63/1990.

conventions. These are primarily conventions relating to rights *in rem* to aircrafts and vessels. Under these conventions, the rights *in rem* to aircrafts and vessels, their establishment, transfers, effects of registration are governed by the law of contracting state where the vessel or aircraft is registered. Moreover, there are conventions concerning the objects in space.<sup>589</sup>

There is no EU regulation containing the conflict-of-law rules for the rights *in rem*.

### 11.3.2 PILA

Section 69(1) contains the general conflict-of-law rule for the rights *in rem*. The rights *in rem* to both immovable things and tangible movable things shall be governed by the law of the state where the thing is located, unless PILA or special legislation does not provide otherwise. The law of the state where the thing is situated (*lex rei sitae*) is a general connecting factor. There is no distinction between tangible movable and immovable things. *lex rei sitae* determines whether a thing is a thing in the legal sense, determines a kind of right *in rem*, its content and effects, creation and termination and also answers the question of whether a thing is movable or immovable.<sup>590</sup>

#### *Immovable Things*

In relation to immovable things, the general rule contained in Section 69 PILA is fundamental. Rights *in rem* are usually subject to regulation of mandatory rules of states. The place where the thing is located expresses the closest connection between the thing and the state. Exceptions to the general rule are rare.

For example, one the exceptions is the creation of ownership as a result of succession. In this case the law applicable to the succession applies. If the immovable thing is a part of matrimonial property regime, the law applicable to this regime is relevant. Application of the Section 69(1) of PILA is also affected by the Insolvency Regulation.<sup>591</sup>

<sup>589</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 454.

<sup>590</sup> POLÁČEK, Bohumil. Kolizní úprava věcných práv. *Ad Notam*. 2014, 2, p. 5.

<sup>591</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 263; PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 453.

### *Movable Things*

In the case of rights *in rem* to movable things, the general rule of Section 69(1) is applicable. The exceptions mentioned above are applicable also here. There are, however, more exceptions to the general rule in the case of movable things.

#### **Section 70(1) – Creation and Termination of the Rights *in Rem*:**

The place where a thing is located is a changeable reality in relation to movable things. If there is a change of the place of the thing's location, the question of which point in time is relevant to the determination of the governing law will arise.<sup>592</sup> This situation is called mobile conflict. Two types of facts can be recognised, closed and open facts. If all conditions for the acquisition of a right under the law of the state of the original position are met in the territory of that state, the right is valid under legal order of that state and the state of the new position should recognise such rights. In this case we are talking about the closed facts. Open facts cover situation when all condition set forth for the acquisition of a right are not met in the territory of the state of the original position.<sup>593</sup>

Therefore, Section 70(1) of PILA sets forth that the creation and termination of rights *in rem* relating to movables shall be governed by the law of the place where the thing was located at the time of occurrence of the event giving rise to the creation or termination of the right. This is a special provision that applies to the creation and termination of rights *in rem* only in relation to movable things. The creation and termination include all the possibilities of the creation and termination of rights *in rem* (i.e. both original and derived acquisition).<sup>594</sup>

In accordance with this special provision, it shall be assessed under the law of any state in whose territory the thing was whether the event giving rise to the creation or extinction of the right under the law of that state occurred when the thing was in this state. If the conditions laid down for the creation

<sup>592</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň – Brno: Aleš Čeněk - Doplněk, 2015, p. 264.

<sup>593</sup> ŠIMKA, Karel. Mobilní konflikty a jejich řešení v mezinárodním právu soukromém ČR, SRN, Rakouska a Švýcarska. *Právní rozhledy*. 2000, No. 12, p. 545.

<sup>594</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 457.

or termination of the right are met within the territory of the first state, the creation or termination of the right is also recognised in the second state. However, the law of the new location of the thing shall be reflected in the assessment of the content and effects of the right.<sup>595</sup>

**Section 70(2) - Creation and Termination of Ownership to Movables on the Basis of a Contract:** The creation and termination of the ownership to movables under contracts is another exception to the *lex rei sitae*. In accordance with Section 70(2) of PILA, the creation and termination of the ownership to movables that are being transferred on the basis of a contract shall be governed by the law governing the contract which forms the basis for the creation and termination of the ownership (*lex causae*). Only the creation and termination of the ownership to tangible movable things falls within the scope of this conflict-of-law rule. Section 70(1) is the special provision to both Section 70(1) and 69(1).

This rule covers also the reservation of ownership, which is used as an instrument ensuring the seller's right to the purchase price. There are various conditions that are required by the national legal orders for the validity of the reservation of ownership. Thus, in the case of international sales contract, it is necessary to determine the applicable law. Under Section 70(2) the reservation of ownership is governed by the law applicable to contract.<sup>596</sup>

**Section 70(3) - Res in Transitu:** *Res in transitu* are things that are subject of transport from one country to another provided that such transport has already begun and it has not been completed yet. If during the transportation a legal fact giving rise to creation or termination of the right in rem occurs, we are facing a specific conflict-of-law situation. If the thing is subject to transport, it is not always possible to find out where the thing is at the moment the legal fact occurs. The connecting factor of *lex rei sitae* is not suitable here.<sup>597</sup>

<sup>595</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, pp. 264–265.

<sup>596</sup> *Ibid.*, p. 265.

<sup>597</sup> *Ibid.*, p. 266.

Section 70(3) PILA solves this situation. It sets forth that the creation and termination of rights *in rem* to *res in transitu* shall be governed by the law of the place from which the thing has been sent (*lex loci expeditionis*).

If there is an interruption of the transportation, while it is not important whether as a result of a legal act or infringement, and the thing is subject to legal relations in the state of its position, there is a reversion to general connecting factor *lex rei sitae*. As regards transportation that uses multiple means of transport, the place of dispatching is the place from which the thing was dispatched at the beginning of the entire transport, while the places of switching to other means of transport shall be disregarded, provided that the contract considers the transportation as a whole.<sup>598</sup> The place from which the thing has been sent shall be understood as the place of factual dispatch of things.

An exception is the case in which the creation and termination of rights *in rem* occurs by means of disposition of a security, which must be submitted in order to release the things and provide dealing with them. In this case, in accordance with Section 70(3), second sentence of PILA, the applicable law is the law of the place where the security is at the time of disposal (*lex situs chartae*).

**Section 69(2) - Rights *in Rem* to Aircraft and Vessels:** The exemption from the general rule also applies in relation to vessels and aircrafts which are registered in the public register, such as vessel and aircraft registers. In accordance with Section 69(2) of PILA, the creation or termination of rights *in rem* to these objects is governed by the law under whose authority the register is kept (i.e. the seat of the authority that keeps the relevant register).

### ***Acquisitive Prescription (Usucaption)***

The issue of acquisitive prescription is dealt with in Section 72 PILA, according to which the acquisitive prescription is governed by the law of the place where the thing was at the beginning of the course of the prescriptive period. This is a general connecting factor. The provision further

<sup>598</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, pp. 266.



contains a subsidiary conflict-of-law rule, according to which a person entitled to acquisitive prescription may invoke the law of the state in whose territory the acquisitive prescription took place if from the time when the thing entered to this state, under the laws of that state all the conditions laid down for the acquisitive prescription were met.

This provision has to be understood in the following sense. If the movable assets is at the beginning of the course of the prescriptive period in a country X, which determines prescriptive period of five years, and after one year an occupant moves the thing to state Y, according to which legislation is the prescriptive period three years, a person entitled to the acquisitive prescription may theoretically invoke the acquisitive prescription after four years from the beginning of the course of the prescriptive period. It is a subsidiary conflict-of-law rule that could be triggered only by a person entitled to acquisitive prescription. Of course, it must meet the other conditions set for the acquisitive prescription by the state of the position of the thing. From the wording of Section 72 PILA it can be deduced that it applies only to movables.<sup>599</sup> Acquisitive prescription of immovable property is governed by the general rule which is enshrined in Section 69 of PILA.

### ***Registrations in Public Books***

Legal acts that create, change, transfer or terminate the rights *in rem* can be subject of registration in public books or in other similar registers. Registration in the public books may have declaratory or constitutive nature.<sup>600</sup> Section 71 of PILA states that the provisions on registration in public books and similar registers applicable in place where the immovable things or movable things are located shall also apply when the legal title for the creation, termination, limitation or transfer of the registered right is governed by a different legal order. Public books and similar registers are registers which are publicly accessible. Everybody can ask a competent authority for an extract of the registered data.<sup>601</sup>

<sup>599</sup> BŘÍZA, Petr; BŘICHÁČEK, Tomáš, FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 376.

<sup>600</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 263.

<sup>601</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 467.

## 11.4 Recognition and Enforcement of Judgements in Matters Relating to Rights in Rem

The recognition and enforcement of judgements in this area rendered in a Member State are governed mainly by the Brussels Ibis Regulation which has also superseded the regulation of bilateral agreements between the Member States. Only the bilateral agreements with the third states are applicable to this matter.

In the residual cases, PILA applies. PILA does not contain special regulations of recognition and enforcement of judgements in matters relating to rights *in rem*. Therefore, the general regulation in Section 14 et seq. is applicable here.

## 11.5 Trust and Similar Concepts

The trust is a new legal concept of the Czech law, which has been introduced by the recodification of the Czech civil law. The principle of the trust is that a settlor sets aside a certain part of his property. The property settled in trust is administered by a trustee, who manages assets for the benefit of the beneficiary. Property held in trust ceases to be owned by the settlor, but it is neither owned by the trustee nor by the beneficiary. It is a property without an owner, but the trustee is entitled to exercise the rights to the entrusted property which belong to the owner.<sup>602</sup>

Concerning the jurisdiction of courts in disputes relating to trusts, the Brussels Ibis Regulation is applicable if the defendant is domiciled in a Member State. The general rule in Article 4 is applicable. Article 7(6) provides for the alternative rule as regards a dispute brought against a settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing. A settlor, trustee or beneficiary domiciled in a Member State may be also sued in the courts of the Member State in which the trust is domiciled. Articles 25 and 26 may be applied as well. Brussels Ibis Regulation also governs the recognition and enforcement of judgements rendered in these

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<sup>602</sup> POLÁČEK, Bohumil. Kolizní úprava svěřenství. *Ad Notam*. 2013, No. 5, p 11.

proceedings. PILA does not have special rules on jurisdiction and recognition and enforcement of judgements in disputes relating to trusts. Thus, the general rules apply.

The Rome I Regulation excludes from its scope of application the constitution of trusts and the relationship between settlors, trustees and beneficiaries.<sup>603</sup> Rome II Regulation excludes non-contractual obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily.<sup>604</sup> Also, the Succession Regulation excludes the creation, administration and dissolution of trusts from its scope.<sup>605</sup> Therefore, there is no EU regulation containing the conflict-of-law rules for a trust. Moreover, the Czech Republic is not bound by any international convention in this area.

Conflict-of-Law rules for trusts can be found in Section 73 of PILA. The trust or a similar concept is primarily governed by the law designated by the settlor. The chosen law will be applied only if this law regulates the trusts or similar devices or it is possible to apply its provisions to trusts.<sup>606</sup> If these conditions are not met or in the absence of choice of law, trust is governed by the law with which is the most closely connected. Section 73(2) of PILA contains a non-exhaustive list of the criteria which should be taken into account when identifying the closest connection. The list expressly encompasses:

- A place from which the trust fund is administered;
- A place in which the property settled in the trust fund is predominantly located;
- A place of a seat or habitual residence of the trustee;
- The purposes intended by the creation of the trust fund as well as to the places where these purposes are to be achieved.

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<sup>603</sup> Article 1(2)(h).

<sup>604</sup> Article 1(2)(e).

<sup>605</sup> Article 1(2)(j).

<sup>606</sup> POLÁČEK, Bohumil. Kolizní úprava svěřenství. *Ad Notam*. 2013, No. 5, p 12.

Section 73(3) PILA explicitly allows the choice of law in relation to a certain element which may be separated from the other trust elements. This leads to splitting the trust, where an element of the fund, which can be separated, is governed by a different law than the other elements.<sup>607</sup>

Section 73(4) regulates the recognition in the Czech Republic of trusts established abroad. A trust that has been set up abroad is recognised in the Czech Republic under the condition that the trust has the basic features required by the Czech law.

The trust is created by the allocation of assets owned by the settlor in that way the trustee entrusted assets for a particular purpose on the basis of a contract or disposition of property upon death and the trustee undertakes to hold and manage the property settled in trust. By the creation of the trust is created a separate and independent proprietary of earmarked property and the trustee is obliged to take on the property and its administration. From the text of Section 73 of PILA it seems that it is not applicable to trusts established directly by law or judicial decision, because in such cases there is not a settlor and his will to set up the trust. However, such a concept can meet the conditions for similar instruments, which also falls under scope of the Section 73 of PILA. The similarity is not possible to understand as identity. So, it is not necessary for such a similar concept to meet all of the above essential features of trust, except those which are typical of trust. For example, similar instrument can also be a concept that has been established by the settlor's unilateral legal act *inter vivos*.<sup>608</sup> In contrast, when it comes to recognizing the trust established abroad, the Czech Republic will recognise it only if it meets the essential requirements of the trust as defined in Section 1448(1) of the Civil Code. The form of a trust deed may not be the reason for its non-recognition in the Czech Republic, as foreign legal systems, in most cases do not require a qualified written form of trust deed.<sup>609</sup>

<sup>607</sup> BŘÍZA, Petr; BŘICHÁČEK, Tomáš, FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 381.

<sup>608</sup> *Ibid.*, p. 379.

<sup>609</sup> *Ibid.*, p. 382.

## 11.6 Conclusion

Rights *in rem* are absolute proprietary rights that are connected to a thing as the object of these rights. The place where the thing is located thus plays a key role, especially in determining the law applicable to rights *in rem*. Concerning the sources governing the jurisdiction, applicable law and recognition and enforcement of judgements in these matters, rules in PILA are applicable only in those cases not covered by international conventions and EU regulations. International and EU sources are more important as regards jurisdiction and recognition and enforcement. Concerning the conflict-of-law rules, PILA still plays a significant role. The general connecting factor is *lex rei sitae*. There are several exceptions, more of them in the case of movable things.

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## 12 INTELLECTUAL PROPERTY RIGHTS

### 12.1 Introduction

Intellectual property (“IP”) refers to creations of human mind, such as inventions, literary and artistic works, designs, names or images used in commerce.<sup>610</sup>

All these creations are protected by law. This protection enables people to earn recognition or financial benefit from what they invent or create. The rights arising out of these creations is regulated by a vast number of national laws, international conventions and EU regulations. The system of protection of IP rights tries to find the balance between the interests of innovators and the public interest on innovations.<sup>611</sup>

The IP rights and their protection is based on the *lex loci protectionis* principle; i.e. the law applicable to the IP and infringement of IP rights is the law of the country in which legal protection for the IP is claimed.

PILA recognises this principle in Section 80: *“The intellectual property rights are regulated by the law of the State, which recognises and protects such a right.”*

### 12.2 Types of IP in General

IP rights can be distinguished according to: their type and how they are created (i.e. if registration is necessary).

#### 12.2.1 Types of IP Rights

The IP rights are customarily divided into two main areas: 1. industrial property rights; and 2. copyright and rights related to copyright.<sup>612</sup>

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<sup>610</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 526; DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu ke 1. lednu 2014*. Praha: Leges, 2013, p. 303; *What is Intellectual Property?* [online]. World Intellectual Property Organization, WIPO Publication No. 450(E) [cit. 14. 11. 2015].

<sup>611</sup> *WIPO Intellectual Property Handbook: Policy, Law and Use* [online]. World Intellectual Property Organization [cit. 14. 11. 2015].

<sup>612</sup> Recital 26 of the Preamble to the Rome II Regulation.

***Industrial Property Rights***<sup>613</sup>

Industrial property can be divided into two main groups.

The first group can be characterised as the protection of distinctive signs, in particular trademarks and geographical indications. The protection of distinctive signs aims to stimulate and ensure the protection of fair competition and consumer rights. This protection may last indefinitely, provided that the sign in question continues to be distinctive.

The second group of industrial property covers inventions (protected by patents), industrial designs and trade secrets. The protection of these rights aims primarily to stimulate innovation, design and the creation of technology. The protection is usually given for a certain period of time, typically for 20 years in case of patents.

***Copyright and Rights Related to Copyright***<sup>614</sup>

The rights of authors of literary and artistic works (books, articles and other writings, musical compositions, paintings, sculptures and films) are protected by copyright, for a minimum period of 50 years after the death of the author. Copyright protects also the related (“neighbouring”) rights; such as the rights of performers (actors, singers, musicians) and broadcasting organizations.

The main purpose for protection of copyrights is to encourage and reward creative work.

**12.2.2 Registered and Unregistered IP Rights**

For some IP rights, the cooperation with state authorities is necessary. Certain IP rights must be registered in special registers, such as patents or trademarks.

Other IP rights do not have to be registered, such as copyright. If some creation fulfils conditions prescribed by the national legal order for literary and artistic work (books, musical compositions, paintings, computer programs, films etc.), it is protected by this national legal order.

<sup>613</sup> *Understanding Intellectual Property* [online]. World Intellectual Property Organization, WIPO Publication No. 895(E) [cit. 14. 11. 2015]. Types of industrial property rights are defined e.g. in Article 1(2) of the Paris Convention of 20 March 1883 for the protection of industrial property [online]. *World Intellectual Property Organization*. Available from: [http://www.wipo.int/treaties/en/text.jsp?file\\_id=288514](http://www.wipo.int/treaties/en/text.jsp?file_id=288514) (“Paris Convention”).

<sup>614</sup> *Understanding Copyright and Related Rights* [online]. World Intellectual Property Organization, WIPO Publication No. 909(E) [cit. 14. 11. 2015].

### 12.3 Legal Characteristics of IP Rights

In order to understand the rules and principles underlying the protection of IP rights, it is necessary to explain certain characteristics of these rights. IP is a “property”. IP rights are rights given to persons for the creations of their minds; they possess both a moral and a commercial value.

The IP rights are “absolute” rights. They usually give the creator an exclusive right over the use of his creation for a certain period of time, and every other person shall refrain from infringing these rights.<sup>615</sup>

The IP rights are limited and governed by the “territoriality principle”.<sup>616</sup> With regards to the territorial limitations of the IP rights, the relevant national law governs the creation, content and permissions for other persons to use such an IP right (*lex loci protectionis*).<sup>617</sup> It is usually the country where the literary work originated or the invention was registered as patent. The intellectual property right and its protection are limited to the territory of this particular state.

In essence, in the IP rights, no “conflict” between laws applicable and their infringement is able to exist. With regards to the nature of the IP rights, it is not possible to determine the law applicable according to the conflict-of-law rules; there are no conflicts in principle.<sup>618</sup> This axiom stems from the nature of the IP rights. As said above, the law applicable to cases of infringement of IP rights is the law of the *locus protectionis*, that is, the law

<sup>615</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 271; PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 526.

<sup>616</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 271; PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 526; DOBLÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 304.

<sup>617</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 527; Recital 26 of the Preamble to Rome II Regulation.

<sup>618</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 272; DOBLÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 306.



of the country in which the protection is sought (see Section 80 of PILA). Each legal order has its own legal rules governing IP rights. For example, an invention (patent) must fulfil certain conditions under national law in order to be recognised, and thus protected, as intellectual property right - patent. These conditions may differ in various states; in one state, an invention may fulfil all the conditions necessary as to be recognised and protected as patent; and in other state not.

Furthermore, the provisions on the protection of IP rights are of “mandatory” nature. They are limited to the territory of the state that recognises and protects a particular IP right; they shall be applied irrespectively of any other rules.<sup>619</sup>

If an artistic work is expressed in a manner perceivable by human senses, it can be used anywhere all around the world without the need to move the physical object in which it is expressed (e.g. a machine made on the basis of the invention).<sup>620</sup> In that sense, its position is unlimited. This feature of the IP is called “potential ubiquity”. If a creator of such an intangible property is interested in its protection, he must seek its protection in every state where the protection is wanted; and the IP must meet all the conditions for protection laid down by the relevant states.<sup>621</sup>

The protection of IP rights is “temporary”,<sup>622</sup> limited in time, so that there were no obstacles to the development of the society.

## 12.4 Sources of Law – General Overview

For IP rights, it is necessary to distinguish two aspects:

1. The law governing the IP right itself (e.g. what is a patent, under what conditions an innovation is protected as patent). This area of law is usually governed by uniform substantive rules.

<sup>619</sup> DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 304.

<sup>620</sup> *Ibid.*, p. 272.

<sup>621</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 527.

<sup>622</sup> *Ibid.*

2. Contractual and non-contractual obligations connected to the IP rights (e.g. patent license agreement, infringement of IP rights). This area is mostly governed by conflict-of-law rules; thus it is necessary to determine the law applicable.

#### 12.4.1 Uniform Rules Governing IP Rights

As said above, due to the legal nature of the IP rights, no “conflicts” between applicable laws, in principle, is possible. With regards to the territorial limitations of the IP rights, the relevant national laws govern the creation, content, permissions for other persons to use such IP right (*lex loci protectionis*).

The protection of IP rights is governed by wide range of international conventions and EU regulations (see below). These conventions and EU regulations are directly applicable before national laws.<sup>623</sup>

#### 12.4.2 Conflict-of-Law Rules for IP Rights

Conflicts between applicable laws may arise in contractual obligations with a cross-border element (e.g. international patent licence agreements) and non-contractual obligations with a cross-border element (e.g. cross-border infringement of copyright).<sup>624</sup> For these legal relationships with international (cross-border) element, it is necessary to apply the conflict-of-law rules and determine the law applicable.

The law applicable to contracts is governed by the Rome I Regulation (Articles 3 and 4) and PILA (Section 84 et seq.).

The law applicable to infringement of IP itself is governed by the Rome II Regulation (Article 8) and Section 80 PILA.

Both, the Rome I Regulation and the Rome II Regulation are directly applicable before PILA.<sup>625</sup>

<sup>623</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 527.

<sup>624</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 273.

<sup>625</sup> PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé*. 2nd ed. Praha: Nakladatelství C.H.Beck, 2013, pp. 47–48.

### 12.4.3 Jurisdiction of Courts

The rules for jurisdiction of courts are between the EU Member States governed by the Brussels Ibis Regulation. The jurisdiction of courts in disputes arising out of IP contracts (e.g. licence agreement) are governed especially by Articles 4 and 7(1). The jurisdiction of courts in disputes arising out of infringement of IP rights (e.g. infringement of trademark) are governed by Articles 4 and 7(2). In both cases, Articles 25 and 26 are also applicable. PILA contains general rules on jurisdiction of courts in Sections 6 and 85.

### 12.5 World Intellectual Property Organization

The primary international organization in the area of IP rights is the World Intellectual Property Organization (“WIPO”),<sup>626</sup> established in 1970, based in Geneva, Switzerland. It is an international organization under the auspices of the United Nations. It administers the Union for the protection of industrial property, the Berne Union for the protection of copyright and other “special” unions between states based on special international conventions regulating particular IP rights. WIPO administers 26 IP treaties including the WIPO Convention.<sup>627</sup>

### 12.6 Analysis of Sources of Law

IP rights are governed primarily by international conventions. These IP conventions do not create material (substantive) law.

They are based on principles of assimilation and nationality and grant some minimum standard of rights (*iura ex conventione*).

#### 12.6.1 Protection of Industrial Property<sup>628</sup>

The protection of IP rights is governed mainly by international conventions. These conventions contain rules whose aim is to overcome the territorial limits of IP rights.<sup>629</sup> These conventions are based on “principle

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<sup>626</sup> *World Intellectual Property Organization* [online]. [cit. 14. 11. 2015].

<sup>627</sup> For the full list of all international treaties administered by WIPO see WIPO-Administered Treaties [online]. *World Intellectual Property Organisation* [cit. 14. 11. 2015].

<sup>628</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 273 et seq.

<sup>629</sup> *Ibid.*, p. 273.

of assimilation” (if state grants a particular right or privilege to its own citizens, it must also grant those advantages to the citizens of other states upon fulfilment of the prescribed conditions of the national law) and they provide some minimal standards of protection based directly on the particular convention (*iura ex conventionione*).<sup>630</sup>

The protection of industrial property can be divided into three main groups of sources of law. Protection granted through:

1. Paris Convention for the protection of industrial property (“Paris Convention”) as a “general convention” containing basic general rules and principles.
2. Subsequent “special conventions” on particular industrial property; or “special unions” between some Contracting States of the Paris Convention.
3. Regulations on particular industrial property of the EU.

