CHARLES UNIVERSITY IN PRAGUE
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Prorogation of Jurisdiction

within the meaning of the Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Master's Degree Thesis

by

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Banská Bystrica, 6 November, 2009

Declaration:

I hereby declare, that this Master's degree thesis represents original work that has not been previously submitted for a degree or a diploma in any university. I have compiled this Master's degree thesis independently and quoted all of the sources that I have used, in a manner commonly used in a sciencetific work.

In Banská Bystrica, 6 November, 2009 Matúš Sura

Acknowledgments

I would like to thank to JUDr. Bc. Jan Brodec, LL.M., Ph.D., the Master's degree thesis consultant, for valuable comments and effective help during the process of elaboration of the thesis and for his great willingness.

Furthermore, I would like to thank to Prof. Michael Bogdan for his helpfulness and useful advices.

At last, I would like to thank to my parents for constant support and encouragement during the course of my studies.

In Banská Bystrica, 6 November, 2009 Matúš Sura

CONTENT:

Introduction

"Freedom is the will to be responsible to ourselves."[1]

In the light of the words of Friedrich Nietzsche, I would like to discuss and ascertain reputedly one of the most interesting articles of the Council Regulation (EC) No. 44/2001[2] (hereinafter the "Brussels I. Regulation"); *in concreto* the Article 23.

The freedom of the parties to enter into and agree upon the terms and conditions of their contractual obligations is generally recognized among the European legal systems. Thereby, the persons are afforded with a choice of whether or not to enter into a contract and if so, with whom. Moreover, it is for the parties to decide the content of their prospective contractual obligations. However, any afforded freedom is not borderless and is accompanied with inevitable degree of responsibility.

Nowadays, it is not an unusual practice that the parties to a contract embody a clause determining a court(s) competent to hear any disputes arising out of their contract; *prorogatio fori*. Even though a choice-of-court clause is relatively easily to draft[3], the consequences stemming therefrom are truly far-reaching.

The intentions of the parties, or their legal representatives, to designate a competent court may be led by several reasons. First of all it is the attempt to secure the certainty as to the competent court. In addition, it may be the aim of reduction of expenses associated with the proceedings, minimalisation of the risks of corruption or other unwelcomed influences or by an effort to choose a legal order well known to the participant.[4]

Throughout this Master's degree thesis I shall examine the issue of prorogation of jurisdiction, contained in the *Section 7* of the Brussels I. Regulation. While the physical designation of a competent court is a subject to an agreement between the parties, the Article 23 governs the consequences, conditions, hand in hand with requirements necessary to be complied with in order to secure the validity of such choice.

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[1] *Nietzsche, Friedrich,* Die Götzen-Dämmerung - Twilight of the Idols [1895], Text prepared from the German original and translated by Walter Kaufmann and R.J. Hollingdale.

[2] The Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *Text see*: *Official Journal L 012, 16/01/2001 P. 0001 – 0023.*

[3] *E.g. "The parties hereby agree that any dispute arising out of, or in relation to, this contract shall be heard by Czech courts."*

[4] *Knapová, J.,* K prorogačním dohodám, Právní rádce, 2007, No. 7.

It shall not be put out of mind that the European Court of Justice (hereinafter the "ECJ") also plays crucial role in this respect *i.e.* it serves to blur the lines between interpretation and application of the act in question. Additionally, the selected topic will not only be assessed from the perspective of EC law. Hence, the provision of national and international law will be considered as well.

This Master's degree thesis will lead in with a short historical background leading towards contemporary appearance of the Article 23 of the Brussels I. Regulation. The attention will be paid to also its valuable predecessor *i.e.* the Brussels Convention[5] which even today represents a document of considerable importance. Due to the fact that not all of the States of the old continent are members of the European Community a reference will be also made to the parallel Lugano Convention.[6] Subsequently, I shall preliminarily outline the interaction of these documents.

Consecutively, the discussion will continue with the introduction of relevant sources of law within the respective field, while not obeying their hierarchy. The legal sources will be introduced in a broader sense in order to provide the reader introductory scheme of legislation that will be discussed in more detail in the upcoming parts of the thesis.

Subsequently, the focus will be shifted to the provisions of the national law *i.e.* the Act on International Private and Procedural Law[7] (hereinafter the "IPPA") and the Civil Procedure Code[8] (hereinafter the "CPC") which are the representatives of domestic legal base for the prorogation of jurisdiction. Due attention will be paid to the provisions establishing the jurisdiction of the Czech courts in property matters. Sequentially, I shall not leave behind the interplay of these statutes.

Thereupon, the discussion will continue with the legal regulation of the prorogation of jurisdiction under the Brussels I. Regulation. At first, the principles of the Brussels I. Regulation will be brought forward. Thereafter, I will concentrate on the consequences of the designation of the competent court and present the outlook into how the concept of domicile interplays with the rules governing the prorogation of

[5] Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, BRUSSELS CONVENTION.
[6] Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters, LUGANO CONVENTION.
[7] Act No. 97/1963 Coll., on International Private and Procedural Law, as subsequently amended.
[8] Act No. 99/1963 Coll., the Civil Procedure Code, as subsequently amended.

jurisdiction. Furthermore, attention will be paid to the material and formal requirements essentially influencing the validity of a choice-of-court clause.