### ***Paris Convention***

One of the first international multilateral IP treaties was the Paris Convention signed in 1883. It established the Union for the Protection of Industrial Property. The Paris Convention is administered by the WIPO. The provisions of the convention fall into three main categories: national treatment (principle of assimilation), priority rights and minimum standards (*iura ex conventionione*). The Paris Convention does not create the substantive law, it regulates only certain aspects of the IP rights.

### ***“Special Conventions” and “Special Unions” on the Protection of Industrial Property***

Some Contracting States of the Paris Convention signed other special conventions and created special unions regarding protection for only one industrial property right. These “special” conventions must be read in accordance with the Paris Convention; legal issues not regulated by the special conventions shall be governed by the Paris Convention.<sup>631</sup>

<sup>630</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 274.

<sup>631</sup> *Ibid*, p. 276.

Madrid Agreement concerning the international registration of marks<sup>632</sup> (“Madrid Agreement”) and the Protocol relating to that agreement, signed in 1989 created the Madrid system for the international registration of marks. It is an international system for facilitating the registration of trademarks in multiple jurisdictions around the world. The Madrid system is administered by the International Bureau of the WIPO and provides a system of obtaining trademark registrations in separate jurisdictions. Its main advantage is that it allows a trademark owner to obtain the trademark protection in any or all member states by filling only one application in one jurisdiction.

Another important international treaty is the Lisbon Agreement for the protection of appellations of origin and their international registration<sup>633</sup> (“Lisbon Agreement”). The Lisbon Agreement was signed in 1958<sup>634</sup> and ensures that in contracting states, appellations of origin receive the protection when they are protected in their state of origin. The Lisbon Agreement establishes a special union under Article 19 of the Paris Convention and is administered by the WIPO.

Another type of industrial property is innovations, which are protected as patents. The Patent law treaty<sup>635</sup> is an international convention concluded in Washington in 1970.<sup>636</sup> This treaty provides a unified procedure for filing patent applications to protect inventions in each of its contracting states. A patent application filed under the Patent law treaty is called an international application. A single international application is filed with the receiving office, in the Czech Republic with the Industrial Property Office. This one single international application has the same effect as national application and establishes a filing date in all contracting states.

<sup>632</sup> Madrid agreement of 1891 concerning the international registration of marks [online]. *World Intellectual Property Organization*. Available from: [http://www.wipo.int/treaties/en/text.jsp?file\\_id=288514](http://www.wipo.int/treaties/en/text.jsp?file_id=288514)

<sup>633</sup> Lisbon agreement for the protection of appellations of origin and their international registration [online]. *World Intellectual Property Organization*. Available from: <http://www.wipo.int/treaties/en/registration/lisbon/> (“Lisbon Agreement”).

<sup>634</sup> Lisbon Agreement entered into force in 1966 and was revisited in 1967 in Stockholm and amended in 1979. In 2015, the Geneva Act of the Lisbon agreement on appellations of origin and geographical indications was adopted.

<sup>635</sup> Patent law treaty [online]. *World Intellectual Property Organization*. Available from: <http://www.wipo.int/treaties/en/ip/plt/>

<sup>636</sup> The Patent law treaty was amended in 1979, modified in 1984 and 2001.

The WIPO administers also the Trademark law treaty<sup>637</sup> adopted in Geneva in 1994. This treaty aims at standardising of national and regional trademark registration procedures.

### ***Regulations of the EU***

The EU adopted several secondary legislation acts (regulations) on the protection of certain types of industrial property.

The Regulation on the Community trade mark<sup>638</sup> created a system of unified and unitary trademark registration in the EU; one registration in one Member State provides the protection in all Member States of the EU. The trademark system is administered by the Office for Harmonization in the Internal Market (Trade Marks and Designs), located in Alicante, Spain.

The Regulation on Community designs<sup>639</sup> created a unified system for industrial design rights, both registered and unregistered. This system exists in addition to national systems of protection in each Member State of the EU. The applications for registration may be made at national intellectual property offices (in the Czech Republic at the Industrial Property Office) or directly at the Office for Harmonization in the Internal Market (Trade Marks and Designs).

The Regulation on quality schemes for agricultural products and foodstuffs<sup>640</sup> guarantees the quality of regional products. It ensures that only products genuinely originating in certain region are allowed to be identified as such in commerce. The aim of this regulation is to protect the reputation of regional foods, promote local and regional agriculture and protect both consumers and fair competition.

<sup>637</sup> Trademark law treaty [online]. *World Intellectual Property Organization*. Available from: <http://www.wipo.int/treaties/en/ip/tlt/>

<sup>638</sup> Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark. In *EUR-lex* [legal information system]. EU Publication Office. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32009R0207&qid=1446317963190&from=CS>

<sup>639</sup> Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs. In *EUR-lex* [legal information system]. EU Publication Office. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32002R0006&qid=1446320149145&from=CS>

<sup>640</sup> Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs. In *EUR-lex* [legal information system]. EU Publication Office. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012R1151&qid=1446320481725&from=CS>

The Regulation on Community plant variety rights<sup>641</sup> grants the protection for new plants varieties which fulfil certain conditions; they shall be distinct, uniform, stable and new. This system is administered by the Community Plant Variety Office, located in Angers, France and established in 1994.

The Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection<sup>642</sup> created a new type of European patent (unitary patent) which would be valid in participating Member States of the EU. The applicability and unitary effects of the European patents will be granted once the Unified Patent Court Agreement enters into force.

### 12.6.2 Protection of Copyright and Rights Relating to Copyright<sup>643</sup>

The protection of copyright is based mainly on international conventions. The protection can be divided into two main areas: 1. protection of copyright; and 2. protection of rights relating to copyright.

The whole system, concept and principles of the copyright protection are based on two principal international conventions, the Berne Convention for the protection of literary and artistic works (“Berne Convention”)<sup>644</sup> and the Universal copyright convention (“Geneva Convention”).<sup>645</sup>

#### *Berne Convention*

The Berne Convention, signed in 1886, established a modern system of copyright law administered by the WIPO. The conditions and protection of copyright are based on national laws; thus following the principle of territoriality.

<sup>641</sup> Council Regulation (EC) Np 2100/94 of 27 July 1994 on Community plant variety rights. In *EUR-lex* [legal information system]. EU Publication Office. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31994R2100&qid=1446320961508&from=CS>

<sup>642</sup> Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection. In *EUR-lex* [legal information system]. EU Publication Office. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012R1257&qid=1446482837937&from=CS>

<sup>643</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, pp. 279 et seq.

<sup>644</sup> Berne Convention for the protection of literary and artistic works [online]. *World Intellectual Property Organization*. Available from: <http://www.wipo.int/treaties/en/ip/berne/> (“Berne Convention”).

<sup>645</sup> Universal copyright convention of 6 September 1952 [online]. *World Intellectual Property Organization*. Available from: [http://www.wipo.int/wipolex/en/other\\_treaties/details.jsp?treaty\\_id=208](http://www.wipo.int/wipolex/en/other_treaties/details.jsp?treaty_id=208) (“Geneva Convention”).

The Berne Convention is based on the principle of assimilation (all signatory states must provide the same copyright protection that their own citizens receive under their national laws, to all foreign authors and their copyrighted works, as long as their countries of origin are signatory states to the Berne Convention). Thus, it is possible, that under the copyright laws of one state the author may have more rights than in the country of origin of the literary work.<sup>646</sup>

The copyright protection is “automatic” and does not require any registration. The copyright protection is based upon the creation and publication of a literary work and is not subject to any subsequent notifications or registrations.

The copyright protection under the Berne Convention is independent. Its rules are applicable regardless of the national copyright laws and regulation, thus the convention provides some minimum standards of protection (*iura ex conventione*).<sup>647</sup>

### ***Other International Conventions on Protection of Copyright***

Another principal convention protecting copyright is the Geneva Convention, adopted in 1952. This convention was developed as an alternative to the Berne Convention for those states who disagreed with some aspects of the latter. The contracting states to the Berne Convention are mainly European countries; contracting states to the Geneva Convention are other states, including the United States.<sup>648</sup> The provisions in the Geneva Convention are similar to the provisions in the Berne Convention.

Nowadays, the Geneva Convention has lost its significance since almost all countries are members of the World Trade Organization (“WTO”) (or are aspiring members) and thus shall be in conformity with the Agreement on trade related aspects of intellectual property rights (“TRIPS”).<sup>649</sup>

<sup>646</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 533.

<sup>647</sup> *Ibid.*

<sup>648</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 280.

<sup>649</sup> Agreement of trade related aspects of intellectual property rights [online]. *World Trade Organisation*. Available from: [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](https://www.wto.org/english/docs_e/legal_e/27-trips.pdf)



Due to the technological development, advances in modern communication, information technology and Internet, the Member States of the WIPO adopted the WIPO Copyright treaty<sup>650</sup> in 1996. This treaty is aimed at the protection of copyright in the context of internet. According to the treaty, computer programs are protected as literary works (Article 4), as well as the arrangement and selection of material in databases is protected (Article 5); it provides authors of works with control over their rental and distribution (Articles 6 to 8); it prohibits circumvention of technological measures for the protection of works (Article 11) etc.

Computer programs are protected also by the Directive on the legal protection of computer programs.<sup>651</sup>

### ***Protection of Rights Related to the Copyright***

The Rome Convention for the protection of performers, producers of phonographs and broadcasting organisations<sup>652</sup> (adopted in 1961) for the first time extended the copyright protection to the creators and owners of particular, physical manifestations of intellectual property.

The Convention for the protection of producers of phonographs against unauthorized duplication of their phonographs<sup>653</sup> was signed in Geneva in 1971. This international convention granted the copyright protection to sound recordings.

In 2012, the Beijing Treaty on audiovisual performances<sup>654</sup> was signed. This multilateral treaty regulates copyright for audiovisual performances and

<sup>650</sup> WIPO Copyright treaty [online]. *World Intellectual Property Organization*. Available from: <http://www.wipo.int/treaties/en/ip/wct/>

<sup>651</sup> Directive 2009/24/EC of the European Parliament and of the Council on 23 April 2009 on the legal protection of computer programs. In *EUR-lex* [legal information system]. EU Publication Office. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32009L0024&qid=1446324533911&from=CS>

<sup>652</sup> Rome Convention for the protection of performers, producers of phonographs and broadcasting organisations [online]. *World Intellectual Property Organization*. Available from: [http://www.wipo.int/treaties/en/text.jsp?file\\_id=28975](http://www.wipo.int/treaties/en/text.jsp?file_id=28975)

<sup>653</sup> Convention for the protection of producers of phonographs against unauthorized duplication of their phonographs [online]. *World Intellectual Property Organization*. Available from: <http://www.wipo.int/treaties/en/ip/phonograms/>

<sup>654</sup> Beijing Treaty on audiovisual performances [online]. *World Intellectual Property Organization*. Available from: <http://www.wipo.int/treaties/en/ip/beijing/>

expands the performer's rights. The treaty will enter into force upon ratification by at least 30 eligible states.

### 12.6.3 TRIPS

TRIPS<sup>655</sup> is one of the five “pillars” (founding treaties) the WTO is based on. It is an international convention administered by the WTO, which lays down minimum standards for intellectual property among WTO Member States. TRIPS was negotiated at the end of the Uruguay Round in 1994 and for the first time introduced intellectual property law into the system of international trade. It is legally binding for all member states of the WTO. TRIPS is based on the most favored nation principle<sup>656</sup> and the national treatment principle<sup>657</sup> and does not preclude application of any of the above-mentioned international IP conventions.

### 12.6.4 Conflict-of-Law Rules for Contractual Obligations and IP Rights

The law applicable to contracts with cross-border element (e.g. patent licence contracts) is governed by the Rome I Regulation. Parties may choose the law applicable (Article 3). In the absence of choice of law, Article 4 will be applicable.<sup>658</sup>

<sup>655</sup> For analysis of the TRIPS see: ROZEHNALOVÁ, Naděžda. *Právo mezinárodního obchodu*. 3rd ed. Praha: Wolters Kluwer, 2010, pp. 98–100.

<sup>656</sup> The most favoured nation (MNF) principle is a level of treatment accorded by one state to another in international trade. It means that a country which is the recipient of the MNF treatment must receive equal trade advantages as the most favoured nation by the country granting such treatment. This treatment in principle treats all foreigners equally. ROZEHNALOVÁ, Naděžda. *Právo mezinárodního obchodu*. 3rd ed. Praha: Wolters Kluwer, 2010, pp. 35–37.

<sup>657</sup> National treatment means that is a state grants a particular right, benefit or privilege to its own citizens, it must grant those advantages to the citizens of other states while they are in that country. ROZEHNALOVÁ, Naděžda. *Právo mezinárodního obchodu*. 3rd ed. Praha: Wolters Kluwer, 2010, pp. 37–38.

<sup>658</sup> For analysis of the Articles 3 and 4 of the Rome I Regulation see: KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, pp. 291 et seq.; ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, pp. 85–114; PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé*. 2nd ed. Praha: Nakladatelství C.H.Beck, 2013, pp. 155–163.

The Rome I Regulation does not contain any specific connecting factor for licence contracts; in that case, the connecting factor “*country where the party required to effect the characteristic performance of the contract has his habitual residence*” shall be applicable (with regards to the escape clauses in Article 4(3)).<sup>659</sup>

The Rome I Regulation is directly and universally applicable. Its provisions take precedence over PILA.<sup>660</sup> The Czech PILA contains general provisions on conflict-of-law rules for contracts in Section 87.

### 12.6.5 Conflict-of-Law Rules for Non-contractual Obligations and IP Rights

The law applicable to the infringement of intellectual property rights is determined by Article 8 of the Rome II Regulation.<sup>661</sup>

The rule in Article 8 is *lex specialis* to the general conflict rule in Article 4. It distinguishes between intellectual property rights in general (para. 1) and unitary EU IP rights (para. 2). A choice of law is explicitly excluded (para. 3). Article 8(1) of the Rome II Regulation establishes the *lex loci protectionis* instead of the *lex loci damni infecti* (Article 4(1)) in relation to all types of IP rights, whether registered or not.

Article 8(2) of the Rome II Regulation regulates unitary EU intellectual property rights. The application of the EU instrument in relation to third

<sup>659</sup> ROZEHNALOVÁ, Naděžda. *Právo mezinárodního obchodu*. 3rd ed. Praha: Wolters Kluwer, 2010, p. 479; DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 307.

<sup>660</sup> Sections 2 and 84 of PILA; KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, pp. 52 and 54; PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé*. 2nd ed. Praha: Nakladatelství C.H.Beck, 2013, p. 179.

<sup>661</sup> Article 8 of Rome II Regulation: “*Infringement of intellectual property rights:*  
 1. *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.*  
 2. *In the case of a non-contractual obligation arising from an infringement of a unitary Community intellectual property right, the law applicable shall, for any question that is not governed by the relevant Community instrument, be the law of the country in which the act of infringement was committed.*  
 3. *The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.*”

states is governed by Article 8(1). The determination of the law applicable of the Member State to the gaps left by the EU instruments is governed by Article 8(2) (*lex loci delicti*).<sup>662</sup>

The Rome II Regulation is directly and universally applicable.<sup>663</sup> If applicable, it takes precedence over PILA.<sup>664</sup>

### 12.6.6 IP rights and PILA

IP rights are regulated by Section 80 of PILA. This provision is in accordance with the international conventions and the system for protection of IP rights. It recognises the principles the IP rights are based on: it expressly recognises the principle of territoriality and *lex loci protectionis*; thus confirming the notion that for the IP rights, it is not possible to choose the law applicable; potential ubiquity; time-limited protection; nature of imperative norms; directly applicable rules etc.<sup>665</sup>

This provision will be used if no international convention or EU regulation in a particular case is applicable.

<sup>662</sup> For the analysis of Article 8 of the Rome II Regulation see: KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 307; VALDHANS, Jiří. *Právní úprava mimosmluvních závazků s mezinárodním prvkem*. Praha: C.H.Beck, 2012, pp. 200–202; ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, pp. 182–183; HUBER, Peter (ed). *Rome II Regulation. Pocket Commentary*. Sellier: European Law Publishers, 2011, p. 230; PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé*. 2nd ed. Praha: Nakladatelství C.H.Beck, 2013, pp. 188–189.

<sup>663</sup> The relationship of the Rome II Regulation with other provisions of EU law is governed by Article 27. See PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé*. 2nd ed. Praha: Nakladatelství C.H.Beck, 2013, p. 196.

<sup>664</sup> Section 2 of PILA; KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, pp. 52 and 54; VALDHANS, Jiří. *Právní úprava mimosmluvních závazků s mezinárodním prvkem*. Praha: C.H.Beck, 2012, p. 55. For analysis of the applicability of the Rome II Regulation see: VALDHANS, Jiří. *Právní úprava mimosmluvních závazků s mezinárodním prvkem*. Praha: C.H.Beck, 2012, pp. 142–161. Relationship of the Rome II Regulation with existing international conventions is governed by Article 28. See PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé*. 2nd ed. Praha: Nakladatelství C.H.Beck, 2013, p. 196.

<sup>665</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 537.

## 12.6.7 Jurisdiction of Courts

Rules for international jurisdiction of courts are governed by the Brussels Ibis Regulation. If all conditions for its application are fulfilled, the Brussels Ibis Regulation is directly applicable to determine jurisdiction of courts; and has precedence over PILA.<sup>666</sup>

### *Brussels Ibis Regulation*

For proceedings concerned with the registration or validity of patents, trademarks, designs or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of an instrument of the EU or an international convention deemed to have taken place (Article 24(4)). This “exclusive jurisdiction” is granted to the abovementioned courts, regardless of the domicile of the parties.<sup>667</sup> The provision also expressly provides for the jurisdiction of the European Patent Office, in proceedings concerned with the registration or validity of any European patent granted for that Member State.<sup>668</sup>

<sup>666</sup> Sections 2 and 84 PILA; KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 312.

<sup>667</sup> For analysis of Article 24(4) of the Brussels Ibis Regulation and relevant case law of the CJEU see: KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 313; KYSELOVSKÁ, Tereza; ROZEHNALOVÁ, Naděžda. *Rozhodování Soudního dvora EU ve věcech příslušnosti: analýza rozhodnutí dle nařízení Brusel Ibis*. Brno: Masarykova univerzita, 2014, pp. 401–409; ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, pp. 290–292; PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé*. 2nd ed. Praha: Nakladatelství C.H.Beck, 2013, p. 112.

<sup>668</sup> Art. 24(4) of the Brussels Ibis Regulation: “The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties: in proceedings concerned with the registration or validity of patents, trademarks, designs, or other similar rights required to be deposited or registered, irrespective of whether the issue is raised by way of an action or as a defence, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of an instrument of the Union or an international convention deemed to have taken place. Without prejudice to the Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction in proceedings concerned with the registration or validity of any European patent granted for that Member State.”

The jurisdiction of courts for disputes arising out of contractual obligations is governed by the general rule (Article 4) and the alternative rule (Article 7(1)). According to the general rule, the courts of the defendant's domicile have jurisdiction.<sup>669</sup> Alternatively, for disputes arising out of contract or in connection with a contract, a plaintiff may choose the rule in Art. 7(1); this provision is based on the criterion of “place of performance”.<sup>670</sup> As to the jurisdiction of the court to rule on the disputes arising out of non-contractual obligations (delicts or torts), i.e. infringement of intellectual property rights, the plaintiff may sue according to the general rule in Article 4 (domicile of the defendant) or alternatively according to Article 7(2) (*lex loci delicti*).<sup>671</sup> In both cases, Articles 25 and 26 of the Brussels Ibis Regulation apply.

### ***Jurisdictional Rules in PILA***

The rules for the international jurisdiction of courts are regulated by Sections 6 and 85 of PILA; these rules are applicable if no international convention or EU regulation is applicable.

<sup>669</sup> For the analysis of Article 4 of the Brussels Ibis Regulation and relevant case law of the CJEU see: KYSELOVSKÁ, Tereza; ROZEHNALOVÁ, Naděžda. *Rozhodování Soudního dvora EU ve věcech příslušnosti: analýza rozhodnutí dle nařízení Brusel Ibis*. Brno: Masarykova univerzita, 2014, pp. 31–77; ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, pp. 221–224.

<sup>670</sup> For the analysis of Article 7 of the Brussels Ibis Regulation see: KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, pp. 312–313; PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé*. 2nd ed. Praha: Nakladatelství C.H.Beck, 2013, pp. 97–102. For analysis of Article 7(1) of the Brussels Ibis Regulation and relevant case law of the CJEU see: KYSELOVSKÁ, Tereza; ROZEHNALOVÁ, Naděžda. *Rozhodování Soudního dvora EU ve věcech příslušnosti: analýza rozhodnutí dle nařízení Brusel Ibis*. Brno: Masarykova univerzita, 2014, pp. 82–134; ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, pp. 225–244.

<sup>671</sup> For analysis of Article 7(2) of the Brussels Ibis Regulation and relevant case law of the CJEU see: VALDHANS, Jiří. *Právní úprava mimosmluvních závazků s mezinárodním prvkem*. Praha: C.H.Beck, 2012, pp. 110–113; KYSELOVSKÁ, Tereza; ROZEHNALOVÁ, Naděžda. *Rozhodování Soudního dvora EU ve věcech příslušnosti: analýza rozhodnutí dle nařízení Brusel Ibis*. Brno: Masarykova univerzita, 2014, pp. 135–177; ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, pp. 244–253.

## 12.7 Conclusion

The system of international protection of intellectual property rights is governed by international conventions and EU regulations. PILA recognises the essential principle the IP rights are built upon. Its provision in Section 80 is very brief, nonetheless fully confirming the *status quo*.

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## 13 SUCCESSION

### 13.1 Introduction

It is especially the free movement of persons within the EU, since the Maastricht Treaty being applicable to all EU citizens, which causes the growing number of cross-border successions. The increasing number of unions between nationals of different Member States is often accompanied by acquisition of property in several Member States.<sup>672</sup> It is only cross-border succession that invokes the questions of international jurisdiction, applicable law or recognition and enforcement of decisions in this area. The relevant legal acts which will be analysed below do not define the cross-border or international element in succession matters. However, the presence of this element is necessary for their application.

Concerning the cross-border element in succession, we have to take into consideration four features: the authority having jurisdiction, the deceased person, the property and heirs. If all these features are located in one state, it is a domestic relationship. On the other hand, if they are located in more than one state, a cross-border implication is present. While determining the cross-border implication, all circumstances of the particular case must be taken into account.

In this chapter the relevant sources of regulation (i.e. regulation on the EU level, national level and international level) and their relationship will be presented first. After that the rules for jurisdiction, applicable law and recognition and enforcement of decisions will be analysed. In the second part, we will focus only on the regulation contained in the Succession Regulation and in PILA.

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<sup>672</sup> Green Paper succession and wills, COM(2005) 65 final, 1 March 2005. In: *EUR-lex* [legal information system]. EU Publications Office, point 1 Introduction. Available from: <http://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:52005DC0065&rid=1> (“Green Paper”).



## 13.2 Sources of Regulation and Their Relationship

There are several legal sources in the Czech Republic which regulate the cross-border succession, namely PILA, the Succession Regulation and international conventions. As they all belong to different legal systems, the question of their mutual relationship and the question of their applicability in particular situations must be addressed.

### 13.2.1 Scope and Aim of the Succession Regulation

The Succession Regulation was adopted in 2012. The most general aim of the Succession Regulation is to overcome the obstacle to the free movement of persons within the EU caused by the existing diversity of rules concerning succession matters in Member States.<sup>673</sup> It covers all aspects (jurisdiction, applicable law, recognition and enforcement and administrative measures) of cross-border successions within the EU.

The Succession Regulation applies to succession of the estates of deceased persons.<sup>674</sup> When defining its material scope, the questions excluded by Article 1(1) and 1(3) have to be taken into account. The application of the Succession Regulation is limited to successions with cross-border implications.<sup>675</sup> Concerning the personal scope, the jurisdictional rules are applicable to deceased persons who have their habitual residence within the EU at the time of their death, as well as persons who do not have their habitual residence within the EU.<sup>676</sup> The same is true for the part concerning

<sup>673</sup> The Proposal for Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European certificate of succession, COM(2009) 154 final, 14. 10. 2009. In *EUR-lex* [legal information system]. EU Publications Office, Explanatory memorandum, point 1. 2. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52009PC0154&rid=3> (“Proposal”).

<sup>674</sup> Article 1 of the Succession Regulation. Article 3(a) of the Succession Regulation defines the notion of succession as “*succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession*”.

<sup>675</sup> Although Article 1 concerning the material scope of application does not even mention the cross-border element, it is still necessary to bear in mind that the Succession Regulation is based on Article 81 of the TFEU. Article 81 gives the EU the power to regulate only the matters with cross-border element.

<sup>676</sup> See Article 10 of the Succession Regulation. In this case there have to be other connections with the EU.

the applicable law, as it is of universal nature.<sup>677</sup> Part IV concerning the recognition and enforcement applies only to the decisions rendered in Member States.

The Succession Regulation is applicable in all Member States except Denmark, Ireland and United Kingdom.<sup>678</sup> According to its Article 83(1), the Succession Regulation shall apply to succession of persons who die on or after 17 August 2015. Article 83(2) and Article 83(3) contain transitional provisions applicable to choice of law and to disposition of property upon death. Concerning the choice of law, the Succession Regulation is applicable, if the choice is made on or after 17 August 2015. Where the deceased had chosen the law prior to 17 August, that choice shall be respected under the Succession Regulation if it meets the conditions laid down in the regulation or if it is valid under the rules of Private International Law which were in force, at the time the choice was made, in the state in which the deceased had his habitual residence or in any of the states whose nationality he possessed.<sup>679</sup> For example, if the Czech Republic is such a state, it means that the choice made in May 2015 will be respected under the Succession Regulation if it is in line with Section 77 of PILA. The same rule applies for the substantive validity and the form of disposition upon death.<sup>680</sup>

The principal goal of the Succession Regulation is to facilitate the settlement of successions with cross-border implications within the EU. The Succession Regulation can be characterised by the following features:

- Coherent treatment of each succession;
- Single law and single competent authority;

<sup>677</sup> Article 20 of the Succession Regulation.

<sup>678</sup> The position of Denmark is regulated by Protocol (No 22) on the position of Denmark. In: *EUR-lex* [legal information system]. EU Publications Office. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/PRO/22&rid=1>. Denmark is not bound by Article 81 of the TFEU. The United Kingdom and Ireland have the opt-in right under Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice. In: *EUR-lex* [legal information system]. EU Publications Office. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/PRO/21&rid=1>. Regarding the Succession Regulation, the United Kingdom and Ireland have not used their opt-in possibility.

<sup>679</sup> Article 83(2) of the Succession Regulation.

<sup>680</sup> See Article 83(3) of the Succession Regulation.

- Party autonomy;
- Avoidance of parallel proceedings and conflicting decisions;
- Mutual recognition of decisions and authentic instruments.<sup>681</sup>

### 13.2.2 The Regulation of Succession in PILA – Scope of Application and Main Features

The regulation of cross-border succession contained in PILA is applicable by Czech courts. Under Section 125, PILA is effective as of 1 January 2014. Regarding the cross-border succession, it means that the provisions on jurisdiction and recognition and enforcement are applicable if the proceedings are commenced on or after 1 January 2014.<sup>682</sup> The conflict-of-law provisions apply if the deceased dies on or after 1 January 2014.<sup>683</sup> The same is true for the time of making a will or another disposition of property upon death and the time of choice of law. For example, if the will was made before 1 January 2014, the question of capacity is assessed under the regulation contained in the former PILA.<sup>684</sup> If the deceased chose the law before 1 January 2014, the choice must be assessed under the former PILA that did not allow the choice of law. Such a choice is thus invalid.<sup>685</sup> However, as was stated above, the situation has changed with the entry into force of the Succession Regulation.

PILA contains the provisions on jurisdiction, applicable law as well as on recognition and enforcement. The situation of the estate without a claimant is also expressly regulated. PILA employs habitual residence as the general connection factor for determining both jurisdiction and applicable law. Habitual residence has replaced the nationality which was used in the previous act. For the first time in the Czech legal order, it is possible to choose the law applicable to succession.

<sup>681</sup> ROHOVÁ, Iveta; DRLIČKOVÁ, Klára. Habitual Residence as a Single Connecting Factor under the Succession Regulation. In: *Scientific Cooperations Workshop on Law and Policy*. Ankara: Scientific Cooperations, 2015, p. 374.

<sup>682</sup> See Article 123(2) of PILA.

<sup>683</sup> See Article 123(1) of PILA.

<sup>684</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 820.

<sup>685</sup> PFEIFFER, Magdalena. Dědický statut v rukou zůstavitele – volba rozhodného práva v rámci kolizní úpravy dědických poměrů. *Ad Notam*, 2014, No. 6, p. 14.

### 13.2.3 International Conventions

The regulation of cross-border succession is contained also in international conventions. There are several multilateral conventions that were created within the Hague Conference on Private International Law: Convention on the conflicts of laws relating to the form of testamentary dispositions,<sup>686</sup> Convention concerning the international administration of the estates of deceased persons,<sup>687</sup> Convention on the law applicable to trusts and on their recognition,<sup>688</sup> Convention on the law applicable to succession to the estates of deceased persons.<sup>689</sup> The Czech Republic is bound only by the Convention on international administration of the estates of deceased persons which is, however, of marginal importance.

The regulation of cross-border succession is included in several bilateral agreements that are binding for the Czech Republic. It is not possible to analyse in detail all these conventions. In comparison to PILA and the Succession Regulation, most of them use nationality of the deceased person as a connecting factor. They also often employ the system of scission which means that a difference is made between the law applicable to succession of immovables and to succession of movables.

### 13.2.4 Relationship between the Sources

The rules contained in PILA are applicable only in those cases in which the Czech Republic is not bound by an international convention or by directly applicable provisions of EU law.<sup>690</sup> Therefore, the regulation contained in international conventions and in the Succession Regulation takes precedence over the regulation contained in PILA.

<sup>686</sup> Convention of 5 October 1961 on the conflicts of laws relating to the form of testamentary dispositions [online]. *Hague Conference on Private International Law*. Available from: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=40](http://www.hcch.net/index_en.php?act=conventions.text&cid=40)

<sup>687</sup> Convention of 2 October 1973 concerning the international administration of the estates of deceased persons [online]. *Hague Conference on Private International Law*. Available from: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=83](http://www.hcch.net/index_en.php?act=conventions.text&cid=83)

<sup>688</sup> Convention of 1 July 1985 on the law applicable to trusts and on their recognition [online]. *Hague Conference on Private International Law*. Available from: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=59](http://www.hcch.net/index_en.php?act=conventions.text&cid=59)

<sup>689</sup> Convention on the law applicable to succession to the estates of deceased persons [online]. *Hague Conference on Private International Law*. Available from: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=62](http://www.hcch.net/index_en.php?act=conventions.text&cid=62)

<sup>690</sup> See Section 2 of PILA.

On 17 August 2015, the provisions of PILA were replaced by the Succession Regulation. This is completely true for the provisions on jurisdiction and applicable law. Concerning the recognition and enforcement, the Succession Regulation is applicable only to judgements, court settlements and authentic instruments rendered in Member States. Thus, PILA still applies to judgements from third states.<sup>691</sup>

The relationship between the Succession Regulation and international conventions is covered by Article 75 of the Succession Regulation. Under this provision the Succession Regulation shall not affect the application of international conventions to which one or more Member States are party at the time of adoption of this regulation and which concern matters covered by this regulation. However, the Succession Regulation shall take precedence over conventions concluded exclusively between two or more of Member State in so far as such conventions concern matters governed by the regulation. In the Czech Republic it means the Succession Regulation will take precedence over bilateral agreements concluded between the Czech Republic and another Member State. On the other hand, bilateral agreements concluded between the Czech Republic and third states will stay applicable.

### 13.3 Jurisdiction

One of the first steps that a court needs to do before it may hear a case involving cross-border succession matters is to decide whether it has jurisdiction to do so. In the Czech Republic, district courts are the competent authorities to handle succession matters, although they delegate the power to notaries who act as commissars of those courts. The succession proceedings are commenced *ex officio*, that is of the courts' own motion. Before a case is referred to a notary,<sup>692</sup> the referring court must *prima facie* examine the facts of the case and consult the relevant legal instruments in order

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<sup>691</sup> Unless a bilateral agreement is applicable in such a case.

<sup>692</sup> In the Czech Republic, a set of firmly established rules on how a particular notary is appointed as a deciding authority in a given succession case is adopted.

to find whether the case at hand falls within its jurisdiction, both in terms of Private International Law rules, as well as of national procedural rules.<sup>693</sup>

The Succession Regulation is currently the main instrument that sets out the grounds on which Czech courts may assume their competence to hear a succession case with cross-border element, or to decide that a given case shall be reserved to another Member State's courts. Only where not applicable – in light of what has been said about its scope of application above – either an international convention or national legislation (PILA) comes into play.

### 13.3.1 Rules on Jurisdiction under the Succession Regulation

Chapter II of the Succession Regulation sets forth rules for determining “international jurisdiction”, that is for the designation of a Member State whose courts shall have jurisdiction to deal with the particular case of transfer of property in case of death.

In order to meet some of its key objectives – namely to enable coherent treatment of each succession and to avoid parallel proceedings and potentially conflicting decisions – the Succession Regulation employs a single connecting factor for determining the competent national courts. According to the general rule embodied in Article 4 of the Succession Regulation, the jurisdiction “to rule on the succession as a whole” lies with the courts of the Member State in which the deceased had his habitual residence at the time of death. Two aspects are crucial in this regard. First, it is the determination of the deceased's last habitual residence. Secondly, it is the meaning of the notion “succession as a whole”.

Although the Succession Regulation uses the deceased's habitual residence at the time of his death as a general connecting factor for the purposes of determining both jurisdiction and the applicable law, it provides no definition thereof. However, as this is meant as a factual criterion, not a legal term, neither autonomous legal definition nor a reference to national law in this regard were desired. Instead, the Succession Regulation provides a list of circumstances that a court shall take into account and evaluate while

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<sup>693</sup> The latter is a second step that the court before which the said case is pending shall take after it assumes that Czech courts have jurisdiction in terms of Private International Law (i.e., they have “international jurisdiction”). This question is regulated mainly by national procedural law, and thus will not be subject to this book.

determining its jurisdiction.<sup>694</sup> While assessing all relevant factual elements of the life of a deceased person during the years preceding his death and at the time of death, the court shall focus namely on the duration and regularity of a deceased's presence in a state concerned and the conditions and reasons for that presence in order to reveal a real and stable connection with a Member State.<sup>695</sup> The Succession Regulation also provides certain guidelines for situations in which the determination of the deceased's last habitual residence proves to be complex.<sup>696</sup>

The jurisdiction of Member States' courts under the Succession Regulation is conceived very broadly. National courts that have jurisdiction according to Article 4 shall be competent to rule on the succession as a whole, regardless of whether the property is located in the Member State whose courts have jurisdiction, or abroad (again, it is not relevant whether in another Member State or in a third country); regardless of whether the succession concerns movable or immovable property.<sup>697</sup> What is also important is the fact that a court of a Member State designated according to the rules in the Succession Regulation shall have jurisdiction also over disputes between heirs and legatees.<sup>698</sup> Only this can ensure that all aspects of a cross-border succession will be dealt with by courts of one Member State.<sup>699</sup> It is expected that the notion "succession as a whole" for the purposes of determining jurisdiction may become subject to interpretation given by the Court of Justice, as it shall undoubtedly have an autonomous meaning.

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<sup>694</sup> The same applies naturally to determining the applicable law, as the general connecting factor for this purpose is the same. For more details see the respective part of this chapter below.

<sup>695</sup> Recital 23 of the Preamble to the Succession Regulation.

<sup>696</sup> See Recital 24 of the Preamble to the Succession Regulation.

<sup>697</sup> Such a broad concept can, however collide with jurisdictional rules of third countries, and can potentially result in rejection of recognition and enforcement of a judgement given in an EU Member State in that third country. On this issue see also BRÍZA, Petr; BRICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 410.

<sup>698</sup> This solution is coherent with the wide scope of the conflict-of-law rules under the Succession Regulation. See Article 23 of the Succession Regulation.

<sup>699</sup> However, this does not necessarily mean that all issues will be handled by a single authority within that Member State. To designate a national authority which is competent to deal with a particular legal question arising out of or in connection with succession remains within the scope of national procedural law.

Besides the general rule, the Succession Regulation further provides several special jurisdictional rules that shall ensure that the competent authority will apply its own domestic law as the law governing the succession. The most important part of them is those that apply in situations where the testator chooses the applicable law to the succession in line with Article 22 of the Succession Regulation.

As a supplement to the possibility of the testator to choose the law applicable to the succession,<sup>700</sup> Article 7 of the Succession Regulation provides an exhaustive list of grounds upon which the jurisdiction of the courts of a Member State whose law had been chosen by the deceased shall be established.

Firstly, those courts shall have jurisdiction instead of the courts of a Member State in which the deceased had his habitual residence at the time of death provided that the parties to the proceedings have agreed to confer jurisdiction on a court or courts of the Member State whose law had been chosen pursuant to Article 22.<sup>701</sup> Article 5 of the Succession Regulation enables the parties to the proceedings to conclude a choice of court agreement in favour of the courts of a Member State whose law has been chosen.<sup>702</sup> Such agreement must be in writing, dated and signed by the parties concerned.<sup>703</sup> Parties may choose courts of the respective Member State as a whole, or designate even a particular court within that Member State. Such agreement can be concluded with regards to any succession matter; it is not necessary to confer the jurisdiction to rule on a succession as a whole. This could be very practical especially when it comes to jurisdiction over disputes between heirs and legatees. Finally, it shall be noted that jurisdiction of a court or courts established by parties' agreement pursuant to Article 5 shall be deemed exclusive.

<sup>700</sup> The choice is again limited to the succession as a whole that is it excludes *dépeçage* – situation where separate aspects of the succession are governed by different national law. See Article 22 of the Succession Regulation and the part of this chapter that deals with the applicable law to succession.

<sup>701</sup> Article 7(b) of the Succession Regulation.

<sup>702</sup> Although Article 22 does not limit the choice of law applicable to the succession to national law of a Member State (see Article 20 of the Succession Regulation), the choice of court agreement may be, on the other hand, concluded only in favour of a court or courts of a Member State. Such an agreement in favour of a court of a third country does not fall within the scope of application of the Succession Regulation.

<sup>703</sup> Whereas any communication by electronic means which provides a durable record shall be deemed equivalent. See Article 5(2) of the Succession Regulation.



Secondly, the courts of a Member State whose law had been chosen by the deceased shall have jurisdiction to rule on the succession provided that the court previously seised had declined its jurisdiction in the same matter pursuant to Article 6.<sup>704</sup> According to the said provision, a court seised pursuant to Article 4 or Article 10 may decline its jurisdiction at the request of one of the parties to the succession proceedings if it considers that the courts of a Member State whose law had been chosen pursuant to Article 22 are better placed to rule on the succession.<sup>705</sup> It is thus upon the seised court to decide whether it will stay the proceeding and refer the parties to the courts of a Member State whose law had been chosen to govern the succession, taking into account practical circumstances of a given case, e.g. habitual residence of the parties or location of the assets. On the other hand, a court seised pursuant to Article 4 or Article 10 shall decline its jurisdiction provided that the parties to the proceedings have concluded a choice of court agreement pursuant to Article 5.<sup>706</sup> This provision only reflects the fact that the jurisdiction established by the choice of court agreement pursuant to Article 5 shall be exclusive. The court seised shall then decline its jurisdiction of its own motion in favour of the court or courts chosen by the parties.

Lastly, the courts of a Member State whose law had been chosen by the deceased shall have jurisdiction to rule on the succession provided that the parties to the proceedings have expressly accepted the jurisdiction of the court seised.<sup>707</sup>

Further, the jurisdiction of courts of a Member State may be also established by virtue of appearance before the court provided that the party does not contest the jurisdiction of the court.<sup>708</sup> This can be deemed as a tacit choice of court agreement, or submission to jurisdiction, as is known from Brussels Ibis Regulation.<sup>709</sup>

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<sup>704</sup> Article 7(a) of the Succession Regulation.

<sup>705</sup> See Article 6(a) of the Succession Regulation.

<sup>706</sup> See Article 6(b) of the Succession Regulation.

<sup>707</sup> Article 7(c) of the Succession Regulation.

<sup>708</sup> See Article 9 of the Succession Regulation.

<sup>709</sup> Article 26 of the Brussels Ibis Regulation.

The Succession Regulation also includes rules on the so-called residual jurisdiction<sup>710</sup> and *forum necessitatis*.<sup>711</sup> Article 10 of the Succession Regulation provides conditions upon which courts of a Member State may assume jurisdiction, although the deceased was not habitually resident in any of the Member States. The jurisdiction is nevertheless with the courts of the Member State in which assets of the estate are located provided that the deceased had the nationality of that Member State at the time of death, or alternatively that the deceased had his previous habitual residence in that Member State and period of no more than five years has lapsed since the habitual residence had changed (until the time the court is seised). If the said conditions are met, courts of the respective Member State shall have jurisdiction to rule on the succession as a whole.<sup>712</sup> Where no court in a Member State has jurisdiction in light of the said conditions, courts of the Member State in which assets of the estate are located shall have jurisdiction to rule only on these assets.<sup>713</sup> The list of the said grounds is exhaustive, and the grounds shall be applied in a hierarchical order as provided.<sup>714</sup> The examined provision presupposes that heirs, legatees or creditors may prefer to have the succession heard by a court in a Member State, especially if the property is located in that state. If, for example, the deceased had his habitual residence in a third country and did not choose the law governing the succession that is a law of a Member State, it will not be otherwise possible to establish jurisdiction of courts of any Member State under any of the preceding provisions.<sup>715</sup>

Finally, Chapter II of the Succession Regulation incorporates the rules on limitation of proceedings,<sup>716</sup> special rules on jurisdiction in cases of acceptance or waiver of the succession, of a legacy or of a reserved share,<sup>717</sup> which is an alternative in relation to the jurisdictional rules under

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<sup>710</sup> Article 10 of the Succession Regulation.

<sup>711</sup> Article 11 of the Succession Regulation.

<sup>712</sup> Article 10(1) of the Succession Regulation.

<sup>713</sup> Article 10(2) of the Succession Regulation.

<sup>714</sup> See Recital 30 of the Preamble to the Succession Regulation.

<sup>715</sup> PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé*. 2nd ed. Praha: C. H. Beck, 2013, p. 270.

<sup>716</sup> Article 12 of the Succession Regulation.

<sup>717</sup> Article 13 of the Succession Regulation.

Articles 4 to 10, rules on seizing of a court,<sup>718</sup> *lis pendens*,<sup>719</sup> related actions<sup>720</sup> or provisional measures.<sup>721</sup>

For the purposes of applying the rules on jurisdiction under the Succession Regulation, the definition of the notion “court” is essential. The term shall be given an autonomous and broad meaning, as is indicated in Article 3(2) of the Succession Regulation, and shall thus entail

*“any judicial authority or any other authority or legal professional with competences in matters of succession provided that they exercise judicial functions or act pursuant to a delegation of power by a judicial authority or act under a control of a judicial authority, as long as the proceedings before them guarantee impartiality and the right of all parties to be heard and that their decisions are made subject to an appeal or review by a judicial authority and have a similar effect as a decision of a judicial authority”.*

This definition clearly indicates that the term shall not cover only courts in the true sense, but also notaries, registry offices and administrative bodies provided that they, under the law of the Member State in which they operate, exercise judicial functions like courts in matters of successions, or which exercise judicial functions in a given succession by the delegation of power of a court, in a certain Member State.<sup>722</sup> In many Member States, succession is settled outside the court in the true sense of the word. When deciding whether an authority is bound by the rules on jurisdiction under the Succession Regulation, the decisive fact is whether it exercises “judicial functions” within the meaning provided above. It is clearly the case of notaries in the Czech Republic, as they act as judicial commissioners, exercising the power of a court in a given succession. Therefore, not only courts, but also notaries in the Czech Republic are bound by these rules on jurisdiction. The similar is also true for the respective authorities in Austria, Hungary, Germany, Slovakia or Slovenia. On the other hand, this notion, within the meaning under the Succession Regulation, does not cover civil law notaries in France, Belgium, Netherlands, Luxembourg, Italy, Portugal or Spain.<sup>723</sup>

<sup>718</sup> Article 14 of the Succession Regulation.

<sup>719</sup> Article 17 of the Succession Regulation.

<sup>720</sup> Article 18 of the Succession Regulation.

<sup>721</sup> Article 19 of the Succession Regulation.

<sup>722</sup> Recital 20 of the Preamble to the Succession Regulation.

<sup>723</sup> See BRÍZA, Petr; BRICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, pp. 409–410.

### 13.3.2 Jurisdictional Rules under PILA

As a part of national legislation, PILA only stipulates in which situations (and on what grounds) Czech courts have jurisdiction in succession matters involving cross-border element. Due to its scope of application limited to the territory of the Czech Republic, it may simply not distribute the competence to deal with cross-border succession matters between national courts of various states<sup>724</sup> as the Succession Regulation (within the territory of the Member States) or international conventions do.

Similar to the Succession Regulation,<sup>725</sup> PILA also employs habitual residence of a deceased person as the decisive criterion for determination of jurisdiction in succession matters.<sup>726</sup> However, it also includes jurisdictional rules for situations where the deceased was not habitually resident in the Czech Republic at the time of his death.<sup>727</sup> Regardless of whether the deceased was habitually resident in the Czech Republic at the time of death or not, it shall be further distinguished whether the property concerned is located within the territory of the Czech Republic or not. Finally, PILA also includes auxiliary provisions touching on situations where the jurisdiction of Czech courts cannot be established.<sup>728</sup>

According to the general rule under Section 74(1) of PILA, Czech courts shall have jurisdiction to hear a cross-border succession case provided that the deceased had at the time of death his habitual residence in the Czech Republic. The said rule does not differentiate between movable and immovable property being part of the estate. Therefore, provided that the deceased was habitually resident in the Czech Republic at the time of death, Czech courts shall rule on the succession as a whole, regardless the nature and the location of the property concerned. The nationality of the deceased, the State or a particular place where the deceased passed away, or habitual

<sup>724</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk – Doplněk, 2015, pp. 352–353.

<sup>725</sup> But unlike the former PILA and most of the bilateral agreements binding on the Czech Republic that use the nationality principle as a general connecting factor. See e.g. Section 44 of the former PILA.

<sup>726</sup> See Section 74(1) of PILA.

<sup>727</sup> See Section 74(3) of PILA.

<sup>728</sup> See Section 74(4) – (6) of PILA.

residence or nationality of the heirs is also completely irrelevant. As no other conditions (besides the deceased's place of habitual residence) are required, the jurisdiction of Czech courts in this case is unconditional.<sup>729</sup>

In situations where the deceased was not habitually resident in the Czech Republic at the time of his death, Czech courts may nevertheless assume their jurisdiction provided that further conditions are met. According to Section 74(3) of PILA, the conditions are following:

- Czech courts may exercise their jurisdiction only over the deceased's property<sup>730</sup> located within the territory of the Czech Republic;
- The state whose courts (or other authorities) would otherwise have jurisdiction over the said succession neither lets the succession of a deceased person habitually resident in the Czech Republic to be heard by the Czech courts, nor attributes legal effects to the decisions of the Czech courts in these matters;
- Or a foreign state declines to hear and decide on the succession or does not provide any statement in this regard.<sup>731</sup>

The jurisdiction of the Czech courts over succession of a person not habitually resident in the Czech Republic is therefore conditional under PILA and aims at circumstances in which foreign authorities that would be otherwise competent to handle the case omit to act. The reason behind this provision is to prevent situations where an estate of a deceased person remains undistributed.<sup>732</sup>

In some cases, the jurisdiction of Czech courts under PILA is exclusive. Firstly, according to Section 74(2) of PILA, Czech courts shall have exclusive jurisdiction over any immovable property located within the territory of the Czech Republic. Last habitual residence or nationality of a deceased, or any other factor shall not be relevant in this regard. Secondly, under

<sup>729</sup> See e.g. BŘÍZA, Petr; BŘICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 393.