After that, I shall concentrate on the possibility of incorporation of a forum selection clause into the statutes of a joint-stock company, while assessing the topic from the perspective of EC law and national law as well. Furthermore, I will focus on the specific protective regimes afforded to the weaker parties (*e.g.* consumers, employees, *etc.*)

The following chapter will introduce the reader with a technique designed not to commence the proceedings in order to win a case, but to misuse the length of proceedings in particular Member States. Furthermore, a due attention will be paid to the case law of the ECJ in this respect and subsequently to matters interrelated with this technique.

Consequently, by gathering the pieces of knowledge from the preceding sections I would like give couple of demonstrative examples of choice-of-court clauses that may appear in the contracts and analyze their impact.

For a stake of consistency, I shall outline the issue of prorogation of jurisdiction also from the perspective of the regime created by the Hague Convention on Choice of Court Agreements.[9] Even though it is an instrument of international, it will be shown that it will influence the legal regulation of the prorogation of jurisdiction. Finally, I shall conclude with the undergoing or upcoming developments within the respective field.

The issue of prorogation of jurisdiction represents only a partial institute stemming from the Brussels I. Regulation. Notwithstanding such partiality, Article 23 is being labeled as one of the most important ones. Its significance results from the governance of crucial aspect *i.e.* the freedom of the parties to, by means of an agreement, designate a competent court and partially create a secure and predicable area of their contractual relationship.

[9] Convention of 30 June 2005 on Choice of Court Agreements, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW. Text available at: www.hcch.net.

1. Historical Background

In order to understand the discussed topic, it is of the essence to consider the historical developments, which preceded the contemporary appearance of the Article 23 of the Brussels I. Regulation.

It is not of my intention to discuss the full and exhaustive historical background, within the field European Private International Law, that lead to the current Article 23. Rather shortly, I would like to focus on the developments after the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters 1968[10] (hereinafter the "Brussels Convention") came into force.

Thereafter, the European Community, having in mind the subsequent enlargement towards prospective Member States, was faced with the question of safeguarding the uniform interpretation of the Brussels Convention. According to the Luxembourg Protocol of 1971 this task was given to the European Court of Justice, whose decisions subsequently resulted to an impressive amount of case law.[11] Moreover, according to many scholars, the Brussels Convention is often considered as a true success.

Due to the fact that the Brussels Convention applied only to the EC Member States, it was felt to be necessary to create a self-standing convention, which would create a similar system to that of Brussels Convention with respect to the EFTA[12] Member States. These efforts led into adoption of the *Lugano Convention 1988.*[13]

Upon the comparison of the conventions, it is clear that the rules provided by the Lugano Convention are in almost all respects identical to those provided by the Brussels Convention.[14] This may be attributed to the intention to create a comparable system to that of Brussels Convention and to bridge these two documents in order to create more flexible cooperation.

However, opposite to the Brussels Convention, the question of uniform interpretation of the Lugano Convention was resolved diversely. It is sufficient to say

[10] Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, BRUSSELS CONVENTION.
[11] *Bogdan, M.,* Concise Introduction to EU Private International Law, Europa Law Publishing, Groningen 2006, p. 33.
[12] European Free Trade Association.
[13] Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters, LUGANO CONVENTION.
[14] *Bogdan, M.,* Concise Introduction to EU Private International Law, Europa Law Publishing, Groningen 2006, p. 34.

that the ECJ is neither competent to give interpretations on the Lugano Convention, nor the ECJ's rulings are not *per se* binding when the Lugano Convention applies.[15]

However, the Protocol No. 2 and two declarations attached to the Lugano Convention make it clear that this Convention shall be interpreted paying due account to the ECJ's case law with respect to the Brussels Convention. Moreover, there is a practically unanimous consensus that the ECJ's rulings on the Brussels Convention are more-or-less followed even for the interpretation of the Lugano Convention, except of the cases of wording differences between the conventions.[16]

As neither legal document is capable to secure every situation which may come out during its legal force or to flexibly adapt to the fast-changing environment, the Community decided to add another fragment to the mosaic of EC legislation. After more than three decades in force and several revisions (1978, 1982, 1989 and 1996) the Brussels Convention was replaced by the Brussels I. Regulation.

At first it should be noted that when adopting a new fragment of EC legislation it is of the essence to use a correct EC Treaty based Article to secure its lawful adoption. Failure to do so will result into annulment of the measure[17] unless the legal basis may be unambiguously indentified from other factors.[18]

Legal base of the Brussels I. Regulation lays in the Article 65 emplaced in the Title IV[19] of the EC Treaty which was inserted by the Treaty of Amsterdam (1999). During the negotiations, Denmark, United Kingdom and Ireland arranged for themselves special "*opt-in*" declarations allowing them to decide whether or not they will participate in certain areas of Community agenda, including areas covered by the Title IV of the EC Treaty.[20]

While United Kingdom and Ireland decided to be bound by the Brussels I. Regulation, Denmark used its privilege stemming from the "*opt-in*" and requested not to be bound by its provisions. The subsequent conclusion may be that, with the exception