<sup>730</sup> Although the provision does not expressly state so, Section 74(3) first sentence of PILA only applies to movable property located within the territory of the Czech Republic. With regards to immovable property, Czech courts would possess exclusive jurisdiction according to Section 74(2) of PILA (see below).

<sup>731</sup> See Section 74(3) first sentence of PILA.

<sup>732</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk – Doplněk, 2015, p. 326.

Section 74(3) of PILA second sentence, Czech courts shall always have jurisdiction over the succession of a citizen of the Czech Republic habitually resident abroad provided that the succession is located within the territory of the Czech Republic and that at least one of the heirs who is habitually resident in the Czech Republic requests Czech courts to do so. Thirdly, exclusive jurisdiction shall be with the Czech courts also in cases covered by Section 78 of PILA. According to this provision, only Czech courts shall decide that the deceased's person property located within the territory of the Czech Republic shall accrue to the Czech Republic provided that there is no heir. Lastly, although Section 74(1) of PILA does not expressly state so, the jurisdiction of the Czech courts over succession of a deceased person habitually resident in the Czech Republic shall be, in light of the meaning and the objective of this provision, as of the entire Section, regarded as exclusive as well.<sup>733</sup>

In other circumstances where jurisdiction of the Czech courts is not established, Czech courts shall limit themselves to take measures necessary to secure the property of a deceased person which is located within the territory of the Czech Republic.<sup>734</sup>

In comparison to the Succession Regulation, provisions on jurisdiction under Section 74(1) to (3) of PILA do not cover jurisdiction over disputes between heirs and legatees. The jurisdiction of Czech courts in such disputes involving cross-border element shall be determined in accordance with the provisions of Section 6 in general, and specifically with those of Sections 85 and 86 of PILA on jurisdiction in relation to obligations.<sup>735</sup> The scope of Section 74 of PILA is thus not as wide as the scope of Article 4 *et seq.* of the Succession Regulation. Further, unlike the Succession Regulation, PILA does not allow parties to succession proceedings to conclude a choice of court agreement in cases where the applicable law has been chosen by the deceased.<sup>736</sup> On the other hand, since Section 74 of PILA does

<sup>733</sup> BŘÍZA, Petr; BŘICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 393.

<sup>734</sup> Section 74(4) of PILA. For more details see Section 74(5) and (6) of PILA.

<sup>735</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk – Doplněk, 2015, p. 327.

<sup>736</sup> See Article 5 of the Succession Regulation and the respective part of this chapter above.

not apply to disputes between heirs and legatees, for example to disputes whether particular rights or obligations form a part of the succession, or disputes on the validity of a testamentary disposition, in these matters a choice of court agreement could be concluded in accordance with Section 85 and 86 of PILA, provided that PILA is applicable, of course.

As a conclusive remark, it shall be emphasised that since 17 August 2015,<sup>737</sup> Sections 74(1) to 74(3) of PILA are completely replaced by the respective provisions of the Succession Regulation (namely those in Chapter II of the Succession Regulation). In light of what has been already said about its scope of application, the Succession Regulation excludes national legislation of the Member States on cross-border succession matters from its application.

## 13.4 Law Applicable to Succession

### 13.4.1 Rules under the Succession Regulation

The Succession Regulation employs the so called “single scheme” of applicable law which means that no difference is made between movable and immovable assets. One law is applicable to the succession as a whole.<sup>738</sup> The Succession Regulation is of a universal nature in its part concerning the applicable law which means that the law determined under the regulation shall be applied whether or not it is the law of a Member State.<sup>739</sup>

The general connecting factor for determining the applicable law is the habitual residence of the deceased at the time of death.<sup>740</sup> The interpretation and meaning of this notion was analysed above. Article 21(2) of the Succession Regulation contains the escape clause. This provision enables to apply different law, if it is clear from all the circumstances of the case that the deceased at the time of death was manifestly more closely connected to a different state. The Preamble states an example in which it would be possible to use the escape clause. The deceased had moved to the state

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<sup>737</sup> According to Article 83(1) of the Succession Regulation, the decisive moment for the Regulation to apply is the day on which the deceased person dies.

<sup>738</sup> See Article 21 of the Succession Regulation.

<sup>739</sup> Article 20 of the Succession Regulation.

<sup>740</sup> Article 21(1) of the Succession Regulation.

of his habitual residence fairly recently before his death and all the circumstances of the case indicate that he was manifestly more closely connected with another state.<sup>741</sup> That can be the state whose nationality the deceased possessed, but also the state where the deceased “only” had the previous habitual residence. The Preamble also states that the escape clause should not be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased proves complex.<sup>742</sup>

Article 22 of the Succession Regulation grants the persons a freedom to select the law applicable to succession. This freedom is limited. A person can choose the law only for the succession as a whole and it can only be the law of the state whose nationality the person possesses at the time of making the choice or at the time of death.<sup>743</sup>

The choice may be made both expressly (in such a case it needs not to be contained in the disposition upon death, it can be made in a declaration in the form of a disposition of property upon death) and impliedly (in this case it must be demonstrated by the terms of disposition upon death). The substantive validity of the act whereby the choice of law was made is governed by the chosen law.

As was mentioned above, concerning the choice of law, the Succession Regulation is applicable, if the choice is made on or after 17 August 2015. Where the deceased had chosen the law prior to 17 August, that choice shall be respected under the Succession Regulation if the conditions of Article 83(2) are met. Moreover, Article 83(4) contains a rule on the fiction of the choice of law. If a disposition of property upon death was made prior to 17 August in accordance with the law which the deceased could have chosen in accordance with the Succession Regulation that law shall be deemed to have been chosen as the law applicable to the succession.<sup>744</sup>

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<sup>741</sup> Recital 25 of the Preamble to the Succession Regulation.

<sup>742</sup> *Ibid.*

<sup>743</sup> Under Article 22(1) of the Succession Regulation: “*A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.*”

<sup>744</sup> For more details see e.g. PFEIFFER, Magdalena. Dědický statut v rukou zůstavitele – volba rozhodného práva v rámci kolizní úpravy dědických poměrů. *Ad Notam*, 2014, No. 6, p. 14.



The Succession Regulation expressly covers the scope of law applicable to succession. Article 23 states that the law determined pursuant to Article 21 or Article 22 shall govern the succession as a whole. Article 23(2) then contains the non-exhaustive list of questions that are governed by the applicable law.

The Succession Regulation contains special conflict-of-law rules for the admissibility and substantive validity of dispositions upon death.<sup>745</sup> In this regard, the Succession Regulation distinguishes between agreements on succession and other disposition upon death (e.g. wills, joint wills). It also enables to choose the law applicable only for the admissibility and substantive validity of these dispositions in accordance with the conditions of Article 22. Moreover, in order to prevent different interpretations of these provisions, the Succession Regulation defines the notion of substantive validity of dispositions upon death.<sup>746</sup>

The conflict-of-law rule for the formal validity of dispositions of property upon death can be found in Article 27. The Succession Regulation, however, covers only the form of dispositions made in writing. Regarding the form, the regulation offers several connecting factors. Article 27(3) defines what the matters of form for the purpose of Succession Regulation are. Regarding the form, it must be stressed that several Member States are bound by the Convention on the conflicts of laws relating to the form of testamentary dispositions. The relationship between the Succession Regulation and this convention is regulated by Article 75(2) of the regulation. Under this provision, Member States which are Contracting Parties to the convention shall continue to apply the provisions of that convention instead of Article 27 of the Succession Regulation with regard to the formal validity of wills and joint wills. However, this is not the case of the Czech Republic which is not bound by the convention.

As mentioned above, the Succession Regulation is applicable if the disposition upon death is made on or after 17 August 2015. Where the deceased made the disposition prior to 17 August, that disposition shall be respected under the Succession Regulation if the conditions of Article 83(3) are met.

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<sup>745</sup> Articles 24 and 25 of the Succession Regulation.

<sup>746</sup> Article 26 of the Succession Regulation.

Further, the Succession Regulation contains several specific rules, e.g. the rule on the estate without a claimant<sup>747</sup> or the rule on adaptation of the rights *in rem*.<sup>748</sup> The *renvoi* in the Succession Regulation is excluded if the law applicable is the law of any Member State. The application of the law of any third State shall mean the application of the rules of law in force in that state including its rules of Private International Law in so far as those rules make a *renvoi* to the law of a Member State or to the law of another third state which would apply its own law. No *renvoi* shall apply with respect to the law determined on the basis of the escape clause, the law chosen by the deceased or to the law applicable to the formal validity of dispositions upon death.<sup>749</sup> The application of a provision of the law of any state specified by the Succession Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum.<sup>750</sup>

#### 13.4.2 Regulation in PILA

PILA also employs the “single scheme” of applicable law. Section 76 contains the general rule for the determination of applicable law. Succession is governed by the law of the state in which the deceased had his habitual residence at the time of his death.

The provision also provides for one exception: “*If the deceased was a Czech national and at least one of the heirs has its habitual residence in the Czech Republic, Czech law is applicable.*” The reason for this provision is to protect the heirs residing in the Czech Republic.<sup>751</sup> As was mentioned above, the jurisdiction of Czech courts in such a case is given as regards the property located in the Czech Republic. The explanatory note to this provision states one example where this provision will be applicable. A Czech national was employed by an international organisation in a foreign country. After retirement he stayed in that country and had there a habitual residence. The heirs, his children, live in the Czech Republic. And of course, the property is located here as well.<sup>752</sup>

<sup>747</sup> Article 33 of the Succession Regulation.

<sup>748</sup> Article 31 of the Succession Regulation.

<sup>749</sup> Article 34 of the Succession Regulation.

<sup>750</sup> Article 35 of the Succession Regulation.

<sup>751</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 501.

<sup>752</sup> Důvodová zpráva k ZMPS [online]. *Nový občanský zákoník*. Ministerstvo spravedlnosti České republiky [cit. 14. 8. 2015].

Section 76 of PILA does not specify the scope of the applicable law. It is clear that Section 76 does not cover the questions that are covered by the special conflict-of-law rules (see below). The scope of Section 76 thus includes the general questions of succession (e.g. the causes for succession, the scope of inheritance, capacity to inherit, disinheritance, the acceptance or waiver of the succession), questions of intestate succession (e.g. determination of heirs *ex lege*, the transfer of the rights and obligations forming part of the inheritance, the determination of the shares) and the questions of succession under the will (e.g. the admissibility of a will, reserved shares, powers of the executor of the wills or administrators of the inheritance).<sup>753</sup>

Section 76 is not applicable if a person chooses the law applicable to succession under Section 77(4). Section 77(4) has introduced the possibility of the choice of law applicable to succession to the Czech legal order. The choice is limited in order to keep certain relationship between the chosen law and the deceased and its property.<sup>754</sup> The deceased has the possibility to choose only two legal orders - the law of the state in which he has his habitual residence at the time of making the will or the law of the state whose nationality he has at the time of making the will. The time of making the will is decisive. The consequent change of the nationality or habitual residence has no impact on the chosen law. PILA does not expressly solve the situation in which the deceased has multiple nationalities. It is up to the deceased which law he prefers.<sup>755</sup> Under Section 77(4) the choice of law must be included in the will<sup>756</sup> and it may be inferred from this provision that only express choice of law is possible.

PILA has special conflict-of-law rules for dispositions upon death, namely for the capacity to make or revoke them, defects in intention and form. Section 77(1) covers the issues of capacity to make or revoke a will and other dispositions of property upon death, defects in intention and its declaration

<sup>753</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 502.

<sup>754</sup> Důvodová zpráva k ZMPS [online]. *Nový občanský zákoník*. Ministerstvo spravedlnosti České republiky [cit. 14. 8. 2015].

<sup>755</sup> PFEIFFER, Magdalena. Dědický statut v rukou zůstavitele – volba rozhodného práva v rámci kolizní úpravy dědických poměrů. *Ad Notam*, 2014, No. 6, p. 10.

<sup>756</sup> The question of choice of law in other dispositions upon death is regulated in Section 77(5) PILA.

and the possible dispositions upon death, for example the question if legacy or agreement as to succession are permissible. There are two connecting factors. These questions are governed by the law of the state whose nationality the deceased has or the law of the state in which a deceased has his habitual residence. Consequently, a person has the possibility to make a will or other disposition upon death in a state whose law better reflects his intention. The time of making a will (or of another disposition upon death) is decisive. The consequent changes of nationality or habitual residence are not relevant.<sup>757</sup>

Section 77(2) regulates the form of a will. Its aim is to extend the formal validity of a will by enumerating several possible connecting factors. Under this provision it is not necessary to have the same form for making and revoking the will. Section 77(3) extends the rule contained in Section 77(2) also to form of other dispositions upon death. As was mentioned above, the Succession Regulation applies only to the form of dispositions upon death made in writing.<sup>758</sup> Therefore, even after the 17 August 2015 the rules in PILA will be applicable to the formal validity of dispositions of property upon death made orally.

Section 78 regulates the question of an estate without claimant. The purpose of this provision is to ensure that the estate located in the Czech Republic is not appropriated by foreign states. PILA does not contain the special regulation of *renvoi* in matters of succession. Thus, the general regulation of *renvoi* in Section 21 is applicable.

### 13.5 Recognition and Enforcement of Decisions and of Authentic Instruments in Succession Matters

In cross-border succession matters, it is often the case that some part of the estate is located abroad. As a consequence, heirs and legatees need an effective means to be able to execute their rights under the succession, not only in the State whose courts or other authorities are competent to rule

<sup>757</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 508.

<sup>758</sup> See Article 1(2)(f) of the Succession Regulation.

on the succession, but also in other – both Member and third – States. Therefore, clear and simple rules on recognition and enforcement of decisions, as well as of authentic instruments are envisaged.

### 13.5.1 Recognition and Enforcement under the Succession Regulation

In order to ease the position of heirs, legatees and administrators of the estate, the Succession Regulation introduces uniform rules on recognition and enforcement of decisions<sup>759</sup> and of authentic instruments<sup>760</sup> and also creates the so called European Certificate of Succession.<sup>761</sup>

Whereas it must be distinguished between decisions and authentic instruments on the one hand, as each of them are subject to specific rules when it comes to their recognition and enforcement, and on the other notions of recognition, enforceability and enforcement must be differentiated as well.

When it comes to the recognition and enforcement of decisions<sup>762</sup> (Chapter IV), the Succession Regulation follows to a large degree the rules under the Brussels I Regulation,<sup>763</sup> which uses the principle of mutual trust between the authorities of the Member States as its cornerstone.<sup>764</sup> Similarly, the Succession Regulation builds on the principle of mutual recognition of decisions between Member States,<sup>765</sup> which shall be automatic, without

<sup>759</sup> See Chapter IV (Article 39 et seq.) of the Succession Regulation.

<sup>760</sup> See Chapter V (Article 59 et seq.) of the Succession Regulation.

<sup>761</sup> See Chapter VI (Article 62 et seq.) of the Succession Regulation.

<sup>762</sup> What is to be understood as “a decision” for the purposes of the provisions on recognition and enforcement, is defined in Article 3(1)(g) of the Succession Regulation as “*any decision in a matter of succession given by a court of a Member State, whatever the decision may be called, including a decision on the determination of costs or expenses by an officer of the court*”.

<sup>763</sup> We refer to the Brussels I Regulation on purpose as there have been some changes in the rules on recognition and enforcement of judgements in Brussels Ibis Regulation, for example abolition of the *exequatur* procedure, which have not been reflected in the Succession Regulation.

<sup>764</sup> See e.g. PERTEGÁS, Marta. Recognition and Enforcement of Judgements in Family and Succession Matters. In MALATESTA, Alberto; BARIATTI, Stefania; POCAR, Fausto (eds.). *The External Dimension of EC Private International Law in Family and Succession Matters*. Padova: CEDAM, 2008, pp. 162–164.

<sup>765</sup> See Article 39 of the Succession Regulation which reads as follows: “*A decisions given in a Member State shall be recognised in the other Member States without any special procedure being required.*”

any formal proceedings required.<sup>766</sup> Nevertheless, any interested party may raise the recognition of a decision as the principal issue in a dispute and apply for that decision to be recognised.<sup>767</sup> An exhaustive list of reasons for which the decision shall not be recognised (if raised) is provided under Article 40. The grounds for non-recognition are as follows:

- The recognition is manifestly contrary to public policy in the Member State in which the recognition is sought.
- The decision was given in default of appearance, provided that the defendant was not served with the document which instituted the proceedings in sufficient time and in such a way to enable him to arrange for his defence, unless the defendant had the possibility to challenge the decision for this reason and he failed to do so.<sup>768</sup>
- The contested decision is irreconcilable with a decision given in proceedings between the same parties in the Member State in which the recognition is sought.
- The contested decision is irreconcilable with an earlier decision given in another Member State or in a third state in proceedings involving the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which the recognition is sought.

<sup>766</sup> With regards to Brussels I Regulation which entails the same provision, see e.g. ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, p. 323.

<sup>767</sup> Article 39(2) of the Succession Regulation. This provision is also reflected in national legislation, in particular in Section 18 of PILA, according to which a competent court decides on this issue in separate proceedings and then renders a judgement on recognition of a foreign decision.

<sup>768</sup> At a first glance, this particular reason for non-recognition may seem irrelevant in matters of succession as they are usually settled on a non-contentious basis. Nevertheless, it shall be born in mind that the scope of the Succession Regulation is much broader than that. It shall cover all civil law aspects of succession to the estate of a deceased person, that is all forms of transfer of assets, rights and obligations, whether voluntary or through intestate succession (see Recital 9 of the Preamble to the Succession Regulation), including also issues such as the capacity to inherit, disinheritance and disqualification by conduct, or claims that persons close to the deceased may have against the estate or the heirs (for more detail see Article 23(2) of the Succession Regulation). In light of the mentioned, the rules of the Succession Regulation also apply to disputes arising out of heirship which is exactly the case where the discussed reason for non-recognition plays a role.

However, under no circumstances a decision rendered in a Member State may be reviewed as to its substance.<sup>769</sup> This is an expression of the “*no revision au fond*” principle embodied in all other EU, as well as international instruments and national legislation on recognition and enforcement of foreign judgements and decisions.

As the above-listed reasons are the same that can be found in the Brussels I Regulation,<sup>770</sup> the respective case law of the Court of Justice can serve as a guideline while interpreting these provisions. It must be kept in mind though that it shall not be followed automatically, but rather carefully, taking into account specifics of the Succession Regulation as well as of proceedings in succession matters itself.

Further, the Succession Regulation distinguishes between enforceability of a decision and its enforcement. The declaration of enforceability or the so called *exequatur* procedure is not known to Czech domestic legal order, but was introduced by the EU instruments regulating the recognition and enforcement of foreign judgements, first one of them being the Brussels I Regulation followed by other instruments. According to Article 43 of the Succession Regulation, decisions given in a Member States, provided that they are enforceable in that Member State, will be enforceable in another Member State once they have been declared enforceable there on an application of any interested party. The *exequatur* procedure is then autonomously regulated in Articles 45 to 58, including the rules on jurisdiction, commencement of the proceedings, grounds for (non)-declaration of enforceability, or grounds for appeal against the decision on (non)-declaration of enforceability. No reference to national law may be made in this regard, unless expressly provided so in the Succession Regulation.<sup>771</sup> Once the foreign decision has been recognised and declared enforceable according to the rules contained in the Succession Regulation, it may be then enforced. The enforcement procedure is not regulated independently in the EU measure, though. It is governed by national rules on enforcement of decisions

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<sup>769</sup> Article 41 of the Succession Regulation.

<sup>770</sup> See Article 34 of the Brussels I Regulation. Similarly, see Article 45(1)(a) - (d) of the Brussels Ibis Regulation.

<sup>771</sup> See for example Article 44 of the Succession Regulation.

instead, subject to one exception, i.e. that the national rules may not contradict or limit the effectiveness of EU rules, in particular they may not contradict the scheme and the objectives of the Succession Regulation.<sup>772</sup>

The Succession Regulation further includes special rules on the enforceability of authentic instruments and of court settlements (Chapter V) which both play a very important role in succession matters, more that court decisions do. Authentic instruments<sup>773</sup> will not merely be enforced but even recognised.<sup>774</sup> According to Article 59 of the Succession Regulation, an authentic instrument established in a Member State shall have the same evidentiary effect in another Member State as it has in the Member State of origin, or at least the most comparable effects, provided that this is not manifestly contrary to public policy of the Member State concerned. Any challenge as to the authenticity of an authentic instrument may be made only before the national courts of the Member State of origin. As long as the challenge is pending before the competent court, the authentic instrument shall not produce any evidentiary effect in another Member State.<sup>775</sup> This essentially means that authentic instruments are solely “accepted”, not recognised, and that they have the same evidentiary value in all Member States as they have in the Member State of issuance.<sup>776</sup> Authentic instruments, as well as court settlements, are subject to declaration of enforceability, similar to court decision. Article 60 provides that an authentic instrument shall be declared enforceable in another Member State provided that it is enforceable in the Member State of origin and that any interested party applies

<sup>772</sup> MAGNUS, Ulrich; MANKOWSKI, Peter (eds.). *Brussels I Regulation*. 2nd ed. Munich: Sellier European Law Publishers, 2012, p. 734.

<sup>773</sup> An authentic instrument is defined in Article 3(1)(i) of the Succession Regulation as “*a document in matter of succession which has been formally drawn up or registered as an authentic instrument in a Member State and the authenticity of which relates to its signature and its content, and which has been established by a public authority or other authority empowered for that purpose in the Member State of origin*”. Again, it is clear that the Succession Regulation adopts the same concept as the Brussels Ibis Regulation (see Article 2(c) thereof), following the CJEU’s former case law on Brussels Convention (see especially the Judgement of the Court of Justice of 17 June 1999. *Unibank A/S v. Flemming G. Christensen*. Case C-260/97).

<sup>774</sup> BOGDAN, Michael. *Concise Introduction to EU Private International Law*. 2nd ed. Groningen: Europa Law Publishing, 2012, pp. 108–109.

<sup>775</sup> See Article 59(2) of the Succession Regulation.

<sup>776</sup> PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé*. 2nd ed. Praha: C. H. Beck, 2013, p. 276.



for it. In the remaining, the provision refers to the procedure for declaration of enforceability of decisions under Articles 45 to 58 of the Succession Regulation. It can be concluded that also this part reflects the rules under the Brussels Ibis Regulation, ensuring the free movement of the instruments throughout EU territory with the presumption of authenticity and with the same complete evidentiary effect with regards to their contents and facts therein as in the Member State of origin.<sup>777</sup>

Furthermore, the Succession Regulation also introduces a (non-compulsory) European Certificate of Succession (Chapter VI) which shall constitute a proof of a legal status and capacity of heirs, legatees, executors of will and administrators of the estate in the whole EU (except Denmark, Great Britain and Ireland).<sup>778</sup> The Certificate will be issued by a court in a Member State whose courts have jurisdiction according to the rules contained in Chapter II of the Succession Regulation, or another authority competent to deal with the succession matter under the national law.<sup>779</sup> Yet, it may be issued only upon application of the persons named above.<sup>780</sup> The application may be made using the standardised form and the requirements as to its content are further listed in Article 65. Once issued, the European Certificate of Succession will be recognised and will produce the same effects as in the Member State of origin in all Member States, without any special procedure being required.<sup>781</sup> It shall be presumed that the Certificate accurately demonstrates all elements which have been established under the applicable law and that the person mentioned in the Certificate has the said status of an heir, legatee, executor of the will or administrator and/or holds the rights stated in the Certificate.<sup>782</sup> The Certificate shall also

<sup>777</sup> RODRIGUEZ BENOT, Andrés. Approach to the Proposal for a Regulation of the European Union on Succession. In CAMPUZANO DÍAZ, Beatriz; CZEPPELAK, Marcin; RODRIGUEZ BENOT, Andrés; RODRIGUEZ VÁZQUEZ, Ángeles. *Latest Developments in EU Private International Law*. Cambridge: Intersentia, 2011, p. 149.

<sup>778</sup> For more details see Articles 62 and 63 of the Succession Regulation.

<sup>779</sup> See Article 64 of the Succession Regulation. The scope of application of Chapter VI of the Succession Regulation is clearly broader than of Chapter II, that is not limited to “courts” within the meaning of Article 3(2), but including also other (non-judicial) authorities that may be competent to rule on the succession matters according to national rules of a Member State.

<sup>780</sup> Referred to in Article 63(1) of the Succession Regulation.

<sup>781</sup> Article 69(1) of the Succession Regulation.

<sup>782</sup> Article 69(2) of the Succession Regulation.

constitute a valid document as a ground for recording of succession property in the relevant register in any Member State.<sup>783</sup>

The European Certificate of Succession is deemed to be a significant step ahead towards the unification in cross-border succession matters.<sup>784</sup> It aims to overcome the obstacles which stem from the use of different types of documents (if any at all) across Member States, with the ambition to completely replace them. However, the latter has not been brought to life yet, as the Succession Regulation still considers the European Certificate of Succession non-mandatory. The Certificate shall not substitute the internal documents used for the same or similar purposes in Member State either, it should exist alongside them.<sup>785</sup> Nevertheless, the use of the European Certificate of Succession (or the so called “succession pass”) is expected to considerably accelerate and simplify the settlement of cross-border successions.

As a final remark, it shall be emphasised that the application of rules on recognition and enforcement of decisions and authentic instruments under the Succession Regulation, as well as on European Certificate of Succession, are limited to “intra-EU” cases. In other words, they only apply to decisions and authentic instruments given by courts or issued by other authorities in the Member States.<sup>786</sup> When a decision or authentic instrument is established in a third country, rules on recognition and enforcement in PILA, or in an international convention if there is any, apply.

### 13.5.2 Recognition and Enforcement Procedure under PILA

In situations where the grounds for application of the Succession Regulation are not given,<sup>787</sup> national legislation, i.e. PILA, remains to be applicable. This is of course true unless there is an international convention on this matter which shall be used preferably.<sup>788</sup>

<sup>783</sup> See Article 69(5) of the Succession Regulation.

<sup>784</sup> See for example PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé*. 2nd ed. Praha: C. H. Beck, 2013, p. 277.

<sup>785</sup> Article 69(3) of the Succession Regulation.

<sup>786</sup> For this purposes, “a Member State” shall be understood as any EU Member State except Denmark, Great Britain and Ireland.

<sup>787</sup> That is the case of a decision or an authentic instrument given in a non-Member State, or a decision rendered or an authentic instrument issued before the day the Succession Regulation starts to apply.

<sup>788</sup> See also Section 2 of PILA.

Section 79 of PILA contains a special provision on the recognition of foreign judgements in cross-border succession matters. It builds on the general rules under Sections 14 to 16 of PILA on recognition and enforcement of foreign decisions to which it is *lex specialis*. It simply means that unless otherwise provided under Section 79 or unless contrary to the objective of this provision, provisions of Sections 14 to 16 apply also in cross-border succession matters.

Section 16 PILA clearly distinguishes between “foreign decisions in property matters” and “foreign decisions in other (non-property) matters” when it comes to their recognition (and enforcement), whereas Section 79 of PILA shall apply to “foreign decisions in successions matters”. From the range of questions covered by the law applicable to succession matters,<sup>789</sup> it is apparent that the material scope of application of Section 79 is somewhat wider and more comprehensive than the one of Section 16 of PILA.<sup>790</sup> It does not cover only decisions in “property matters” of succession, and it does not even distinguish between “property” and “other” succession matters.

Foreign decisions in succession matters will be recognised in the Czech Republic without any special procedure required as long as the following conditions are met: (i) the decision is final and binding according to a certificate of a competent foreign authority;<sup>791</sup> (ii) the decision rendered is not contrary to the rules establishing jurisdiction of Czech courts under PILA; (iii) the decision was rendered in a State where the deceased had his habitual residence at the time of death or whose national the deceased was at that time; and (iv) that State gives out successions of deceased persons habitually resident in the Czech Republic to the Czech courts for hearing or attributes legal effects to the decisions of Czech courts in this matters.<sup>792</sup> The aforesaid essentially means that the recognition of foreign decisions in succession matters is automatic, without any special procedure required, but

<sup>789</sup> For what questions fall within the scope of the conflict-of-law rule in Section 76 of PILA, see above.

<sup>790</sup> See also PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 518.

<sup>791</sup> For more details see Section 14 PILA, and the respective chapter of this book.

<sup>792</sup> See Section 79 of PILA.

conditional – a foreign decision in succession (property or other) matters may (and shall) be recognised only if all the conditions listed above are met.<sup>793</sup>

Section 79 further provides that a foreign decision that contradicts the rule in Section 78 of PILA (which is mandatory from the point of view of Czech courts) shall not be recognised. Under Section 78, the deceased person's property and rights located within the territory of the Czech Republic shall accrue – provided that there is no heir or legatee – to the Czech Republic. The exclusive jurisdiction to rule on this matter is with the Czech courts. As a result, a decision of a foreign court on this issue will not be recognised in the Czech Republic.

The general provision on grounds for the non-recognition of foreign decisions is embodied in Section 15 of PILA. Section 15(2) of PILA specifies which of the listed grounds shall be taken into account only when raised by a party concerned, while the rest of them shall be applied by the court *ex officio*.<sup>794</sup>

According to its literal wording, Section 79 of PILA applies to “foreign decisions in succession matters”.

According to its literal wording, Section 79 of PILA applies to “foreign decisions in succession matters”. Although it does not expressly mention foreign authentic instruments or court settlements, it shall be read as it covers all kinds of foreign decisions of courts or of other authorities, foreign court settlements, foreign notarial acts or other authentic instruments in succession matters.<sup>795</sup> In other words, its scope of application is not limited to foreign decisions (judgements) in the true sense of the words. Further, as has been already indicated, the term “succession matters” shall be understood in line with the scope of the conflict-of-law rule in Section 76 of PILA.<sup>796</sup> Therefore,

<sup>793</sup> This also implies that there is no discretion of the court. Provided that the conditions established in Section 79 of PILA are met, the foreign decision shall (that is must) be recognised.

<sup>794</sup> For details, see Section 15 of PILA and consult the respective chapter of this book.

<sup>795</sup> The reason is that Section 14 of PILA introduces a legislative abbreviation “*foreign decisions*” that shall, according to this provision, include “*court decisions of a foreign State, decisions of other foreign authorities, as well as foreign court settlements, foreign notarial acts or other authentic instruments on rights and obligations*”.

<sup>796</sup> See above. Further see e.g. PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 502.

the notion “foreign decisions in succession matters” does not encompass foreign judgements on disputes on heirship, for example.<sup>797</sup> Section 79 of PILA does not apply to wills or other dispositions of property upon death even if they are in form of an authentic instrument, either.<sup>798</sup>

Finally, some of the foreign decisions on succession matters may be subject to enforcement procedure. PILA does not have any specific provision on enforcement of foreign decisions in succession matters. Therefore, decisions in succession property matters may be enforced according to Section 16(3) of PILA. The enforcement procedure before Czech courts is further regulated mainly in Code of Civil Procedure. Section 16(3) of PILA merely establishes that enforcement of such a decision shall be – provided that conditions for its recognition under PILA are given – ordered by a Czech court in a reasoned decision.

### 13.6 Conclusion

As of 17 August 2015, the Succession Regulation has become the most important instrument regulating cross-border succession matters. The Succession Regulation covers jurisdiction, applicable law as well as recognition and enforcement of decisions in succession matters. Within its scope of application it takes precedence over PILA and bilateral agreements between the Czech Republic and other Member States. Only the bilateral agreements between the Czech Republic and third states shall be applied even after the Succession Regulation has entered into force. Concerning the jurisdiction and applicable law, the Succession Regulation has replaced the regulation in PILA. Concerning the recognition and enforcement, the Succession Regulation is applicable only to decisions render in other Member States. In this regard, PILA can be applied if a bilateral agreement does cover the situation.

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<sup>797</sup> Note that the scope of the applicable law (see Article 23 of the Succession Regulation), and thus of the notion „decision in succession matters“ is much wider under the Succession Regulation than under Czech law.

<sup>798</sup> See BRÍZA, Petr; BRICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C. H. Beck, 2014, p. 457.

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## 14 CONTRACTUAL OBLIGATIONS

### 14.1 Introduction

The legal regulation of contractual obligations with an international element has a specific position as it is the area of Private International Law that had been mostly replaced by the legislation of the EU and international conventions. PILA itself provides for the application priority of the directly applicable EU legislation and international conventions in its Section 84. The provision also expressly states that the regulation of PILA is limited only to the issues not covered by this legislation and international conventions.

Hence the PILA provisions apply only in restricted number of cases and the rules are in fact only residual ones. This means that before the application of PILA it is always necessary to examine whether the issue is not covered by EU legislation or by any international convention.

### 14.2 Jurisdiction

#### 14.2.1 International Conventions

The Czech Republic is a party to several international conventions which contain provisions according to which the international jurisdiction in contractual matters is determined. The application of such provisions is of course limited by the scope of the international convention and therefore applicable only to specific subject matters. The international conventions binding on the Czech Republic are both bilateral (e.g. with Belarus, Georgia, Russia, Vietnam)<sup>799</sup> and multilateral. The bilateral agreements between the Member States are superseded by the Brussels Ibis Regulation.<sup>800</sup> However, the Brussels Ibis Regulation does not affect the application of bilateral conventions between a third state and a Member State.<sup>801</sup>

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<sup>799</sup> BŘÍZA, Petr; BŘICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C.H. Beck, p. 53.

<sup>800</sup> Article 69 of the Brussels Ibis Regulation.

<sup>801</sup> Article 73(3) of the Brussels Ibis Regulation.

The most important multilateral convention is surely the Lugano II Convention. The rules and functioning of Lugano II Convention is basically the same as the Brussels Ibis Regulation. The relationship between the Brussels Ibis Regulation and the Lugano II Convention is regulated in Article 64 of the Lugano II Convention. Article 64(1) states that the Lugano II Convention shall not prejudice the application by the Member States of the Brussels Ibis Regulation. However, the convention shall be applied in matters of jurisdiction where the defendant is domiciled in the territory of a Contracting State where the Lugano II Convention but not Brussels Ibis Regulation applies, or where Articles 22 (exclusive jurisdiction) or 23 (prorogation) of the convention confer jurisdiction on the courts of such a state.

The rules on jurisdiction are also contained in some conventions concerning international transport.<sup>802</sup> In accordance with Article 71 of the Brussels Ibis Regulation, the application of these conventions are not affected by the regulation.

#### **14.2.2 EU Law Regulation - Brussels Ibis Regulation**

In case of disputes concerning contractual obligations the vast majority of proceedings will be governed by the Brussels Ibis Regulation. That is except the cases where the defendant is not domiciled in the EU (and at the same time the dispute does not comply with any exception from Article 5 or 6).

The Brussels Ibis Regulation establishes a hierarchy of jurisdiction. This means that some jurisdiction have priority over the other. When it comes to disputes arising out of contracts, one firstly examines whether a dispute falls within the scope of exclusive jurisdiction. Then it is necessary to examine if the parties have chosen a court or courts for their dispute. The limits concerning the protection of weaker parties must be taken into account here. In case parties did not choose a court one makes sure whether the conditions for applying the special jurisdiction are met. Only when the jurisdiction cannot be determined according to previously mentioned mechanism

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<sup>802</sup> E.g. Convention of 19 May 1956 on the contract for the international carriage of goods by road.

the jurisdiction is determined according to general jurisdictions provision or according to the provision regulating jurisdiction alternative to the general one. Except for the exclusive jurisdiction, all the rules can however be overcome in case of so called submission of jurisdiction according to Article 26 of the Brussels Ibis Regulation.

### ***Exclusive Jurisdiction***

Concerning disputes arising out of contracts, the exclusive jurisdiction under Article 24(1) must be taken into account. Article 24(1) provides for exclusive jurisdiction in proceedings which have as their object tenancies of immovable property. In such proceedings, only the courts of the Member State in which the property is situated have jurisdiction. However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State.

### ***Prorogation of Jurisdiction***

Parties to a contract may prorogate the jurisdiction according to Article 25. When they do, the court shall be determined in accordance with the agreement of the parties (sometimes referred to as a choice of court agreement). The jurisdiction based on prorogation is an exception to the general personal scope of the Brussels Ibis Regulation. Parties can conclude a choice of court agreement according to Article 25 even when neither of them has a domicile in an EU Member State.

Their choice is naturally limited only to the territory of the EU. Hence, when the parties choose the courts of a third state, the Brussels Ibis Regulation cannot ensure the effectiveness of such agreement outside EU and it cannot encroach the sovereignty of non-EU countries.<sup>803</sup>

The Brussels Ibis Regulation establishes formal requirements to be met in order for the choice of court agreement to be valid. They are listed

<sup>803</sup> ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie: (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, p. 295.



in Article 25(1) and their non-fulfilment is penalised by nullity. The agreement has to be therefore concluded in one of the following forms:

- In writing or evidenced in writing;
- In a form which complies with practices established by the parties between themselves;
- In disputes arising out of international trade or commerce in a form which conforms to a usage.
- On the other hand, the substantive validity is governed by the law of the Member State whose courts have been chosen.

The prorogation agreement can be concluded separately as an independent agreement or it can form part of the main contract. Even in the latter case the prorogation agreement shall be treated independently of the main contract. This means that even when the choice of court agreement is contained in the main agreement its validity and effects shall be examined independently.

### *Special Jurisdiction*

The Brussels Ibis Regulation reflects the general trend of the EU law – the protection of a weaker party. It creates a special system for determining of jurisdiction for three types of contracts - insurance contracts, consumer contracts and individual contracts of employment.

The following protective rules apply for all three contracts covered by the special jurisdiction:

- A weaker party has more possibilities where to sue the other party.
- A weaker party can only be sued in a Member State where he is domiciled.
- The prorogation of jurisdiction has certain limitations.<sup>804</sup>

Special jurisdiction is an exception to the general personal scope as it shall be applicable even in cases where a weaker party (the insured, consumer, employee) enters into a contract with a party not domiciled in a Member State. That is however only if the defendant has a branch, agency or other establishment in one of the Member States. In such case a legal fiction

<sup>804</sup> ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie: (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, p. 266.

applies and the defendant shall be deemed to be domiciled in that Member State.<sup>805</sup> Moreover, the rules in Articles 18(1) and 21(1)(b) are applicable regardless the domicile of the professional or employer.

**Insurance Contracts:** The jurisdiction is determined according to Articles 10–16. Those provisions regulate all types of insurance (voluntary and mandatory as well) given that they are based on a contract.<sup>806</sup> On the other hand, the insurance from social security law is expressly excluded from the application of the regulation.<sup>807</sup>

In addition to the general rules of special jurisdiction listed above,<sup>808</sup> in case of liability insurance or insurance of immovable property, the insurer can be sued in the courts of the Member State where the harmful event occurred.<sup>809</sup>

The choice of court agreements are limited in respect to insurance contract so that they can only be concluded after the dispute has arisen. They have to be concluded in the favour of the policyholder, the insured or a beneficiary. When a policyholder and an insurer are domiciled in the same Member State, only the courts of such a Member State can be chosen.<sup>810</sup>

**Consumer Contracts:** Jurisdiction is regulated in Articles 17–19. These provisions are applicable to contracts for sale of goods on instalment credit terms, to contracts for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods. Apart from that the provisions apply also to the contracts that have been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State (given that the contract falls within the scope of such activities).<sup>811</sup>

<sup>805</sup> ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie: (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, p. 267.

<sup>806</sup> MAGNUS, Ulrich; MANKOWSKI, Peter (eds.). *Brussels I Regulation*. Munich: Sellier European Law Publishers, 2007, p. 274.

<sup>807</sup> See Article 1(2)(c) of the Brussels Ibis Regulation.

<sup>808</sup> See Article 11 of the Brussels Ibis Regulation.

<sup>809</sup> Article 12 of the Brussels Ibis Regulation.

<sup>810</sup> Article 15 of the Brussels Ibis Regulation.

<sup>811</sup> Article 17(1) of the Brussels Ibis Regulation.

On the other hand, contracts of transport have been excluded from the consumers' protection, unless those are contracts providing for a combination of travel and accommodation.<sup>812</sup>

Not every weaker party is considered to be a consumer in respect of the Brussels Ibis Regulation. According to the Court of Justice case law the consumer is only a natural person<sup>813</sup> who acts absolutely outside any business activities. When the contract fulfils partially private and partially business purpose it cannot be regarded as consumer contract unless the business purpose is negligible.<sup>814</sup>

Consumer can sue in both Member State of his domicile (regardless the domicile of the other party) and also Member State of the other party's domicile while the consumer can only be sued in the Member State where he is domiciled.<sup>815</sup>

The autonomy regarding the prorogation of jurisdiction is again restricted. The choice of court agreement can be concluded only after the dispute has arisen and only in the favour of the consumer. It can refer to the courts of Member State where both consumer and the other party are at the time of conclusion of the contract domiciled provided that such an agreement is not contrary to the law of that Member State.<sup>816</sup>

**Individual Employment Contracts:** The jurisdiction in disputes arising out of employment contracts is regulated in Articles 20–23. The Brussels Ibis Regulation does not contain a definition of individual employment contract and therefore we need to derive it from the case law of the Court of Justice. According to it the special jurisdiction applies to contracts for work (other than on a self-employed basis) which create a lasting bond which brings the worker to some extent within the organizational framework of the business of the undertaking or employer.<sup>817</sup>

<sup>812</sup> Article 17(3) of the Brussels Ibis Regulation.

<sup>813</sup> Judgement of the Court of Justice of 3 July 1997. *Francesco Benincasa vs. Dentalkit Srl*. Case C-269/95.

<sup>814</sup> Judgement of the Court of Justice of 19 January 1993. *Shearson Lehmann Hutton Inc. vs. TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH*. Case C-89/91.

<sup>815</sup> Article 18 of the Brussels Ibis Regulation.

<sup>816</sup> Article 19 of the Brussels Ibis Regulation.

<sup>817</sup> MAGNUS, Ulrich; MANKOWSKI, Peter (eds.). *Brussels I Regulation*. Munich: Sellier European Law Publishers, 2007, p. 328.

The basic rule is the same as in the previous case – the employee can be sued only in a Member State of his domicile.<sup>818</sup> The rule for determining the jurisdiction in cases where the employer is sued however slightly differs. Employer can be sued either:

- In a Member State of his domicile;
- Or in a Member State of the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so;
- Or in a Member State where the business which engaged the employee is or was situated provided that the employee does not or did not habitually carry out his work in any one country.<sup>819</sup>

In cases where the work is carried out by the employee in more than one state than it is understood that he carries out his work habitually in the place where he has established the effective centre of his working activities and where or from which he performs the essential part of his duties towards the employer.<sup>820</sup>

The prorogation of jurisdiction is restricted similarly as in the previous cases. It can be concluded only after the dispute has arisen and only in the favour of the employee.<sup>821</sup>

### ***General Jurisdiction***

The general rule for jurisdiction is contained in Article 4 of the Brussels Ibis Regulation which says that defendant shall be sued in the court of the Member State where he is domiciled (the nationality of the defendant is irrelevant).<sup>822</sup> The jurisdiction is determined according to that rule under the condition that it was not possible to determine it based on the rules discussed above.

<sup>818</sup> Article 22 of Brussels Ibis Regulation.

<sup>819</sup> Article 21 of Brussels Ibis Regulation.

<sup>820</sup> PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé*. Praha: C.H. Beck, 2008, p. 149.

<sup>821</sup> Article 23 of Brussels Ibis Regulation.

<sup>822</sup> MAGNUS, Ulrich; MANKOWSKI, Peter (eds.). *Brussels I Regulation*. Munich: Sellier European Law Publishers, 2007, p. 73.

### *Alternative Jurisdiction*

The Brussels Ibis Regulation has several alternatives to the general jurisdiction that can be found in Articles 7–9. It allows a plaintiff to decide whether to sue a defendant in the Member State of the latter's domicile (i.e. in accordance with the general jurisdiction rule) or in some other Member State which may have a closer connection to the dispute than the domicile (i.e. in accordance with the alternative jurisdiction rule).<sup>823</sup>

For the disputes arising out of contracts the most important alternatives are contained in Article 7(1) and 7(5). Article 7(1) provides for the rule in matters relating to a contract. In such a dispute, the courts of a Member State where the place of performance is located have jurisdiction. The alternative of Article 7(1) is one of the most used provision in Brussels Ibis Regulation.<sup>824</sup> This provision contains the general rule in letter a) and the special rules for the sale of goods and provision of services in letter b). Letter b) states that unless agreed otherwise by parties the place of performance of the obligation is:

- In case of the contract on the sale of goods the Member State where the goods were or should have been delivered; and
- In case of the contract on the provision of services the Member State where the services were or should have been provided.

Article 7(5) provides the alternative as regards a dispute arising out of the operations of a branch, agency and other establishment.

Also, the alternatives of procedural nature contained in Article 8 may play a role in contractual disputes. They aim to combine more proceedings which are closely related with each other before the same court. The reason for that lies firstly in the procedural economy and secondly in the effort to avoid contradictory decisions.<sup>825</sup>

<sup>823</sup> PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé*. Praha: C.H. Beck, 2008, p. 137.

<sup>824</sup> ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie: (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, p. 226.

<sup>825</sup> ROZEHNALOVÁ, Naděžda. Evropský justiční prostor ve věcech civilních. Část IV.: Nařízení č. 44/2001 (ES) o příslušnosti a uznání a vykonatelnosti rozhodnutí ve věcech občanských a obchodních základní pravidlo o pravomoci, speciální pravomoc. *Právní fórum*. 2013, Vol. 2, No. 4, p. 126.

### ***Submission to Jurisdiction***

Notwithstanding all of the discussed types of jurisdiction (except for the exclusive jurisdiction) a court of a Member State shall have jurisdiction in case where a defendant enters an appearance before such court. This conduct of a defendant is considered to be a submission of jurisdiction unless the appearance was entered to contest the jurisdiction of the court.<sup>826</sup>

In matters where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant, the court cannot assume its jurisdiction automatically. In those cases the jurisdiction can only be assumed when the court ensures that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance.<sup>827</sup>

#### **14.2.3 PILA**

As was stated above, PILA is applicable only to those cases that are not covered by the Brussels Ibis Regulation or international conventions. Taking into account the scope of these instruments, PILA applies only to limited number of cases.

#### ***General Rule***

The general rule regulating jurisdiction is set out in Section 6 of PILA. This provision says that the jurisdiction of the Czech court is given, when the Czech court has local jurisdiction according to the Czech procedural law. This rule was analysed above.

#### ***Prorogation of Jurisdiction***

The choice of court agreements are regulated in Sections 85 (prorogation in favour of Czech courts) and 86 (prorogation in favour of foreign courts) of PILA. Before the analysis itself it is important to note the limited temporal scope of those provisions.

PILA entered into force on 1 January 2014 when the predecessor of the Brussels Ibis Regulation (i.e. Brussels I Regulation) was in effect.

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<sup>826</sup> Article 26(1) of the Brussels Ibis Regulation.

<sup>827</sup> Article 26(2) of the Brussels Ibis Regulation.

The material scope of Brussels I Regulation was basically the same as today's legislation; the personal scope on the other hand changed significantly when it comes to prorogation. The Brussels I Regulation was applicable to the choice of court agreements only under the condition that at least one of the parties was domiciled in a Member State. The Czech regulation of prorogation in favour of Czech or some other Member State's court was therefore applicable in cases of choice of court agreement where neither of parties was domiciled in the EU.

Nowadays applicable the Brussels I Regulation's personal scope is however broader and it covers also choice of court agreements of parties not domiciled in the EU. Since 10 January 2015, Sections 85 and 86 of PILA can therefore be applied only to prorogation in cases of contracts not falling into the material scope of the Brussels I Regulation (or some international agreements). Though we cannot define any such case currently<sup>828</sup> and the Sections can hence be considered as obsolete, we still cannot exclude that such case will come up in the future.