[15] *Terret, S.,* Introduction to the Law of International Trade, Workbook 1, International Jurisdiction, University of Cambridge – Introduction to English and EU Law – *A Course by Correspondence with Tutoring,* p. 4.
[16] *Bogdan, M.,* Concise Introduction to EU Private International Law, Europa Law Publishing, Groningen 2006, p. 35.
[17] Case C - 325/91, *France v. Commission,* [1993] ECR I – 3283, para. 26.
[18] Case C – 45/86, *Commission v. Council,* [1987] ECR 1493.
[19] Title IV of the EC Treaty: Visas, asylum, immigration and other policies related to free movement of persons.
[20] *In detail:* Protocol On The Position Of The United Kingdom And Ireland On Policies In Respect Of Border Controls, Asylum And Immigration, Judicial Cooperation In Civil Matters And On Police Cooperation and Protocol On the Position of Denmark, available at www.eur-lex.europa.eu.

of Denmark[21], all of the EU Member States are bound by the Brussels I. Regulation. Consequently, this means that there are four different legal subsumptions that are available for a proper decision-making as to which legal document is available to be applied.

First of all, it is the Brussels I. Regulation which will be applicable when the defendant is domiciled in an EU Member State with the exception of Denmark. Secondly, for the defendant domiciled in Denmark the provisions of the Brussels Convention continue to apply. Thirdly, if the defendant is domiciled in the EFTA Member States the Lugano Convention will be applicable. Lastly, if none of the above mentioned regimes applies, it is necessary to use national conflict-of-laws rules.[22]

The contemporary appearance of the Article 23 is stemming from the Article 17 of the Brussels Convention. Even though the substantial content of the Article 17 remained unchanged, some parts of the former text were deleted, for example, par. 6 of Article 17 which dealt with the jurisdiction clauses in employment contracts. On the other hand, certain modifications of the "future" Article 23 had to be made in order to fulfill the needs of today's legal environment.[23]

The important linkage lying behind this is basically threefold. Firstly, that all ECJ's judgments with respect to Article17 of the Brussels Convention remain fully valid with respect to the Article 23 of the Brussels I. Regulation.[24] Secondly, that the Brussels I. Regulation openly expresses, in Recital *5*, that the continuity in the results achieved by Brussels Convention is to be ensured. Thirdly, it is clear that the Brussels I. Regulation supersedes the Brussels Convention and hence, any reference to the Brussels Convention shall be understood as a reference to the Regulation.[25]

Notwithstanding the fact that the numbering of articles changed, sometimes challenging research in the case law of the ECJ, doctrinal and other legal materials may cause certain difficulties, it is of the essence to understand and keep in mind the connections, continuity and complexity of these legal documents.

[21] According to the Recital 21 to the Brussels I. Regulation and Article 1(3) thereof, Denmark is not bound nor is subject to the application of the Brussels I. Regulation.
[22] *Terret, S.,* Introduction to the Law of International Trade, Workbook 1, International Jurisdiction, University of Cambridge – Introduction to English and EU Law – *A Course by Correspondence with Tutoring,* p. 5.
[23] *E.g.* the Article 23 (2) renders the communication by electronic means, if it provides a durable record of the agreement, equivalent to writing.
[24] *Magnus/Mankowski,* Brussels I Regulation (2007), European Law Publishers, 2007, Art. 23, note 8.
[25] Article 68 (1) and Article 68(2) of the Brussels I. Regulation.

2. The Sources of Law; Hierarchy

Throughout this section I purport to focus my attention on the sources of law governing the prorogation of jurisdiction. It should be noted that this Section only provides the basic outline or more precisely respective portfolio of relevant sources of law which will be discussed in more detail in the upcoming parts of the thesis.

2.1 EC Law; The Doctrine of Supremacy

First of all, it is the Treaty establishing the European Community[26] representing the fundament of primary EC legislation. In order to understand the essentials of the relationship between the EC law and the law of the Member States the doctrine of supremacy shall be the subject of further review.

As such, the doctrine of supremacy is not being specifically mentioned in the provisions of the EC Treaty. This concept was developed by the ECJ as consequence of famous line of case law heading towards "new legal order".[27] Since the law stemming from the EC Treaty cannot be overridden by domestic legal provisions[28] the national court must set aside any provision of national law which may conflict the EC law.[29] This however does not mean that the national court is required to annul the conflicting provision of national law, but rather to refuse to apply it, and give priority to EC law. Therefore, in case of conflicting national law and the EC law, the latter takes precedence.

However, the sources of primary EC law are not being considered as direct sources of European Private International Law.[30] This does not mean that they should be simply disregarded. Quite contrary; from these provisions we are able to extract crucial principles that are forming and representing the fundamental values of the European Community.[31] The provisions of primary law are directly applicable, *i.e.* they do not require any measure of reception into the national law and they have direct effect *i.e.*

[26] OJ 2006, C 321 E/1, CONSOLIDATED VERSIONS OF THE TREATY ON EUROPEAN UNION AND OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY. Available at www.eurlex.eu.
[27] Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nderlandse Administratie der Belastingen,* [1963] ECR 1.
[28] Case 6/64, *Flaminio Costa v. ENEL,* [1964] ECR 585, 593.
[29] Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthlas Spa,* [1978] ECR 629.
[30] *Pauknerová, M.,* Evropské mezinárodní právo soukromé, 1. vydání. Praha : C.H.Beck, 2008, p. 38.
[31] *E.g.* the principle of non-discrimination, principles of free movement of goods or services, issues connect with EU citizenship, *etc.*

they are affording individuals scope of rights and obligations that can be relied on before national courts and other authorities in the Member States.[32]

The secondary legislation represents a crucial method of regulation with respect to the relationships containing an international implication and consequently a dominant source of European Private International Law.[33] As mentioned above, the condition of correct EC Treaty based article has to be fulfilled, in order to secure its lawful adoption and to induce its binding effect. The most frequently used pieces of EC secondary legislation take form of regulations and directives.[34]

The Article 249 of the EC Treaty regards the regulation as a measure of general application which is binding in its entirety and directly applicable in all Member States. Moreover, the direct application of regulations means that its entry into force and its application in favor of those subject to it are independent of any measure of reception into national law.[35] Consequently, it is for the Member States to modify their national law in order to comply with the provisions of a regulation.

On the other hand, the directives are binding, as to the result to be achieved, upon each Member State to which it is addressed, but the methods and forms of implementation are for the national authorities of each Member State to decide.

As indicated, it is not only the primary and secondary legislation which is forming a stalwart part of the EC law. Equally significant are the conclusions reached by the ECJ in its interpretations in order adjust the scope of *acquis communautaire* to the national scenario.

In the *ICC*[36] case the ECJ makes it clear that although a judgment is addressed primarily to the court which requested the original ruling, it should be relied on by other national courts before which the matter arises. Consequently, the ECJ will lay down the legally authoritative interpretation, which will then be adopted by national courts.[37] The ECJ‘s willingness to provide specific answers to the questions of the national courts

[32] *Bogdan, M.,* Concise Introduction to EU Private International Law, Europa Law Publishing, Groningen 2006, p. 15.
[33] *Pauknerová, M.,* Evropské mezinárodní právo soukromé, 1. vydání. Praha : C.H.Beck, 2008, p. 39.
[34] The remaining components of EC secondary legislation are the decisions that are binding in their entirety upon those to whom they are addressed, and recommendations and opinions that have no binding force.
[35] Case 34/73, *Variola v. Amministrazione delle Finanze,* [1973] ECR 981.
[36] Case 66/80, *International Chemical Corporation v. Amministrazione delle Finanze dello Stato,* [1981] ECR 1191.
[37] *Craig and De Burca*, EU Law, Text, Cases, and Materials, Oxford University Press, 2007, p.474.

serves to blur the line between interpretation and application.[38] Moreover, the national courts are mainly responsible for the implementation of EU law.[39]

Therefore, the requirement of compatibility of national law with the EC law covers not only the conformity of national legislation with primary and secondary legislation but also covers the confrontation of the national law with the conclusions reached by the ECJ.[40] Hence, the judgments of the ECJ are used as valuable sources of EC law[41] and the proper understanding of the conclusions reached therein are essential in order to perceive and apply the EC law.

2.2 International Law

It is not only the EC law that has to be taken into consideration when facing relationships containing an international implication. The impacts of bilateral and multilateral treaties that are binding both the Czech Republic and also the European Community also require attention.

The precedence of the international treaties is stipulated by the Article 10 of the Constitution of the Czech Republic.[42] The promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply. Moreover, the application priority of international treaties is also established under the provisions of the IPPA. The Section 2 of the IPPA states that the provisions of IPPA shall apply unless an international agreement binding for the Czech Republic stipulates otherwise.

Furthermore, it would be certainly unwise to omit the Hague Conference on Private International Law[43] and its Convention of 30 June 2005 on Choice of Court Agreements.[44]At the outset it is sufficient to say that by the Council Decision of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law[45], the European Community declared its interest to join the Hague

[38] *Ibid.,* 494.
[39] This is clear from the Article 10 of the EC Treaty.
[40] *Pauknerová, M.,* Evropské mezinárodní právo soukromé, 1. vydání. Praha : C.H.Beck, 2008, p. 76.
[41] *Pelikánová, I.,* Význam komunitárního práva pro právni praxi stále roste, Právní zpravodaj, 2007, No. 5, p. 1.
[42] Act. No. 1/1993 Coll., Constitution of the Czech Republic, as subsequently amended.
[43] www.hcch.net.
[44] Text available at: http://hcch.e-ision.nl/index_en.php?act=conventions.text&cid=98&zoek=choice%20of%20court.
[45] Text available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006D0719:EN:NOT.

Conference and became a member thereof on April 3rd 2007. The possibility of the European Community to conclude international treaties on behalf of the Member States and the interplay of the Convention and the EC law will be discussed further.