The above said however does not apply to the choice of court agreements in favour of some third country. Such prorogations are excluded from the scope of Brussels I Regulation and Section 86 is fully applicable. That is of course true only for disputes not falling within the scope of any other international convention which have to be applied instead of the national law.

Prorogation may be established by means of a written agreement of the parties. Failure to comply with the written form causes that such agreement is invalid.<sup>829</sup> This rule applies to all types of prorogation under PILA.

**Prorogation in Favour of the Czech Courts:** It is regulated by Section 85 if PILA according to which it cannot alter the subject-matter jurisdiction of the Czech courts. This means that the parties cannot prorogate the jurisdiction in favour of the court that has not a subject matter jurisdiction over the dispute (e.g. they cannot prorogate the case falling under authority of district court in favour of regional court etc.).

<sup>828</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 575.

<sup>829</sup> *Ibid.*, p. 577.

**Prorogation in Favour of Foreign Courts:** It is covered by Section 86 of PILA whose temporal applicability to choice of court agreements in favour of EU Member State is limited (see above).

Section 86 contains special rules for prorogation in cases of insurance and consumer contracts. It states that it shall be admissible only after a dispute arises or provided it enables only the policyholder, the insured, another beneficiary, the injured or the consumer to initiate proceedings in the courts of another state.

When parties assign the jurisdiction and a foreign court starts proceedings than the jurisdiction of the Czech courts is excluded. PILA however lists few exceptional circumstances under which the Czech court shall hear the case nevertheless. It is the situation where:

- The parties unanimously declare their intent not to insist on the agreement.
- A judgement issued abroad would not be recognised in the Czech Republic.
- A foreign court declined to hear the case.
- A jurisdiction agreement is contrary to public policy.

**Prorogation in Case of Employment Relationships:** The regulation in Section 88 of PILA applies only to employment relationships established by other means than a contract, for example by appointment.

When parties prorogate Czech courts they cannot alter the subject-matter jurisdiction of the Czech courts.

Parties can assign the jurisdiction in favour of a foreign court only after the dispute arises or provided that the agreement enables only the employee to initiate proceedings in the courts of another state. In case where parties assign the jurisdiction in favour of foreign court and such court starts proceedings, Czech courts' jurisdiction is excluded. This rule however does not apply in exceptional cases which are identical to those in Section 86 PILA (see above).



### 14.2.4 Summary

The Czech regulation relating to international jurisdiction of contractual matters is in a specific position as it applies only in a limited number of cases. It is because this area is widely covered by the EU legislation (i.e. the Brussels Ibis Regulation) and international conventions.

The determination of international jurisdiction according to the Brussels Ibis Regulation is done according to several rules. One needs to be aware of the regulation's hierarchy of the jurisdiction rules in order to match the dispute with the right jurisdiction rule. The general rule is based on the defendant's domicile, the special rules are based on several different approaches (for example the will of the parties or protection of the weaker party).

Being residual, the Czech regulation contains the general rule on determination of jurisdiction and provisions dealing with certain types of prorogation. The general provision in PILA says that the Czech court's jurisdiction is given, when the Czech court has the local jurisdiction according to the Czech procedural law.

## 14.3 Law Applicable to Contractual Obligations

The conflict-of-law rules dealing with contractual obligations are, similarly as the regulation of international jurisdiction in this area of law, largely replaced by the EU legislation.

PILA contains rules for the determination of applicable law to a contract. Its applicability is, however, limited only to the issues not covered by the EU regulation or international conventions. Therefore, same as with the determination of international jurisdiction, before one applies PILA he should always firstly examine whether the issue is not covered by EU or international instrument.

### 14.3.1 International Conventions

The Czech Republic is a party to several multilateral and bilateral international conventions which contain either conflict-of-law rules or even substantive regulation of contractual relations with international element. Each of them

has different material, personal, territorial and temporal scope and it is therefore necessary to consider their application on a case-to-case basis.

Here is the list of the most important international conventions dealing with contractual obligations which are binding on the Czech Republic:

- CISG;
- Convention concerning international carriage by rail (COTIF);
- Convention for the unification of certain rules relating to international carriage by air (Warsaw Convention);
- Convention for the unification of certain rules for international carriage by air (Montreal Convention);
- Convention on the contract for the international carriage of passengers and luggage by road;<sup>830</sup>
- Rome Convention;
- International convention on civil liability for bunker oil pollution damage;<sup>831</sup>
- Agreement between Czechoslovak Socialist Republic and the People's Republic of Mongolia on legal assistance and settlement of relations in civil, family and criminal matters;<sup>832</sup>
- Agreement between the Czech Republic and the Republic of Uzbekistan on legal assistance and legal relations in civil and criminal matters;<sup>833</sup>
- Agreement between the Czech Republic and Ukraine on legal assistance in civil matters.<sup>834</sup>

### 14.3.2 EU Regulation - Rome I Regulation

The Rome I Regulation is the principal EU instrument regulating the determination of the applicable law to contractual obligations. It is the successor

<sup>830</sup> Convention of 1 March 1973 on the contract for the international carriage of passengers and luggage by road [online]. *The United Nations Economic Commission for Europe*. Available from: [http://www.unecce.org/fileadmin/DAM/trans/conventn/CVR\\_e.pdf](http://www.unecce.org/fileadmin/DAM/trans/conventn/CVR_e.pdf)

<sup>831</sup> Convention of 23 March 2001 on civil liability for bunker oil pollution damage [online]. *University of Oslo*. Available from: <http://www.jus.uio.no/english/services/library/treaties/06/6-07/bunkers-convention.xml>

<sup>832</sup> Regulation No. 106/1978.

<sup>833</sup> Notice of the Ministry of Foreign Affairs No. 133/2003 Coll Int. Conv., on Agreement between the Czech Republic and the Republic of Uzbekistan on legal assistance and legal relations in civil and criminal matters.

<sup>834</sup> Notice No. 123/2002.

to the Rome Convention of 1980 whose text served as the draft of the text of the regulation. The Rome I Regulation applies to contracts concluded after 17 December 2009 and is of a universal nature.

The rather broad definition of the material scope is refined in Article 1(2). Under this provision the Rome I Regulation do not apply to (for example):

- Obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments;
- The question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party;
- The constitution of trusts and the relationship between settlors, trustees and beneficiaries;
- Obligations arising out of dealings prior to the conclusion of a contract;
- Specific kind of insurance contracts (arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC).

Generally speaking, the material applicability of Rome I Regulation is very wide with a few exclusions. Hence it shall apply to the vast majority of contracts. In other words, the Rome I Regulation had systematically replaced the national conflict rules related to contractual obligations with an international element.<sup>835</sup>

It is however important to stress that the applicable law determined according to the Rome I Regulation does not cover all issues connected to the contract. It applies especially to the rights and obligations deriving from the contract and also to issues explicitly listed in Article 12 of the Regulation. On the other hand it does not apply for example to issue of the legal capacity of the parties or rights *in rem* issues connected to the contract. Those issues are covered by national conflict-of-law rules.<sup>836</sup>

<sup>835</sup> ŠTEFANKOVÁ, Natálie. *Introduction to Private International Law*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2011, p. 83.

<sup>836</sup> ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie: (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, p. 84.

### *Choice of Law*

The Rome I Regulation is based on the respect to party autonomy. The law applicable to the contract can be chosen by the parties. The choice of law is regulated by Article 3. It means that when parties decide that their contracts shall be governed by certain law and they validly undertake such a choice, the other provisions containing specific conflict rules (see below) do not apply.

The party autonomy is quite broad within the Rome I Regulation regime. The chosen law may be applied to only a part or to the whole contract. At the same time the choice of law may be made either expressly or it may be clearly demonstrated by the terms of the contract or the circumstances of the case. The first possibility, the express choice, does not bring many challenges and questions. The second possibility, the unexpressed choice demonstrated by the terms of the contract or the circumstances of the case (also called “tacit choice” of law), on the other hand, is quite a challenge when it comes to interpreting and proving of the will of the parties. Therefore the tacit choice associates procedural risk<sup>837</sup> and the expressed choice of law is definitely the recommended one.

Parties can only choose law of some country as a whole. Though the question of allowing parties to choose for example *lex mercatoria* or UNIDROIT Principles of International Commercial Contracts<sup>838</sup> was discussed during the drafting of the Rome I Regulation, it was refused in the end.<sup>839</sup>

Choice of law is not unlimited and Article 3 sets certain restrictions in its paragraphs 3 and 4. Those provisions limit the choice firstly in case where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen (intra-state situations). In such cases the provisions of the law of that other country which cannot be derogated from by agreement must be applied. Therefore,

<sup>837</sup> ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie: (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, p. 89.

<sup>838</sup> UNIDROIT Principles of International Commercial Contracts 2010 [online]. *International Institute for the Unification of Private Law (UNIDROIT)*. Available from: <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010>

<sup>839</sup> ROZEHNALOVÁ, Naděžda. *Závazky ze smluv a jejich právní režim: (se zvláštním zřetelem na evropskou kolizní úpravu)*. Brno: Masarykova univerzita, 2010, pp. 104–108.

the parties' choice applies only in the area of law which can be derogated from.<sup>840</sup>

The same goes to the cases where all other elements relevant to the situation at the time of the choice are located in one or more Member States and parties choose the applicable law other than that of some Member State (they choose law of a so called third country). In such cases the provisions of EU law which cannot be derogated from by agreement must be applied. They shall be applied in the way they were implemented in the Member State of the forum.

The Rome I Regulation sets some more limits to choice of law in addition to Article 3(3) and Article 3(4). They apply to some specific types of contracts and are discussed below.

### ***Applicable Law in the Absence of Choice***

When parties do not agree on the governing law for their contract or when the choice of law is not done validly, the applicable law is in most cases<sup>841</sup> determined according to conflict rules in Article 4.

Before the sole analysis of the provision, let us firstly define habitual residence – the term with which the provision operates. The definition differs for natural persons, natural persons acting in the course of their business activities and legal persons. While determining habitual residence we always have to be considering the situation at the time of the conclusion of the contract as this is the relevant one.

A habitual residence of a natural person is not defined in the Rome I Regulation. It is however derived from the place where he actually lives and to which he is closely connected. The nationality of the person is not important.<sup>842</sup>

A habitual residence of a natural person acting in the course of his business activity is defined in Article 19 of the Regulation. The term shall

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<sup>840</sup> BĚLOHLÁVEK, Alexander J. *Rome Convention, Rome I Regulation: Commentary: New EU Conflict-of-Laws Rules for Contractual Obligations: December 17, 2010. Volume 1*. New York: Juris, 2010, p. 704.

<sup>841</sup> For the exception see below.

<sup>842</sup> Judgement of the Court of Justice of 25 February 1999. *Robin Swaddling vs. Adjudication Officer*. Case C-90/97.

be interpreted as his principal place of business. When it comes to legal persons, the definition of a habitual residence is also defined in Article 19 and it is the place of central administration. In case where the contract is concluded by a branch, agency or any other establishment than the habitual residence shall be deemed as place where they are located.

Article 4 of Rome I Regulation is structured in the following way.

Firstly, it mentions specific types of contracts and the connecting factors according to which the applicable law shall be determined (para. 1). Namely it sets the conflict rule for example for:

- A contract for the sale of goods (applicable law is the one of the country where the seller has his habitual residence);
- A contract for the provision of services (applicable law is the one of the country where the service provider has his habitual residence);
- A contract relating to a right *in rem* in immovable property or to a tenancy of immovable property (applicable law is the one of the country where the property is situated);<sup>843</sup>
- A franchise contract (applicable law is the one of the country where the franchisee has his habitual residence);
- Etc.

Secondly, when the contract does not fall either within any or within more than one of the relationships mentioned in paragraph 1, than the applicable law shall be determined by reference to the country where the party required to the effect the characteristic performance has his habitual residence (Article 4(2)).

Thirdly, Article 4(3) contains so called escape clause - a provision inserted in a legal instrument to supplement or cure the effect of the main rule if necessary.<sup>844</sup> It is applied in situations where it is clear from the circum-

<sup>843</sup> The Rome I Regulation establishes special conflict-of-law rule for contracts on a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months provided that the tenant – natural person and the landlord have their habitual residence in the same country. Such contracts shall be governed by the law of the country of the habitual residence. This special rule however applies only when the tenant is a natural person. (see Article 4(1)(d) of the Rome I Regulation).

<sup>844</sup> OKOLI, Chukwuma Samuel Adesina; ARISHE, Gabriel Omoshemime. The Operation of the Escape Clauses in the Rome Convention, Rome I Regulation and Rome II Regulation. *Journal of Private International Law*. 2012, Vol. 8, No. 3, p. 513.

stances of the case that the contract is manifestly more closely connected with a country other than the one determined by the aforementioned rules, the law of that other country shall apply. The wording of this provision however suggests that it should be used only in exceptional cases. The Court of Justice decided that it has to be “*clear from the circumstances as a whole that the contract is more closely connected with a country other than that identified on the basis of the presumptions*”.<sup>845</sup>

Finally, where it is impossible to determine the applicable law pursuant to the previous paragraphs, the contracts shall be governed by the law of the country with which it is mostly connected. For example barter contracts or cross-licence contracts would fall under this residual provision in Article 4(4).

### ***Law Applicable Law to Specific Contracts***

Rome I Regulation contains special provisions for some specific contracts. Those contracts are subject to special conflict-of-law rules and therefore the applicable law is not determined in accordance with Article 4 of Rome I Regulation but according to the special rules.

**Contracts for the Carriage of Goods:** They are regulated in Article 5(1). In the absence of choice of law, the law of the country of carrier’s habitual residence is applicable. That is however only if that is also the country where the place of receipt or of delivery or the consignor’s habitual residence is located. In case that it is not, the contract of carriage is governed by the law of the country where the place of delivery as agreed by the parties is situated.

**Contracts for the Carriage of Passengers:** They are regulated in Article 5(2). The choice of law is limited only to the closed list of possible laws.<sup>846</sup> This provision intends to assure the protection of the weaker party, the passenger, by allowing to choose only the law connected to the contract.

<sup>845</sup> Judgement of the Court of Justice of 6 October 2009. Intercontainer Interfrigo SC (ICF) vs. Balkenende Oosthuizen BV and MIC Operations BV. Case C-133/08.

<sup>846</sup> Law of the state where:

- a) the passenger has his habitual residence;
- b) the carrier has his habitual residence;
- c) the carrier has his place of central administration; or d) the place of departure is situated; or e) the place of destination is situated.

To the extent that the law was not chosen by the parties, the governing law is the law of the country where the passenger has habitual residence, but only when either the place of departure or of destination is also located there. In case that neither of those conditions is fulfilled, the law of the country of the carrier's habitual residence governs the contract.

Article 5 contains the escape clause based on a manifestly closer connection that can however apply only in the absence of the choice of law.

**Consumer Contracts:** The regulation is to be found in Article 6 and they are defined as *“the contracts concluded by a natural person for a purpose which can be regarded as being outside his or her trade or profession with another person acting in the exercise of his or her trade or profession”*. Not all consumer contracts are within the protective umbrella of Article 6. The provision does not apply on those contracts which are expressly excluded in Article 6(4).<sup>847</sup> Those contracts not excluded from the scope of Article 6 enjoy the special protection only when following conditions are fulfilled:

- The professional pursues his commercial or professional activities in the country where the consumer has his habitual residence; or
- The professional by any means, directs such activities<sup>848</sup> to that country or to several countries including that country;
- And the contract falls within the scope of such activities.

<sup>847</sup> Article 6(4) Rome I Regulation:

*“Paragraphs 1 and 2 shall not apply to:*

- a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence;*
- b) a contract of carriage other than a contract relating to package travel within the meaning of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours;*
- c) a contract relating to a right in rem in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC;*
- d) rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service;*
- e) a contract concluded within the type of system falling within the scope of Article 4(1)(b).”*

<sup>848</sup> Directing of activities is in most cases (though not always) associated with electronic commerce. See for example: ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie: (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, pp. 428–432.



When consumer contract does not fall within the scope of Article 6 the conflict-of-law rules of Article 3 and 4 apply. When however a consumer contract is governed by Article 6 then the special conflict-of-law rules have to be applied. Parties can agree that their contract shall be governed by any national law. Such choice, however, cannot deprive the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law designated under the subsidiary conflict-of-law rule. The subsidiary conflict-of-law rule, i.e. Article 6(1), states that those consumer contracts shall be governed by the law of the country of consumer's habitual residence.

**Insurance Contracts:** They have a special regulation in Article 7. The scheme of this provision is rather complex and it applies to insurance contracts for large risks situated in or outside the EU and all contracts covering the risks situated within the EU. The former's applicable law can be determined according to the choice of law made by the parties. In case that none is chosen, the contract is governed by the law of the insurer's habitual residence. The provision also contains an escape clause based on a more closely connection for the insurance contracts for large risks.

The choice of law regarding the latter is limited in the way that parties may only choose some of the law mentioned in the closed list.<sup>849</sup> Where no choice of law is made the contract is governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract. In case the contract covers risks situated in more than one Member State, the contract is considered separated to as many contracts as there are Member States involved.

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<sup>849</sup> The list includes:

- a) the law of any Member State where the risk is situated at the time of conclusion of the contract;
- b) the law of the country where the policy holder has his habitual residence;
- c) in the case of life assurance, the law of the Member State of which the policy holder is a national;
- d) for insurance contracts covering risks limited to events occurring in one Member State other than the Member State where the risk is situated, the law of that Member State;
- e) where the policy holder of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitus residence of the policy holder.

**Individual Employment Contracts:** They are regulated in Article 8. An employee is also considered to be a weaker party and therefore the choice of law is limited in case of individual employment contracts. The limitation is basically the same as in case of consumer contracts, i.e. the choice of law cannot deprive the employee of the protection afforded to him by the provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been otherwise applicable.

The conflict-of-law rule itself is, however, different. In the absence of choice of law, individual employment contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work.

In cases where the work is carried out by the employee in more than one state than it is understood that he carries out his work habitually in the place where he has established the effective centre of his working activities<sup>850</sup> and where, or from which he performs the essential part of his duties towards the employer.<sup>851</sup>

If it is not possible to determine the governing law pursuant to this conflict-of-law rule in Article 8(2), the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated. Article 8 contains also an escape clause. Hence, when it appears from the circumstances in their entirety that the contract is more closely connected with another country, the contract shall be governed by the law of such a country.

### ***Security of Obligation, Consequences of Breach and Alteration of Obligation***

**Security of Obligations:** The applicable law is determined according to the Rome I Regulation when it is based on contractual arrangements<sup>852</sup> (e.g. contractually based liability, bank guarantee). Parties are allowed to choose

<sup>850</sup> Judgement of the Court of Justice of 9 January 1997. Petrus Wilhelmus Rutten vs. Cross Medical Ltd. Case C-383/95.

<sup>851</sup> Judgement of the Court of Justice of 13 July 1993. Mulox IBC Ltd vs. Hendrick Geels. Case C-125/92.

<sup>852</sup> In case it is based on unilateral legal act the applicable law is determined according to national conflict rules.

the governing law provided that they follow the requirements mentioned in Article 3. In the case of the absence of such choice the applicable law shall be determined according to Article 4(2). Therefore the security of obligation will be governed by the law of the country where the party required to the effect the characteristic performance has his habitual residence, i.e. the country where the party providing the security has his habitual residence.<sup>853</sup>

**Consequences of Breach:** They are regulated in Article 12 of the Rome I Regulation. This provision contains a list of issues to which *lex causae* is applicable and consequences of breach is one of them (see Article 12 (1)(c)). The consequences of a total or partial breach of obligations are governed by the law applicable to the contract. The same rule applies also to the assessment of damages in so far as it is governed by the rules of law. The Rome I Regulation contains also specific conflict rules for certain alterations of the obligation.

**Voluntary Assignment and Contractual Subrogation of a Claim against the Debtor:** They are regulated in Article 14. The relationship between assignor and assignee shall be governed by the law that applies to the contract between the assignor and assignee under the Rome I Regulation. It will hence be either the law chosen by parties or according to Article 4(2) the law of the country where the assignor's habitual residence is.

However, the applicable law of the assigned or subrogated claim shall determine

- Its assignability;
- The relationship between the assignee and the debtor;
- The conditions under which the assignment or subrogation can be invoked against the debtor;
- Whether the debtor's obligations have been discharged.

**Transfer of Rights and Obligations by Operation of Law (i.e. Legal Subrogation):** According to Article 15 the law which governs the third

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<sup>853</sup> BŘÍZA, Petr; BŘICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C.H. Beck, 2014, p. 555.

person's duty to satisfy the creditor is applicable also to the issue whether and to what extent the third person is entitled to exercise the rights which the creditor had against the debtor under the law governing their relationship.

### 14.3.3 PILA

With respect to the existence and broad scope of application of the Rome I Regulation, the Czech legislator determined the conflict-of-law rules for contracts in PILA as a residual arrangement. The below discussed regulations and conflict rules can be applied only in case of the contracts falling out of the scope of the Rome I Regulation or any other European or international legal instrument.

#### *General Conflict-of-Law Rule*

General provision for contracts with international element is Section 87 of PILA. It applies to all contracts which are in PILA's scope of application and at the same time are not regulated by any other special provision in PILA.<sup>854</sup>

It is obvious from the formulation of this provision that it was inspired by the Rome I Regulation and it aims to be in harmony with it. *Bříza* believes that the intention to bring those conflict rules near the Rome I Regulation has to be kept in mind while interpreting Section 87 of PILA.<sup>855</sup>

**Choice of Law:** Parties can in accordance with Section 87(1) choose which law shall govern their contract. Such a choice must be either an expressed one or it has to be clearly demonstrated by the terms of the contract or the circumstances of the case (i.e. tacit choice). The wording of this provision is almost the same as the wording of Article 3 of the Rome I Regulation and confirms what was said above in this chapter.

Though the provision does not expressly state so, the chosen law may be applied to only a part or to the whole contract. The choice of two or more laws however cannot lead to logically incompatible situations.<sup>856</sup>

<sup>854</sup> PILA contains special conflict-of-law rules for example for arbitration agreements, insurance contracts and those discussed in this paper below.

<sup>855</sup> BŘÍZA, Petr; BŘICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C.H. Beck, 2014, p. 532.

<sup>856</sup> *Ibid.*, p. 533.

Section 87 is based on unlimited choice of law, i.e. choice of any law irrespective of whether such law is anyhow associated with the contract or not.<sup>857</sup> Same as in the case of the Rome I Regulation, the choice of law might be modified by parties even after the conclusion of the contract. Such later choice would have a retroactive effect.<sup>858</sup>

**Applicable Law in the Absence of Choice:** When parties do not (validly) choose the applicable law, the contract shall be governed by the law of the country with which it is most closely connected (Section 87 (1)). Having a criterion of the most closely connection as the main substitute connecting fact proves again that PILA was inspired by the Rome I Regulation.<sup>859</sup> Unlike Rome I Regulation, PILA however does not use this connecting factor as an escape clause but as a preferential connecting factor in the absence of a choice of law.

### *Law Applicable to Specific Contracts*

**Consumer Contracts:** They are regulated in Section 87(2). This rule aims to the consumer contracts to whose third (i.e. non-EU state) law is applied. This provision is actually not a conflict-of-law rule as it does not say which law shall be the applicable one. It merely states that in a situation when such contract shall be, according to the choice of law or otherwise, governed by the law of a third state (non-EU state) and at the same time is closely connected with the territory of a Member State of the EU, a consumer shall not be deprived of the protection granted under the Czech law provided the proceedings are undertaken in the Czech Republic.

Section 87(2) applies anytime when its condition are met. This means that it can apply even in case when the law of a third state is determined according to the Rome I Regulation and the proceedings take place in the Czech Republic. In such cases, the consumer contract is governed by the so called mosaic regulation.

<sup>857</sup> PAUKNEROVÁ, Monika, Naděžda ROZEHNALOVÁ, Marta ZAVADILOVÁ et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 600.

<sup>858</sup> BRÍZA, Petr; BRICHÁČEK, Tomáš; FIŠEROVÁ, Zuzana et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: C.H. Beck, 2014, p. 533.