2.3 National Law

Under the Czech law, the legal grounds of *prorogatio fori* are provided by the Act on International Private and Procedural Law[46] and the Civil Procedure Code.[47] While the former provides the domestic legal base of prorogation with respect to the relationships containing international implication, the latter represents a general procedural norm providing additional intrastate guidelines in this respect.

It should be noted that due to the rules operating within the regimes of EC and international law, the contemporary usage of the provisions of the IPPA is fairly limited. Within the respective field the provisions of the IPPA shall apply where:

- There is no international treaty, which would govern, due to its scope, the particular relationship and fulfils other requirements provided by the Article 10 of the Constitution of the Czech Republic,
- The relationship is not situated/connected within/to the European Community, where it would otherwise fall within the scope of a Regulation having intra-community nature.[48]

2.4 Terminological Homogenity

In order to hold on to the terminological homogenity and to avoid unwanted confusion, it is initially vital to draw a distinction between the terms *competence* and *jurisdiction* within the meaning of Czech and EC law. *Competence [příslušnost]*, under Czech law, determines which court is competent, in the case at hand, to hold the trial.[49] On the other hand the term *jurisdiction [pravomoc]* determines the complex of rights and duties that are by virtue of law given to the judiciary, *i.e.* the power of the court(s) to adjudicate.

[46] Act No. 97/1963 Coll., on International Private and Procedural Law, as subsequently amended.
[47] Act No. 99/1963 Coll., the Civil Procedure Code, as subsequently amended.
[48] *Rozehnalová, N.,* Určení fóra a jeho význam pro spory s mezinárodním prvkem, Bulletin Advokacie, 2005, No.4, p. 23.
[49] It is the territorial (venue), subject-matter and functional competence.

The degree of confusion stems from the fact that the official Czech translation of the Brussels I Regulation uses the terms "*competence*"[50] instead of "*jurisdiction*".[51]

Hence, this terminological discrepancy is to be interpreted within the meaning of the latter term. This view is also upholded by the doctrine[52] and the Czech courts.[53]

3. ***Prorogatio Fori* under the Czech Law**

Without any doubt the questions regarding the jurisdiction of a court(s) represent one of the crucial elements of the international procedural law. In current environment it is not unusual for a private law relationship to contain an international implication which changes the point of view at the case at hand and sometimes is capable to cause controversies.

3.1. Jurisdiction under the IPPA

Throughout this section I would like to discuss the possibilities of the parties to conclude a prorogation agreement within the Czech law. The rules for determining the international jurisdiction of Czech courts are contained in the Part II[54] of the IPPA.

In order to stick to the scope of application of the Brussels I. Regulation the attention will be paid to relevant provision of the IPPA *in concreto* Section 37 thereof, which establishes the jurisdiction of the Czech courts in property matters. In brief, the general rule is as follows:

First of all, the jurisdiction of Czech courts, in property disputes, shall be given if their competence is given under Czech law. Secondly, the parties are afforded the possibility to establish, in property matters, the jurisdiction of Czech courts by virtue of written prorogation agreement. At lastly, the Czech legal entities may agree, as for property disputes and in writing, to the competence of a foreign court on the basis of derogation agreement.

At the outset I consider it necessary to give an explanation with respect to two central terms, *i.e.* jurisdiction and property matters or more precisely property dispute.

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[50] In the Czech language "*příslušnost.*"
[51] In the Czech language "*pravomoc.*"
[52] *Pauknerová, M.,* Evropské mezinárodní právo soukromé, 1. vydání. Praha : C.H.Beck, 2008, p. 133.
[53] Judgment of the Regional Court in České Budějovice Sp. Zn. 19 Co 1782/2004 : *"...pravomoc českých soudů je nutno posuzovat podle uvedeného nařízení, byť toto nařízení hovoří o „příslušnosti" soudů. Obsahově však jde o posuzování pravomoci českých soudů podle uvedeného nařízení."*
[54] Part II. of the IPPA - *International Procedural Law.*

The jurisdiction is to be understood as an aggregate of authorities that the law provides to the courts and other judicial bodies as organs of the state.[55] With respect to legal relationships containing an international implication, the jurisdiction is determined by the inland rules of procedural law of state in question (*lex fori*).[56] Moreover, the sense and function of the term jurisdiction covers the delimitation of matters, which are the courts or judicial bodies of one state authorized to deal with, in relationship to similar jurisdiction of other states.[57] Therefore, if the inland court is faced with a case containing an international implication the first and foremost question that needs to be answered is the question of its jurisdiction; *i.e.* if the jurisdiction of Czech courts may be established according to the provisions of IPPA. If the jurisdiction, as a condition of the proceedings, is not given the court shall stay the proceedings.[58]

The property disputes are to be understood as proceedings concerning legal relationships with an international implication, the subject matter of which are property values.[59] Property disputes include not only disputes regarding proprietary fulfillment, *i.e.* performance evaluated in money, but also proposition to determine the existence or non-existence of the right to proprietary fulfillment.[60] The doctrine and the case of the Czech courts tend to interpret the term "*property dispute*" quite broadly. *Kučera*[61] explains that this term covers all cases, when the participant of the proceedings claims performance, which is off proprietary value, with the exception of cases, that are governed by other provisions of the IPPA (*e.g.* matters related to upbringing and alimony of minors under Section 39). For completeness, the disputes arising out of *e.g.* non-proprietary rights, matters related to personal statues, *etc.* are excluded.

3.1.1. Section 37(1); The Gathering Provision

The Section 37(1) establishes the jurisdiction of the Czech courts, in property disputes, if their competence is given under Czech law.[62] With respect to the

[55] *Kučera, Z., Tichý, L.,* Zákon o mezinárodním právu soukromém a procesním, Praha : Panorama, 1989, p. 217.
[56] Section 48 of the IPPA provides that: *The Czech courts shall proceed according to Czech procedural provisions; all participants shall have the same position in asserting their rights.*
[57] *Kučera, Z., Tichý, L.,* Zákon o mezinárodním právu soukromém a procesním, Praha : Panorama, 1989, p. 217.
[58] By virtue of the Section 104(1) of the CPC.
[59] *Pokorný, M.,* Zákon o mezinárodním právu soukromém a procesním, Komentář. 2 vydání. Praha: C.H.Beck, 2004, p. 58.
[60] The ruling of the Supreme Court of the Czech Republic: R 37/1997.
[61] *Kučera, Z., Tichý, L.,* Zákon o mezinárodním právu soukromém a procesním, Praha : Panorama, 1989, p. 221.
[62] In the main the provision of CPC, Sections 88 – 89a of the CPC.

competence of the courts, the commentary to the IPPA makes a reference to the *local competence*[63] under the provisions of the CPC.

The construction of this provision comes out of the fact that, if we are able to allocate a locally competent court to settle property disputes on the basis of rules provided by the provisions of the CPC governing the local competence, then the jurisdiction of the Czech courts is simultaneously given. Therefore, if it is possible, in particular state, to allocate a locally competent court to settle disputes in the case at hand, than there undoubtfully exists a sufficiently intensive relationship to the judiciary of that state.[64]

The range of this provision is far-reaching. Certainly, is off general and supportive nature according to which it is possible to establish the jurisdiction of Czech courts in matters not explicitly governed by other provisions of the IPPA. Therefore it may be regarded as a gathering provision.

Moreover, the overlap between the provisions of IPPA and CPC is clear and visible, *i.e.* the legal regulation of the international jurisdiction of the Czech courts originates from the general procedural norm. Hence, in order to establish the international jurisdiction under the Section 37 of the IPPA two criteria have to be met. First of all, the case at hand must fall within the scope of a property dispute and secondly, any type of local competence must be given.

3.1.2. Section 37(2); Prorogation Agreement

The wording of the Section 37(2) is as follows: *Jurisdiction of Czech courts in property matters may be also based on a written agreement of the parties. In this way, however, the subject-matter competence of Czech courts must not be changed.*

The Section 37(2) of the IPPA allows the parties, in property matters, to establish the jurisdiction of Czech court by a form of written agreement. Such an agreement constitutes jurisdiction beyond the criteria, which follow from inland procedural norms.[65] The IPPA anticipates a written form of this agreement and precludes the parties to prorogate on the subject-matter competence of Czech court.

[63] There are three types of local competence – general, alternative (given by selection) and exclusive competence.
[64] *Kučera, Z., Tichý, L.,* Zákon o mezinárodním právu soukromém a procesním, Praha : Panorama, 1989, p. 222.
[65] *Kapitán, Z.,*Volba sudiště v soukromoprávních vztazích s mezinárodním prvkem, Časopis pro právní vědu a praxi, 2004, č.1, p. 22.

3.1.3. Section 37(3); Derogation Agreement

The Section 37(3) of the IPPA governs the possibility of the "*Czech organization*", in *property disputes*, to exclude, *in writing*, the jurisdiction of the Czech courts on the basis of derogation agreement.[66]

The usage of the term "*organization*" gives rise to the question of the scope of subjects covered therewith. *Bělohávek*[67] points out that this term is to be understood in the meaning of "*enterprise*" or more precisely as "*entrepreneur*", within the meaning of the Commercial Code.[68] The prevailing consensus is that the contemporary appearance of this term in IPPA is to be understood as a synonym to the term legal person[69], covering entrepreneurs whether natural or legal persons. However, if this is true than is it possible for a natural person, not performing any business activities, to prorogate a foreign court?

The effect of the Section 37(3) of the IPPA is basically two fold. First of all, it restricts the inland natural persons from the possibility to prorogate a foreign court.[70] However, the current environment regards such conclusion as doubtful and obsolete.[71] Secondly, the agreement validly concluded under this provision prevents the Czech court to hear and decide the dispute. Such conclusion is also supported by the doctrine and the Supreme Court of the Czech Republic (hereinafter the "Supreme Court").

Therefore, if the parties validly agree that their potential disputes shall be heard by the foreign civil court, the jurisdiction of the Czech courts is thereby excluded.[72] Moreover the Supreme Court points out, that the delimitation of jurisdiction of the court to hear and settle the disputes in proceedings having international implication is a fundamental concern of the state in question and its own legal order.[73] Following this, the Czech legal order cannot govern the jurisdiction of the courts of foreign countries and that is why the section 37(3) uses the term competence instead of jurisdiction.