<sup>859</sup> *Ibid.*, p. 535.

The term “protection granted under the Czech law” does not refer only to provision that cannot be derogated from by agreement. It also refers to provision that can be derogated from by agreement given that it grants certain protection to the consumer.<sup>860</sup>

Unlike Rome I Regulation, PILA does not define what a consumer contract is. The determination whether some contract is or is not a consumer contract shall therefore be done based on qualification according to Czech law.

Similar rule for special type of consumer contracts can be found in Section 87(4). This provision applies to contracts:

- Regarding the use of one or more accommodation establishments against consideration for more than one time period provided the contract is concluded for a period longer than one year (so called timeshare “timeshare”);
- The benefits of accommodation provided the contract is concluded for a period longer than one year (so called “long-term holiday product”);
- Assistance in the timeshare or the long-term holiday product transfer against consideration or participation in an exchange system enabling consumers the mutual transfer of the right to use the establishment providing accommodation or other services related to the timeshare under another legislation.

PILA for those contracts states that in case when the applicable law is other than the law of a Member State of EU, the proceedings are undertaken in the Czech Republic and at the same time any of the immovable properties concerned is situated within the territory of a Member State, or an entrepreneur pursues activities in the territory of a Member State or the activities are by any means directed in the territory of a Member State and are in connection with an immovable property concerned, than a consumer shall not be deprived of the protection given by perspective EU legislation.<sup>861</sup>

<sup>860</sup> PAUKNEROVÁ, Monika, Naděžda ROZEHNALOVÁ, Marta ZAVADILOVÁ et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 603.

<sup>861</sup> Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts. In *Eur-lex* [legal information system]. EU Publication Office. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447689070518&uri=CELEX:32008L0122>

**Insurance Contracts:** They are residually regulated in Section 87(3). This provision applies to insurance contracts expressly excluded from Rome I Regulation's scope.<sup>862</sup> Those shall be governed by the law determined by the choice and in the absence of such choice by the law of the habitual residence of the policyholder.

The provision also covers some insurance contracts for which Article 7(3) Rome I Regulation permits parties to take advantage of greater freedom of choice of the law granted by the Member State. In this case parties may, to an extent admitted by PILA, choose any applicable law.

**Employment Relationships:** Employment relationships established by other means than a contract, for example by appointment, are covered by Section 89 (those established by a contract are fully regulated by Rome I Regulation). Such relationships shall be governed by the law of the state under which the employment was established.

### ***Security of Obligation, Consequences of Breach and Alteration of Obligation***

The matters of security of obligation, consequences of breach and alteration of obligation fall within the regulation of Section 91 only in case they do not fall within the scope of the Rome I Regulation.

**Security of Obligation:** It is regulated in Section 91(1). According to this provision it shall be governed by the same law as the secured obligation (*lex causae*), unless other law is chosen. The provision simultaneously sets out some exceptions to this general rule:

- The relationships where rights *in rem* are concerned (e.g. liens): the law where the thing is situated is applicable (*lex rei sitae*);
- The case of a statutory lien over claims and other rights: parties may choose the law but such choice may not prejudice the right of third parties; in the absence of choice of law the applicable law is determined as the law governing the secured obligation (*lex causae*);

<sup>862</sup> I.e. insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance. In *Eur-lex* [legal information system], EU Publication Office. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447689100001&uri=CELEX:32002L0083>

at the same time only rights following from *lex causae* may be exercised against the debtor;

- The law or nature of the matter refer to another law: this is case of for example responsibility of legal business entity's partners or members for liabilities and for example those types of securities mentioned in Section 83 PILA.<sup>863</sup>

**Consequences of a Breach of Obligation:** They shall be according to Section 91(2) PILA governed by the law which is applicable to the obligation.

**Transfer of Rights and Obligations by the Operation of Law:** It is regulated by Section 91(3) PILA. This provision applies to for example the situation where an insurance company is a legal successor of a policyholder as a result of insurance payment.<sup>864</sup> In this case the transfer of rights and obligations shall be governed by the law applicable to cases for which the law stipulates such a transfer, unless it follows otherwise from the nature of the matter. The law applicable to the transfer however does not influence the right and obligation itself – they shall be still governed by the same law as before the transfer.

#### 14.3.4 Summary

Provisions in PILA are residual because most of the contracts fall within the scope EU law instrument (Rome I Regulation) or some international convention.

The Rome I Regulation gives a primacy to the will of the parties and therefore the applicable law is determined primarily according to the choice of law. When parties do not choose the governing law, the Rome I Regulation contains a list of conflict-of-law rules from which some are applicable only to specific contracts (for example where there is a weaker party involved).

PILA compared to Rome I Regulation naturally contains fewer conflict-of-law rules. It is also based on the precedence of the will of the parties who are allowed to choose the law applicable to their contract. Apart from that PILA also contains conflict-of-law rules for certain specific cases (for example employment relationships established by an appointment).

<sup>863</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 625.

<sup>864</sup> *Ibid.*, p. 626.



## 14.4 Contractual Obligations – Recognition and Enforcement of Judgements

The recognition and enforcement of a court decision dealing with contractual obligations is again an area of law widely covered by the EU legislation. The core instrument is the Brussels Ibis Regulation which is used for recognition and enforcement of judgements in civil and commercial matters. The regulation only deals with the recognition and enforcement of court decisions and does not apply to arbitral awards.<sup>865</sup>

There are also other EU instruments that can be used for the recognition and enforcement of judgements in contractual matters. These instruments try to even more simplify this procedure in comparison to the Brussels Ibis Regulation.<sup>866</sup> They represent the alternatives to the Brussels Ibis Regulation and can be applied if the specific conditions contained therein are met.

The recognition and enforcement of judgements in contractual matters are also covered by international conventions. They are mostly relevant in the case of judgements rendered in third states (e.g. Lugano II Convention, bilateral agreements).

The regulation of recognition and enforcement in PILA is of residual nature. For the detailed analysis of the regulation in PILA, we kindly refer to the chapter on recognition and enforcement.

## 14.5 Conclusion

Concerning the regulation of jurisdiction, applicable law and recognition and enforcement in contractual matters, the regulation in national legal act, i.e. PILA is only of residual nature. These questions are covered by international instruments and maybe more importantly by the EU instruments, especially the Brussels Ibis Regulation and Rome I Regulation.

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<sup>865</sup> Article 1 and 2 of the Brussels Ibis Regulation.

<sup>866</sup> European Enforcement Order Regulation; European Payment Order Regulation; Small Claims Procedure Regulation.

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## 15 NON-CONTRACTUAL OBLIGATIONS (DELICTS OR TORTS)

### 15.1 Introduction

This chapter analyses the concept and legal rules governing non-contractual obligations (arising out of delicts or torts) with international (cross-border) element.

Civil wrongs may have legal consequences in different countries. Let us have a case scenario where unlawful conduct (civil delict) occurred in State A, whereas its consequences (damage) occurred in State B. To determine the law of which state is applicable, and courts of which state have jurisdiction in this case, it is necessary to turn to conflict-of-law rules and to rules on international jurisdiction of courts.

There can be many examples of delicts with cross-border element: a collision of two cars in Croatia, one registered in the Czech Republic, the other in Austria; a defamatory statement about a French actor published in a Czech newspaper, both in paper and online version; online copyright infringement; a collision between a Czech citizen and a Polish citizen on a ski slope in Italy, etc.

This chapter defines the concept of a non-contractual obligation, with regards to certain differences in terminology; it presents and analyses the relevant sources of law containing conflict-of-law rules and jurisdiction rules; it explains the relationships between these sources of law; and it analyses the rules in PILA.

Since the law applicable to non-contractual obligations and the jurisdiction of courts are determined according to the unified EU regulations or international conventions, the rules in PILA are very brief; and they refer to the directly applicable sources. Nevertheless, the provisions in PILA are still of importance in cases not covered by international conventions or EU regulations.

## 15.2 Definition of a Non-contractual Obligation (Delict)

For the application of the relevant rules, it is necessary to explain the concept and definition of the term “delict” or “tort”, or alternatively “non-contractual obligation”.

To define the term “non-contractual obligation”, it is possible to use the following example: a non-contractual obligation means a legal situation, where a person, who is responsible for loss sustained by another person, is required to compensate the victim, in a case not linked to performance of a contract, such as traffic accident, defamation or infringement of personal rights.<sup>867</sup>

It is possible to define a non-contractual obligation (delict) as type of a civil wrong. Civil wrong consists of an unlawful conduct (commissive or omissive); intentional or negligent breach of duty of care, that causes loss or harm to a victim and triggers legal liability for the wrongdoer; and is not result of a breach of contract (other civil wrongs include breach of contract). The clear distinction of non-contractual obligations from the breach of contract is declared in the case law of the Court of Justice (especially cases 189/87<sup>868</sup> and C-51/97<sup>869</sup>).<sup>870</sup>

The Preamble to the Rome II Regulation states in Recital 11: “*The concept of a non-contractual obligation varies from one Member State to another.*” Not only the concept of non-contractual obligation varies in different Member States, but also the legal terminology and legislative technique might be different in various jurisdictions.

<sup>867</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 647.

<sup>868</sup> Judgement of the Court of Justice 27 September 1988. Athanasios Kalfelis vs. Bankhaus Schröder, Münchmeyer, Hengst and Co. and others. Case 189/87. Analysed in: VALDHANS, Jiří. *Právní úprava mimosmluvních závazků s mezinárodním prvkem*. Praha: C.H.Beck, 2012, pp. 22–23; KYSELOVSKÁ, Tereza; ROZEHNALOVÁ, Naděžda et al. *Rozhodování Soudního dvora EU ve věcech příslušnosti: analýza rozhodnutí dle nařízení Brusel Ibis*. Brno: Masarykova univerzita, 2014, pp. 137–139.

<sup>869</sup> Judgement of the Court of Justice of 27 October 1998. Réunion européenne SA and Others vs. Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002. Case C-51/97. Analysed in: VALDHANS, Jiří. *Právní úprava mimosmluvních závazků s mezinárodním prvkem*. Praha: C.H.Beck, 2012, pp. 24–26; KYSELOVSKÁ, Tereza; ROZEHNALOVÁ, Naděžda et al. *Rozhodování Soudního dvora EU ve věcech příslušnosti: analýza rozhodnutí dle nařízení Brusel Ibis*. Brno: Masarykova univerzita, 2014, pp. 141–143.

<sup>870</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 648.

The civil law jurisdictions rather use term “delict”, common law countries term “tort”. As to the legislative basis, the law of delicts in civil law countries usually consist of an abstractly defined general clause (statute) with some additional rules for specific merits; whereas in common law countries,<sup>871</sup> the law of torts arises from case law, therefore, there are many rules on specific types of torts.<sup>872</sup>

Nevertheless, the concept of a non-contractual obligation is based on the Roman idea of wrongful conduct and its classic distinction *omnis enim obligatio vel ex contractu vel ex delicto nascitur*.<sup>873</sup>

The Czech Civil Code unfortunately differs in terminology. The Civil Code distinguishes three types of civil delict; (intentional) breach of good morals (Section 2879), breach of law (Section 2880) and breach of contractual obligation (strict liability, Section 2993). These general provisions are followed by rules for some special types of delicts. Despite this terminological inconsistency, the Czech civil law follows the traditional concept of non-contractual obligations and their separation from contractual obligations.<sup>874</sup>

### 15.3 Non-contractual Obligation with International (Cross-border) Element

The international (cross-border) element will be mainly in subject - person (victim or wrongdoer); or in the matter of fact relevant for its creation and existence. The “general” connecting factor is *lex loci delicti* (as the link between unlawful conduct and territory where the conduct takes place or where the damage occurs).

<sup>871</sup> VALDHANS, Jiří. *Právní úprava mimosmluvních závazků s mezinárodním prvkem*. Praha: C.H.Beck, 2012, pp. 7–8.

<sup>872</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 648; VALDHANS, Jiří. *Právní úprava mimosmluvních závazků s mezinárodním prvkem*. Praha: C.H.Beck, 2012, p. 13.

<sup>873</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 648; VALDHANS, Jiří. *Právní úprava mimosmluvních závazků s mezinárodním prvkem*. Praha: C.H.Beck, 2012, p. 7.

<sup>874</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 648.

In case the conduct takes place or the damage occurs in another country, the “general” connecting factor is divided into *lex loci delicti commissi* (law of the place where the delict was committed) or *lex loci damni infecti* (law of the country where the damage occurred). The connecting factor *lex loci delicti commissi* emphasises the place of the wrongdoer (tortfeasor), whereas the latter the position of the victim.<sup>875</sup>

Historically, the conflict-of-law rules favoured the *lex loci delicti commissi* against *lex loci damni infecti*. Nowadays, the modern legal systems prefer to use the latter<sup>876</sup> (see Article of the 4 Rome II Regulation, Section 101 of PILA). These two connecting factors are further modified or refined for certain types of delicts as *lex loci protectionis* for the infringement of intellectual property rights (see Article 8 of the Rome II Regulation, Section 80 of PILA) etc.

## 15.4 Sources of Law

This chapter introduces a general overview of relevant sources of law, which are further analysed in more details.

### 15.4.1 Law Applicable

The law applicable to torts (delicts) (i.e. product liability; unfair competition and acts restricting free competition; environmental damage; infringement of intellectual property rights; industrial action) and other non-contractual obligations (i.e. unjust enrichment; *negotiorum gestio*; *culpa in contrahendo*) is determined by the Rome II Regulation.

The law applicable to traffic accidents is governed by the Convention on the law applicable to traffic accidents (“Hague Convention”). The application of this convention is not affected by the Rome II Regulation (see below).<sup>877</sup>

The area of nuclear damage is regulated by the Convention on third party liability in the field of nuclear energy,<sup>878</sup> Vienna Convention on civil liabil-

<sup>875</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 649.

<sup>876</sup> *Ibid.*

<sup>877</sup> *Ibid.*

<sup>878</sup> Convention of 29 July 1960 on third party liability in the field of nuclear energy, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982 [online]. *Nuclear Energy Agency*. Available from: [https://www.oecd-nea.org/law/nlparis\\_conv.html](https://www.oecd-nea.org/law/nlparis_conv.html)

ity for nuclear damage<sup>879</sup> and Convention on supplementary compensation for nuclear damage.<sup>880</sup>

The law applicable to non-contractual obligations may be determined also by various bilateral agreements on legal assistance adopted between the Czech Republic and other countries.<sup>881</sup>

The relationship between these bilateral agreements and the Rome II Regulation is regulated in Article 28(2) the Rome II Regulation: *“However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.”*

PILA contains the conflict-of-law rules for non-contractual obligations in Section 101. This provision applies to the relationships that are excluded from the Rome II Regulation (violations of privacy and rights relating to personality, including defamation); and that are not covered by any multi-lateral or bilateral international conventions.

#### 15.4.2 Jurisdiction

The rules on international jurisdiction of courts for disputes arising out of non-contractual obligations between Member States of the EU are governed by the Brussels Ibis Regulation. PILA does not contain any special jurisdictional rule for disputes arising out of non-contractual obligations; the jurisdiction is governed by Section 6 (general rule on jurisdiction).

### 15.5 Relationship between Sources of Law

#### 15.5.1 Law Applicable

International conventions and EU regulations that are directly applicable shall be applied before national legislation, i.e. provisions in PILA. PILA

<sup>879</sup> Vienna Convention of 21 May 1963 on civil liability for nuclear damage [online] *International Atomic Energy Agency*. Available from: <https://www.iaea.org/publications/documents/infcircs/vienna-convention-civil-liability-nuclear-damage>

<sup>880</sup> Convention of 22 July 1998 on supplementary compensation for nuclear damage [online]. *International Atomic Energy Agency*. Available from: <https://www.iaea.org/publications/documents/treaties/convention-supplementary-compensation-nuclear-damage>

<sup>881</sup> For the analysis of the bilateral international treaties see VALDHANS, Jiří. *Právní úprava mimosmluvních závazků s mezinárodním prvkem*. Praha: C.H.Beck, 2012, pp. 67 et seq.

shall be applied in cases not regulated by EU regulations or international conventions. Nowadays, it will be mainly in cases involving parties from third states, non-Member States of the EU; or in relationships and disputes which originated before the abovementioned sources of law entered into force.

The most important international convention in this area is the Hague Convention. The application of the Hague Convention shall not be prejudiced by the application of the Rome II Regulation because its Contracting States are not only Member States of the EU, but also third states.<sup>882</sup> The Hague Convention takes precedence over the Rome II Regulation in case the matter relates to participants from Member States. The Rome II Regulation is applicable in Member States that are not contracting states to the Hague Convention. The Hague Convention takes precedence over PILA.

### 15.5.2 Jurisdiction

The rules on jurisdiction for disputes arising out of non-contractual obligations are governed by the Brussels Ibis Regulation. If applicable, this regulation has priority over Section 6 of PILA.

The Brussels Ibis Regulation shall nonetheless affect the application of any conventions with third states, which in relation to particular matters govern jurisdiction or recognition and enforcement of foreign judgements (Article 71(1)). The Brussels Ibis Regulation expressly establishes its relationship with other instruments, such as the Brussels Convention, other EU instruments, bilateral or multilateral conventions (Articles 67 to 73).

Section 6 of PILA is applicable in case there is no international convention or the Brussels Ibis Regulation is not applicable.

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<sup>882</sup> Article 28(1) of the Rome II Regulation: *“This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations.”*

## 15.6 Analysis of Sources of Law

### 15.6.1 Law Applicable

#### *Rome II Regulation*<sup>883</sup>

Rome II Regulation, together with the Rome I Regulation, creates a system of conflict-of-law rules for obligations, contractual and non-contractual alike. Their structure, systematics and concept are similar.<sup>884</sup> Moreover, the substantive scope and the provisions of the Rome II Regulation shall be consistent with the Brussels Ibis Regulation. Therefore, it is possible and necessary to use the case law of the Court of Justice for the interpretation of legal terms and concepts in the Rome II Regulation.<sup>885</sup>

The Rome II Regulation is universally applicable (Article 3). In its scope of application it excludes PILA.<sup>886</sup>

The Rome II Regulation governs the conflict-of-law rules for non-contractual obligations in civil and commercial matters that are not excluded from its scope (Article 1). The Rome II Regulation is not applicable to revenue, customs or administrative matters or *acta iure imperii*<sup>887</sup> (Article 1(1)).

The Rome II Regulation also excludes the non-contractual obligations arising out of: (a) family relationships and relationships deemed by the law applicable to such relationships to have comparable effects including maintenance obligations; (b) matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects on marriage, and wills and successions; (c) bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that

<sup>883</sup> VALDHANS, Jiří. *Právní úprava mimosmluvních závazků s mezinárodním prvkem*. Praha: C.H.Beck, 2012. 277 p.; HUBER, Peter (ed.). *Rome II Regulation. Pocket Commentary*. Sellier: European Law Publishers, 2011. 470 p.; ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, pp. 148–195.

<sup>884</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 651.

<sup>885</sup> Recital 7 of the Preamble to the Rome II Regulation.

<sup>886</sup> ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, p. 157.

<sup>887</sup> Liability of a state for the acts and omissions in the exercise of state authority.



the obligations under such other negotiable instruments arise out of their negotiable character; (d) law of companies; (e) relations between settlors, trustees and beneficiaries of a trust created voluntarily; (f) nuclear damage; (g) violations of privacy and rights relating to personality, including defamation (Article 1(2)).

The conflict-of-law rule for the non-contractual obligations arising out of violations of privacy and rights relating to personality and defamation is expressly provided for in Section 101 of PILA.<sup>888</sup>

As for the structure of the rules in the Rome II Regulation, it is similar to the Rome I Regulation. The main connecting factor in the Rome II Regulation is choice of law (Article 14). The Rome II Regulation is, similarly to the Rome I Regulation, based on the autonomous will and freedom of the parties. The choice of law takes precedence over other rules in the Rome II Regulation. Nevertheless, the position of the choice of law rule in the Rome II Regulation is different.<sup>889</sup> The choice of law is provided for in Article 14, thus in the end of the regulation; after the general rule in Article 4 and special provisions in Articles 5 to 9 or, alternatively, Articles 10 to 13.

There are limitations to the choice of law: personal and temporal. The parties may choose law applicable in almost every non-contractual obligation, with the exception of unfair competition and acts restricting free competition (Article 6(4)); and infringement of intellectual property rights (Article 8(3)). Rome II Regulation also provides for the protection of a weaker party; in case of consumer non-contractual relationship, the parties may agree on the law applicable by an agreement entered into force after the event giving rise to the damage occurred (Article 14(1)(a)). In case where all the parties are pursuing a commercial activity, they may conclude on agreement freely negotiated before the event giving rise to the damage occurred (Article 14(1)(b)).<sup>890</sup>

<sup>888</sup> ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, p. 158

<sup>889</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 651.

<sup>890</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 306.

The choice of law is limited also by the application of: national provisions which cannot be derogated from (Article 14(2)); provisions of EU law which cannot be derogated from; overriding mandatory provisions (Article 16); rules of safety and conduct (Article 17); and public policy of the forum (Article 26).

The general rule for non-contractual obligations is laid down in Article 4. The main connecting factor is *lex loci damni infecti*, irrespective of the country or countries in which the indirect consequences of that event occur<sup>891</sup> (Article 4(1)). If both parties, the person claimed to be liable and the person sustaining the damage, have their habitual residence in the same country at the time when the damage occurred, the law of that country shall apply (Article 4(2)). The Rome II Regulation contains an escape clause in Article 4(3) to provide for a situation when the delict is manifestly more closely connected with other country; in that case, the law of that other country shall apply.<sup>892</sup>

The Rome II Regulation contains special provisions for the law applicable to product liability (Article 5); unfair competition and acts restricting free competition (Article 6); environmental damage (Article 7); the infringement of intellectual property rights (Article 8); industrial action (Article 9); unjust enrichment (Article 10); *negotiorum gestio* (Article 11) and *culpa in contrabendo* (Article 12).

### ***Hague Convention***

The main connecting factor in the Hague Convention is *lex loci delicti commissi*, i.e. the law of the state where the accident occurred (Article 3). There are exemptions from the general rule in Article 4 (the law of the state of registration in case where only one vehicle is involved in the accident and it is registered

<sup>891</sup> The Rome II Regulation does not define “direct” or “indirect” consequences. It is necessary to consult the case law of the Court of Justice, e.g. judgement of the Court of Justice of 11 January 1990. *Dumez France SA and Tracoba SARL vs. Hessische Landesbank and others*. Case C-220/88; judgement of the Court of Justice of 19 September 1995. *Antonio Marinari vs. Lloyds Bank plc and Zubaidi Trading Company*. Case C-364/93; judgement of the Court of Justice of 10 June 2004. *Rudolf Kronhofer vs. Marianne Maier nad others*. Case C-168/02. See PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 652.

<sup>892</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 306.

in a state other than that the accident occurred; where there are two or more victims the law applicable is determined separately for each of them).<sup>893</sup>

### **PILA**

PILA contains in Section 101 an express provision on the law applicable to some non-contractual obligations:

*“Non-contractual obligations arising out of violations of privacy and personal rights including defamation are governed by the law of the State, where the violation occurred.*

*The harmed person [victim] may use the law of the State, where:*

- a) the harmed person has his/her habitual residence or seat;*
- b) the wrongdoer has his/her habitual residence or seat; or c) where the harmful effect of the violation occurred, if the wrongdoer could predict that.*“

Section 101 of PILA contains the connecting factor *lex loci delicti commissi*.

This objective criterion may be set aside by choice of the harmed person. The victim may choose other, expressly provided, alternative criteria.

The harmed person thus has the choice of law, although limited by the act.<sup>894</sup>

The wrongdoer has not such a choice.<sup>895</sup> The choice between these three criteria can be based on several factors: e.g. closer connection between the court and place of damage; jurisdiction of court; enforceability of the judgement; presumed amount of court awarded damages etc.

The harmed person may choose the law of the state where he has his habitual residence (natural person) or seat (legal person). This alternative would be suitable in cases in which the courts of the habitual residence of the harmed person have jurisdiction. Very often this will be the place where the victim suffered the real damage, where he is known, has family, social connections etc.<sup>896</sup>

<sup>893</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 309.