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[66] "*As for property disputes, a Czech legal organization may also agree in writing to the competence of a foreign court."*

[67] *Bělohlávek, A.J.,* Prorogace pravomoci soudů v majetkových sporech s mezinárodním prvkem a otázka vzájemnosti, Právní rádce, 2002, č.12, p.22.

[68] The Act No. 513/1991 Coll., as subsequently amended,

[69] *Kapitán, Z.,*Volba sudiště v soukromoprávních vztazích s mezinárodním prvkem, Časopis pro právní vědu a praxi, 2004, č.1, p. 24.

[70] *Kapitán, Z.,*Volba sudiště v soukromoprávních vztazích s mezinárodním prvkem, Časopis pro právní vědu a praxi, 2004, č.1, p. 24.

[71] *Kučera,Z.,* Mezinárodní právo soukromé, 6 vydání. Brno : Doplněk, 2004, p. 330.

[72] The ruling of the Supreme Court of the Czech Republic 32 Odo 183/2006 with reference to the rulings dated 28.05.1997, sp. zn. 1 Odon 39/97, and ruling dated 21.02.2007, sp.zn. 29 Odo 22/2006.

[73] *Ibid.*

Therefore, it would be up to the provisions of the foreign law to consider if it, by virtue of this agreement, accepts the jurisdiction of its courts.[74]

The usage of the term "*organization*" does not correspond with the current status and is considered as confusing and backward-looking. It reflects the position before 1990, when a performance of foreign business activities was permitted only to legal persons.[75] However, until now this provision was not revised by the Czech legislator.[76]

3.2. *Prorogatio fori* under the CPC

It follows from the judgment of the Supreme Court that the agreement of the parties as to which court is *in concreto* competent to settle the dispute is not considered as an jurisdiction agreement, but rather as an agreement on territorial (local) competence.[77]

The prorogation of local (territorial) competence is recognized by the Section 89a of the CPC. However, the possibility of the parties to do so is not borderless. The provision of the CPS only allows the parties to the proceedings involving a *commercial case (matter)* to agree, *in writing,* to the local competence of another court of first instance, unless the law stipulates the *exclusive competence.*[78] Even if the parties by virtue of their agreement establish the jurisdiction of the Czech court, but the requirements for local competence are not present or cannot be determined, it would be for the Supreme Court to decide which court is competent to hear and settle the dispute.[79] Therefore, it is not necessary for the parties to establish explicitly territorial competence of a particular court as long they establish the jurisdiction of the court.

Furthermore, the parties are only given the possibility to agree upon the territorial competence. Therefore, the agreement regarding the subject-matter competence[80] is not recognized. Moreover, the prorogated competence is to be

[74] *Kučera,Z.,* Mezinárodní právo soukromé, 6 vydání. Brno : Doplněk, 2004, p. 330.

[75] *Bělohlávek, A.J.,* Prorogace pravomoci soudů v majetkových sporech s mezinárodním prvkem a otázka vzájemnosti, Právní rádce, 2002, č.12, p.22.

[76] It should be noted that the Proposal of the new IPPA, in the Section 86, abandons the archaic formulation and affords both natural and legal persons the possibility to agree upon competence of a foreign court.

[77] The ruling of the Supreme Court of the Czech Republic: R 50/2004.

[78] *See:* Sections 88 and 200a of the Civil Procedure Code.

[79] The ruling of the Supreme Court of the Czech Republic: R 50/2004, with reference to the Section 11(3) of the Civil Procedure Code.

[80] The subject matter competence is telling us which court from the judiciary is, as a court of first instance, competent to hear and decide a dispute in question. The subject-matter competence is recognized as one of the conditions of the proceedings, which may be at anytime reviewed. If the case was heard and decided by a court not having proper subject-matter competence it is establishing a reason to for annulment of such decision.

understood as exclusive and in case of an initiation of the proceedings before other than the prorogated court, it is suitable to proceed according to the Section 105 of the CPC with respect to review of the conditions of the proceedings.[81]

Subsequently, the matter of *commercial case* shall be examined. The commentary to the CPC is referring, in the matter of commercial cases, to the Section 9 which governs the subject-matter competence. Since the commercial cases are being considered as special, legally and factually complicated agenda, the most of the cases will be for regional courts to decide. However, every rule has an exception.[82] Hence, it is sufficient to conclude that the prorogation agreement may relate to all commercial cases, *i.e.* not only those, where the subject-matter competence is given to the regional court, but also to those belonging to the subject-matter competence of the district court.[83]

3.3. Overlap between Section 37(2) of the IPPA, Section 89a of the CPC and the Article 23

The combined reading of the Section 37(2) of the IPPA and the Section 89 of the CPC would incite to the interpretation that the prorogation is only possible with respect to commercial cases. As *Kapitán*[84] points out such conclusion would be contrary to the meaning and purpose of prorogation, as regulated for the relationships with international implication. Furthermore, he highlights the interdependent relationship of these two provisions, where the local competence leads only to determination of the international jurisdiction of the concrete court. The Section 37(2) of the IPPA is to be regarded as *lex specialis* to the Section 89a of the CPC, while the Article 23 is having priority over the provisions of the CPC. Hence it is possible to agree upon the local competence in all legal relationships falling with the scope of Section 37(2) of the IPPA and Article 23 of the Brussels I. Regulation.[85]