<sup>894</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, pp. 652–653; KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 312; DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. edni 2014*. Praha: Leges, 2013, p. 361.

<sup>895</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 312.

<sup>896</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém. Komentář*. Praha: Wolters Kluwer, 2013, p. 654.

## 15.6.2 Jurisdiction

### *Brussels Ibis Regulation*

Brussels Ibis Regulation contains the rules on jurisdiction of courts and recognition and enforcement of judgements in civil and commercial matters. If all the conditions for the application of the Brussels Ibis Regulation are fulfilled, it is directly applicable and has precedence over Section 6 of PILA.<sup>897</sup>

The general rule in the Brussels Ibis Regulation is the domicile of the defendant (Article 4). If the general rule is fulfilled, the plaintiff may alternatively choose special jurisdictional rule in Article 7(2):

*“A person domiciled in a Member State may be sued in another Member State in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.”*

The choice between these two forums is up to the plaintiff.<sup>898</sup>

The crucial criterion in this provision is “the place where the harmful event occurred or may occur”. This provision has been subject of many decisions of the Court of Justice.<sup>899</sup> The criterion “the place where the harmful event occurred or may occur” must be interpreted as being intended to cover both “the place where the damage occurred” and “the place of the event giving rise to it”.<sup>900</sup>

<sup>897</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém. Komentář*. Praha: Wolters Kluwer, 2013, p. 655.

<sup>898</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RUŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, pp. 312–313.

<sup>899</sup> For analysis of the relevant case law of the Court of Justice to Article 7(2) of the Brussels Ibis Regulation see: KYSELOVSKÁ, Tereza; ROZEHNALOVÁ, Naděžda et al. *Rozhodování Soudního dvora EU ve věcech příslušnosti: analýza rozhodnutí dle nařízení Brusel Ibis*. Brno: Masarykova univerzita, 2014, pp. 135–177; ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, pp. 244–253.

<sup>900</sup> Judgement of the Court of Justice of 30 November 1976. *Handelskwekerij G. J. Bier BV vs. Mines de potasse d'Alsace SA*. Case 21-76 analysed in: KYSELOVSKÁ, Tereza; ROZEHNALOVÁ, Naděžda et al. *Rozhodování Soudního dvora EU ve věcech příslušnosti: analýza rozhodnutí dle nařízení Brusel Ibis*. Brno: Masarykova univerzita, 2014, pp. 152–153.

The most interesting case law of the Court of Justice regarding Article 7(2) and the interpretation of the term “where the harmful act occurred or may occur” covers the area of defamation and infringement of intellectual property rights.

In case of defamation, the victim of a libel by a newspaper article distributed in several Member States may bring an action for damages against the publisher: either (a) before the courts of the Member State of the place where the publisher is established, these courts have jurisdiction to award damages for all the harm caused by the publication; or (b) before the courts of each Member State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, these courts have jurisdiction only to the harm caused in the Member State of the court seised.<sup>901</sup>

The so called “mosaic principle” was further developed by the Court of Justice in case of online defamation, i.e. the infringement of personality rights on the Internet. The Court of Justice confirmed its previous ruling and introduced a new criterion, “the centre of interest” of the victim. The courts of the Member State where the person who considers that his rights have been infringed, has his centre of interest have jurisdiction in respect of all the damage caused.<sup>902</sup>

With electronization, globalization and the Internet, the Court of Justice had to interpret the “place where the harmful event occurred or may occur” for an online infringement of intellectual property rights.

In case of an action relating to the infringement of a trade mark registered in a Member State, it is possible to sue before either the courts

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<sup>901</sup> Judgement of the Court of Justice of 7 March 1995. *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd vs. Presse Alliance SA*. Case C-68/93 analysed in: KYSELOVSKÁ, Tereza; ROZEHNALOVÁ, Naděžda et al. *Rozhodování Soudního dvora EU ve věcech příslušnosti: analýza rozhodnutí dle nařízení Brusel Ibis*. Brno: Masarykova univerzita, 2014, pp. 160–162.

<sup>902</sup> Judgement of the Court of Justice of 25 October 2011. *eDate Advertising GmbH vs X*. Case C-509/09 and *Olivier Martinez and Robert Martinez vs MGN Limited*. Case C-161/10 analysed in: KYSELOVSKÁ, Tereza; ROZEHNALOVÁ, Naděžda et al. *Rozhodování Soudního dvora EU ve věcech příslušnosti: analýza rozhodnutí dle nařízení Brusel Ibis*. Brno: Masarykova univerzita, 2014, pp. 162–167.

of the Member State in which the trade mark is registered (*lex loci protectionis principle*) or the courts of the Member State of the place of establishment of the wrongdoer.<sup>903</sup>

In case of an action relating to the infringement of copyright protected by the Member State of the court seised, the court has jurisdiction only to determine the damage caused in this Member State.<sup>904</sup>

<sup>903</sup> Judgement of the Court of Justice of 19 April 2012. Wintersteiger AG vs. Products 4U Sondermaschinenbau GmbH. Case C-523/10. “Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters [Article 7 Para 2 Brussels I Regulation] must be interpreted as meaning that an action relating to infringement of a trade mark registered in a Member State because of the use, by an advertiser, of a keyword identical to that trade mark on a search engine website operating under a country-specific top-level domain of another Member State may be brought before either the courts of the Member State in which the trade mark is registered or the courts of the Member State of the place of establishment of the advertiser.” Analysed in: KYSELOVSKÁ, Tereza; ROZEHNALOVÁ, Naděžda et al. *Rozhodování Soudního dvora EU ve věcech příslušnosti: analýza rozhodnutí dle nařízení Brusel Ibis*. Brno: Masarykova univerzita, 2014, pp. 164–167.

<sup>904</sup> Judgement of the Court of Justice of 3 October 2013. Peter Pinckney vs. KDG Mediatech AG. Case C-170/12. “Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters must be interpreted as meaning that, in the event of alleged infringement of copyrights protected by the Member State of the court seised, the latter has jurisdiction to bear an action to establish liability brought by the author of a work against a company established in another Member State and which has, in the latter State, reproduced that work on a material support which is subsequently sold by companies established in a third Member State through an internet site also accessible with the jurisdiction of the court seised. That court has jurisdiction only to determine the damage caused in the Member State within which it is situated.” Analysed in: KYSELOVSKÁ, Tereza; ROZEHNALOVÁ, Naděžda et al. *Rozhodování Soudního dvora EU ve věcech příslušnosti: analýza rozhodnutí dle nařízení Brusel Ibis*. Brno: Masarykova univerzita, 2014, pp. 167–169; Judgement of the Court of Justice of 22 January 2015. Pez Hejduk vs. EnergieAgentur.NRW GmbH. Case C-441/13. “Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters must be interpreted as meaning that, in the event of an allegation of infringement of copyright and rights related to copyright guaranteed by the Member State of the court seised, that court has jurisdiction, on the basis of the place where the damage occurred, to hear an action for damages in respect of an infringement of those rights resulting from the placing of protected photographs online on a website accessible in its territorial jurisdiction. That court has jurisdiction only to rule on the damage caused in the Member State within which the court is situated.”

### *Jurisdiction rules in PILA*

As mentioned above, PILA does not contain any specific jurisdictional rule for non-contractual obligations. Therefore, the general rule in Section 6 is applicable. However, this provision will be used only in case no international convention or EU regulation is applicable.<sup>905</sup>

## **15.7 Conclusion**

This chapter analysed the conflict-of-law rules determining the law applicable to non-contractual obligations, as well as the rules on jurisdiction of courts. This area of Private International Law is governed mainly by EU regulations and international conventions. The provisions in PILA “fill the gaps” in the relevant sources of law; i.e. PILA is applicable only if no EU regulation or international convention shall be applied.

The provisions in PILA are in accordance with the international and EU conflict-of-law rules for non-contractual obligations.

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<sup>905</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 314.

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## 16 MUTUAL (CROSS-BORDER) COOPERATION AND JUDICIAL ASSISTANCE

### 16.1 Introduction

The relationship between states, their courts and other public authorities is based on the principle of territoriality and principle of sovereignty.<sup>906</sup> The judicial authority of courts is inseparably connected to the territory of its country.

In civil proceedings, it is sometimes necessary to obtain evidence, or to serve a document on a foreign citizen, in another country. Foreign courts can be asked to help to provide information on the address of a witness or other person, information from public registry etc.<sup>907</sup>

The procedural laws and their application by courts or other judicial authorities are the manifestation of state power and sovereignty of the state. Court of one state shall not interfere and execute any procedural authority on the territory of another state.<sup>908</sup> The cooperation between courts and other state authorities falls into the scope of mutual (cross-border) cooperation and judicial assistance.

The mutual cooperation and judicial assistance in civil and commercial matters between courts of different states is an essential part of private international law and international procedural law. Within the EU, the judicial cooperation helps to maintain and develop the area of freedom, security and justice, thereby securing the proper functioning of the internal market.<sup>909</sup>

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<sup>906</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 87; PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 666.

<sup>907</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 666.

<sup>908</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 368.

<sup>909</sup> Preamble to the Service Regulation and Preamble to the Evidence Regulation.



## 16.2 Types of Mutual Cooperation and Judicial Assistance between Courts

It is possible to distinguish two types of mutual cooperation and judicial assistance:

1. Active mutual cooperation – e.g. a Czech court asks a foreign court for cooperation or assistance in a civil or commercial matter.
2. Passive mutual cooperation – e.g. a Czech court is asked by a foreign court to provide cooperation or assistance in a civil or commercial matter.<sup>910</sup>

## 16.3 Sources of Law – General Overview

The mutual cooperation and judicial assistance between states is based on international conventions (multilateral and bilateral), EU regulations and national laws.

The Czech Republic is a contracting state to numerous bilateral agreements on legal assistance (e.g. with the Slovak Republic, Belgium, Croatia etc.) and multilateral conventions on particular issues (see below).<sup>911</sup>

Within the EU, the Service Regulation and the Evidence Regulation are directly applicable.

The general rules on mutual cooperation and judicial assistance are provided for in PILA in Sections 102–110. These rules will be used in case there is no directly applicable EU regulation, international multilateral convention or bilateral treaty.<sup>912</sup>

<sup>910</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 368; PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 667.

<sup>911</sup> *Přehled hlavních mnohostranných a dvoustranných smluvních dokumentů o mezinárodní právní pomoci v oblasti trestní a civilní a dokumentů souvisejících* [online]. Ministerstvo spravedlnosti České republiky [cit. 15. 11. 2015]; PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé*. 2nd ed. Praha: C.H.Beck, 2013, pp. 41–43.

<sup>912</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 665.

## 16.4 Analysis of Sources of Law

### 16.4.1 International Conventions

The Czech Republic is a contracting party to many bilateral agreements (sometimes referred to as treaties on “legal assistance”) and multilateral conventions on mutual cooperation and judicial assistance.

The most important and interesting multilateral conventions are:<sup>913</sup>

- Convention on international access to justice;<sup>914</sup>
- Convention on the service abroad of judicial and extrajudicial documents in civil and commercial matters;<sup>915</sup>
- Convention on the taking evidence abroad in civil or commercial matters;<sup>916</sup>
- Convention on the recovery abroad of maintenance;<sup>917</sup>
- European Agreement on the transmission of application for legal aid;<sup>918</sup>
- Convention abolishing the requirement of legalisation for foreign public documents;<sup>919</sup>
- European Convention on information on foreign law.<sup>920</sup>

<sup>913</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, pp. 372–373.

<sup>914</sup> Convention of 25 October 1980 on international access to justice [online]. *Hague Conference on Private International Law*. Available from: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=91](http://www.hcch.net/index_en.php?act=conventions.text&cid=91)

<sup>915</sup> Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil and commercial matters [online]. *Hague Conference on Private International Law*. Available from: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=17](http://www.hcch.net/index_en.php?act=conventions.text&cid=17)

<sup>916</sup> Convention of 18 March 1970 on the taking evidence abroad in civil or commercial matters [online]. *Hague Conference on Private International Law*. Available from: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=82](http://www.hcch.net/index_en.php?act=conventions.text&cid=82)

<sup>917</sup> Convention of 20 June 1956 on the recovery abroad of maintenance [online]. *Hague Conference on Private International Law*. Available from: [http://www.hcch.net/index\\_en.php?act=publications.details&pid=4161&dtid=45](http://www.hcch.net/index_en.php?act=publications.details&pid=4161&dtid=45)

<sup>918</sup> European Agreement of 27 January 1977 on the transmission of applications for legal aid [online]. *Council of Europe*. Available from: <http://www.coe.int/cs/web/conventions/full-list/-/conventions/rms/0900001680077322>

<sup>919</sup> Convention of 5 October 1961 abolishing the requirement of legalisation for foreign public documents [online]. *Hague Conference on Private International Law*. Available from: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=41](http://www.hcch.net/index_en.php?act=conventions.text&cid=41)

<sup>920</sup> European Convention of 7 June 1969 on information on foreign law [online]. *Council of Europe*. Available from: <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680072314>

### 16.4.2 EU Regulations

Mutual cooperation and judicial assistance within the Member States of the EU is based on the Service Regulation and the Evidence Regulation. The Service Regulation<sup>921</sup> allows service of judicial documents from one Member State to another without the recourse to diplomatic or consular channels. The Service Regulation enables a simplified service of documents by establishing transmitting and receiving agencies in each of the Member States (Article 2). A standardised request form included in the annex to the Service Regulation shall be used. The transmitting agency in one Member State sends the document to the receiving agency which is responsible for its service. In the Czech Republic, the transmitting agencies are all courts; the receiving agencies are district courts.<sup>922</sup> The Service Regulation also regulates its relationship with agreements or arrangements to which Member States are parties; and other conventions on legal aid (Articles 20 and 21).<sup>923</sup>

In the area of service of documents, it is necessary to mention two other EU regulations, which govern some aspects of service of documents. It is the European Payment Order Regulation<sup>924</sup> and European Enforcement Order Regulation.<sup>925</sup>

The Evidence Regulation<sup>926</sup> allows taking of evidence from one Member State to another Member State without recourse to diplomatic or consular channels. The Evidence Regulation enables simplified way of allowing direct contact between courts in the Member States. A standardised request form

<sup>921</sup> PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé*. 2nd ed. Praha: C.H.Beck, 2013, pp. 205–211.

<sup>922</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 371.

<sup>923</sup> PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé*. 2nd ed. Praha: C.H.Beck, 2013, p. 211.

<sup>924</sup> For analysis of this regulation see: ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, pp. 387–399.

<sup>925</sup> For analysis of this regulation see: ROZEHNALOVÁ, Naděžda; VALDHANS, Jiří; DRLIČKOVÁ, Klára; KYSELOVSKÁ, Tereza. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I)*. Praha: Wolters Kluwer, 2013, pp. 364–387.

<sup>926</sup> PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé*. 2nd ed. Praha: C.H.Beck, 2013, pp. 213–216.

included in the annex to the Evidence Regulation shall be used. The Evidence Regulation also contains rules on the use of electronic communication technologies.<sup>927</sup> It establishes its relationship with the existing or future agreements or arrangements between the Member States (Article 21).<sup>928</sup>

### 16.4.3 PILA

The mutual cooperation and judicial assistance are provided on the basis of the “principle of material reciprocity” (“mutuality”)<sup>929</sup> (Section 103 of PILA). The Czech courts act in accordance with the Czech procedural rules (Section 104(1)).

#### *Types of “Contacts” between State Authorities*

Unless stated otherwise (by international convention or EU regulations), Czech courts cooperate with foreign authorities through the Czech Ministry of Justice (Section 102). In other words, if Czech court is asked or asks foreign court or other authority for cooperation or assistance, this request will proceed through this Ministry.

It is possible to distinguish five types of contacts (relationships):<sup>930</sup>

1. Diplomatic and consular channels;
2. Inter-ministerial channels;
3. Direct contact between courts.

There is not a clear line between these types of contact. Some international conventions may allow mixed forms; a choice between these types can be based on a factual situation of the case or habitual practice between the relevant States.<sup>931</sup>

<sup>927</sup> PAUKNEROVÁ, Monika. *Evropské mezinárodní právo soukromé*. 2nd ed. Praha: C.H.Beck, 2013, pp. 216.

<sup>928</sup> *Ibid.*

<sup>929</sup> Material reciprocity (mutuality) is a format of international cooperation wherein a state agrees to provide foreign national the same legal rights (protection) that the foreign state affords the first state's own nationals. KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 368.

<sup>930</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 371.

<sup>931</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 668.

### *Passive Mutual Cooperation*

If asked by a foreign court, the Czech court will provide necessary cooperation and assistance in a civil or commercial matter. The cooperation shall be refused under the following circumstances (Section 103):

1. The cooperation does not fall into the jurisdiction (competence) of the requested court. In this case, the incompetent court will forward the matter to the relevant court or state authority.
2. The cooperation is contrary to public policy.<sup>932</sup>

As mentioned above, the mutual cooperation is based on *lex fori* principle; i.e. the Czech court applies Czech procedural rules (only Czech courts are allowed to request cooperation or assistance from foreign courts, not notaries or bailiffs<sup>933</sup>). The Czech court will apply the rules of the Czech Code of Civil Procedure on serving documents, taking evidence etc.<sup>934</sup>

There is an exception to this rule. The Czech court may apply foreign procedural rules, if the foreign court requests so, and the application for the foreign procedural rules is not contrary to the public policy (Section 104(1)). This situation may concern issues as “affidavit” (sworn statement, statement under oath). Czech law does not recognise this type of evidence; nevertheless, PILA allows it and contains rules on its execution (Section 104(2) - (5)).<sup>935</sup>

PILA contains several rules on serving (delivery of) documents (Sections 105, 106 and 107).

PILA distinguishes between two types of delivery: formal and regular delivery.<sup>936</sup> The difference between these two types of delivery is, that formal delivery allows for alternative delivery (in situation when person to whom the document is being delivered, refuses to accept the delivery).

<sup>932</sup> For the interpretation and analysis of “public policy” see Section 3 of PILA.

<sup>933</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém; komentář*. Praha: Wolters Kluwer, 2013, p. 668.

<sup>934</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 369.

<sup>935</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém; komentář*. Praha: Wolters Kluwer, 2013, p. 680.

<sup>936</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 369.

Formal delivery is governed by the Czech procedural rules. The served document shall be provided with a certified translation into the Czech language (Section 105).

If the served document is not provided with a certified translation into the Czech, it may be delivered regularly. The document will be served only if the person accepts this delivery. If the delivery is refused, Czech court will not seek the alternative delivery and will return the document to the authority requesting its service.<sup>937</sup> The delivering court shall inform the person about legal consequences of such a refusal (Section 105).

The served document shall not contain any threats of use of coercive measures; this would be contrary to the Czech public policy (Section 103(b)).<sup>938</sup>

### ***Active Mutual Cooperation***

If a Czech court asks a foreign court for cooperation or assistance, the foreign court will proceed in accordance with its procedural rules (*lex fori* principle). For the purposes of the proceedings in the Czech Republic, it will be sufficient if the serving of documents carried out by the foreign court is in accordance with Czech law, even if it does not comply with the foreign law (Section 107). In other words, for the effect of the foreign procedural act it is sufficient, if it complies with the foreign law and not with the Czech law.<sup>939</sup>

The Czech court might use procedural steps, that are not known in the Czech law, if it is necessary for fact finding<sup>940</sup> (e.g. affidavit or pre-trial discovery of documents).

The documents delivered formally shall be provided with translation into the pertaining foreign language. The served documents shall not contain any threats of use of coercive measures; this would be contrary to the Czech policy.

<sup>937</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015.

<sup>938</sup> *Ibid.*

<sup>939</sup> *Ibid.*, p. 370.

<sup>940</sup> *Ibid.*

### ***Czech Diplomatic Missions Abroad***

If Czech courts need legal assistance in a foreign country, the relevant procedural act can be performed by Czech diplomatic missions and offices in that country (e.g. Czech embassy in a foreign country).<sup>941</sup>

Upon request of the Czech court, the Czech diplomatic mission will:

1. Serve documents on persons in that country, if it is allowed under international conventions, public international law rules or relevant foreign laws;
2. Serve documents on Czech citizens who enjoy diplomatic immunity in that country, or their interrogation as witnesses, experts or parties to civil proceedings;
3. Interrogate witnesses, experts<sup>942</sup> and parties to civil proceedings, if these persons participate voluntarily, and if such a conduct is allowed by laws of the foreign country or there are no other serious legal obstacles (Section 106(1)).

The Czech diplomatic mission proceeds appropriately according to the laws of the requesting court and its acts have the same effect as if they were conducted by the Czech court itself (Section 106(2)).

In case of proceedings in succession matters in a foreign country, and if it is evident under relevant circumstances, that the heir is Czech citizen or has habitual residence in the Czech Republic, Czech Ministry of Foreign Affairs will ask a court to do anything necessary to locate the heir. Local jurisdiction in this matter has the district court in whose jurisdiction the person was last known; otherwise the jurisdiction is asserted to the seat of the Ministry of Foreign Affairs (Section 106(3)).

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<sup>941</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, pp. 684 et seq.

<sup>942</sup> BĚLOHÁVEK, Alexander, J.; HÓTOVÁ, Renata. *Znalci v mezinárodním prostředí v soudním řízení civilním a trestním, v rozhodčím řízení a investičních sporech*. Praha: C.H. Beck, 2011, 592 p.

### ***Information (Certificate) on Czech Law***<sup>943</sup>

The Ministry of Justice of the Czech Republic issues, to those who need it to exercise their rights abroad, the information (certificate) on the law applicable in the Czech Republic.<sup>944</sup> This certificate shall not contain any information on the interpretation or application of the Czech law to a particular legal matter (Section 108).

This certificate will be issued, for instance, for civil proceeding abroad, where the foreign court shall use law applicable determined pursuant to a conflict-of-law rule. The certificate can be issued also upon the request of a foreign citizen.<sup>945</sup>

### ***Superlegalisation (Higher Verification)***

Superlegalisation is a process of authenticating or certifying a legal document, so a foreign court will recognise it with its full legal effect. The authentication can be also made with an apostille; albeit superlegalisation is a more difficult process than that of the apostille.<sup>946</sup>

The Czech Ministry of Justice, and subsequently the Czech Ministry of Foreign Affairs, upon request of the holder of a document, attaches the superlegalisation to legal documents issued or certified by Czech courts, or to documents drawn up or certified by a notary or bailiff that has to be submitted abroad. The superlegalisation shall not be attached to a simple copy of the document (Section 109).

<sup>943</sup> Under Section 23(1) of PILA, Czech law is applicable as law, not as evidence. Czech court does not have *ex officio* to know the content of foreign law, it has to learn content of the foreign law. DOBIÁŠ, Petr et al. *Zákon o mezinárodním právu soukromém: komentář: podle právního stavu k 1. lednu 2014*. Praha: Leges, 2013, p. 389.

<sup>944</sup> PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 172.

<sup>945</sup> KUČERA, Zdeněk; PAUKNEROVÁ, Monika; RŮŽIČKA, Květoslav et al. *Mezinárodní právo soukromé*. 8th ed. Plzeň - Brno: Aleš Čeněk - Doplněk, 2015, p. 373,

<sup>946</sup> Apostille is a system when a document issued in one signatory state can be certified for legal purposes in other signatory states. The international system of apostille is based on the Convention of 5 October 1961 abolishing the requirement of legalisation for foreign public documents [online]. *Hague Conference on Private International Law*. Available from: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=41> See PAUKNEROVÁ, Monika; ROZEHNALOVÁ, Naděžda; ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém: komentář*. Praha: Wolters Kluwer, 2013, p. 694.



## **16.5 Conclusion**

The mutual cooperation and judicial assistance are provided on the basis of the “principle of material reciprocity”. The legal basis for the cooperation and assistance is based on international conventions, bilateral treaties and EU regulations. The provisions in PILA are applicable in the absence of the abovementioned rules. PILA is fully in accordance with the legal principles and requirements for effective mutual relationships between states and their authorities in civil and commercial matters.

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Act No. 359/1999 Coll., on social and legal protection of children.

Act No. 89/2012 Coll., civil code.

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