[81] *Kapitán Z.,*Volba sudiště v soukromoprávních vztazích s mezinárodním prvkem, Časopis pro právní vědu a praxi, 2004, č.1, p. 21.
[82] *E.g. See:* Section (9)(3)(r) 1-6.
[83] *Bureš, J., Drápal, L., Krčmář, Z. a kol.* Občanský soudní řád, Komentář. I. díl. 7. vydání. Praha : C.H.Beck, 2006, p. 393.
[84] *Kapitán Z.,*Volba sudiště v soukromoprávních vztazích s mezinárodním prvkem, Časopis pro právní vědu a praxi, 2004, č.1, p.24.
[85] *Doležel, V.,* Formulace prorogační doložky, Právní rádce, 2007, No. 12.

4. *Prorogatio fori* under the Brussels I. Regulation

4.1. Principles of the Brussels I. Regulation

It should be noted that the principles of law are to be understood as rules forming a fundament of a certain legal institute, statute, branch of law or the legal system as such.[86] Moreover, these principles are intended to provide the "legal society" with basis in order to relieve the studies of the particular law. Omission or insufficiency of understanding may lead towards wrongful interpretation of the act or even to failure to realize the core of a law. The role of these principles is underlined by unsubstitutable fulfillment of the grey areas created by abstract terms used, time-to-time, in legal acts.

For a stake of consistency a reference has to be made to the principles that are stemming from the Brussels I. Regulation. At the same time, it is important to have in mind the established case law of the ECJ and the multiplicity of developed legal systems among the EU Member States.

First of all, the Brussels I. Regulation does not affect rules of substantive law[87], but has the aim of establishing uniform rules of international jurisdiction.[88] The reasoning behind this is that it aims to avoid the multiplication of the basis of jurisdiction in relation to one and the same legal relationship and to reinforce the legal protection available to persons in the Community.[89]

Moreover, the Recital 11 to the Brussels I. Regulation gives clear evidence that the parties shall be always able to easily identify, either the court where they may initiate the proceedings or to reasonably foresee the court before which they may be sued.[90] This principle is recognized as the *principle of predictability*.

Following the case *Trasporti Castelletti v. Trumpy*[91], account should be taken to the principle of *legal certainty,* which constitutes one of the aims of the Brussels I. Regulation. It encompasses the ability of the national court seized to readily decide whether it has jurisdiction on the basis of the rules of the Brussels I. Regulation, without having to consider the substance of the case.[92]

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[86] *Staudek J.,* Právní principy, Masaryk University in Brno, available at: www.fi.muni.cz/usr/staudek/vyuka/
[87] Case C-25/79, *Sanicentral v. Collin,* [1979] ECR 3423, para. 5.
[88] Case C-269/95, *Francesco Benincasa v. Dentalkit* Srl., [1997] ECR I-3767, para. 25.
[89] *Ibid*, para. 26.
[90] Case C-38/81, *Effer v. Kantner,* [1982] ECR 825, para. 6 and Case C-125/92, *Mulox v. Geels*, [1993] ECR I-4075, para. 11.
[91] Case C-159/97, *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA,* [1999] ECR I-1597.
[92] Cases C-34/82, *Peters v. ZNAV,* [1983] ECR 987, para. 17; C-288/*92, Custom Made Commercial v. Stawa Metallbau,* [1994] ECR I-2913, para. 20; and Case C - 269/95, *Francesco Benincasa v. Dentalkit Srl*., [1997] ECR I-

Undoubtedly, the principles included in the Brussels I. Regulation are interrelated. For example, the aim of securing legal certainty is underlined by making it possible to reliably foresee which court is to have jurisdiction, *etc*.

To conclude, the frequently divers rules of the Member States are thereby prevented to undermine the purposes of the rules granted by the Brussels I. Regulation. Moreover, the elementary importance of these principles lies in the achievement of legal security, by way of certainty, predictability and uniformity of the results regardless of which courts are involved.[93]

4.2. Scope of Application of the Article 23

Following the theory of law, the scope of application, in general, delimitates the range of realization and application of a particular legal act. As to the content, it encompasses the material, territorial, temporal and personal aspects which have to be taken into consideration.

4.2.1. Material Scope of Application

First of all, the Article 1(1) of the Regulation limits its scope of application to *"civil and commercial matters"*, while explicitly excluding certain subject matters in the Article 1(2).[94]

The concept of *"civil and commercial matters"* is autonomous and independent of corresponding national legal concepts.[95] The interpretations of the ECJ in this respect resulted into considerable amount of case law. The illustration of the viewpoints of the ECJ may be seen from the selected cases below.

The principal rule is as follows: a judgement in an action between a public authority and a person governed by private law, in which a private authority acted in the exercise of its powers, is excluded from the scope of civil and commercial matters.[96] The concept of *"civil matters"* covers also an action for compensation for damage brought before a criminal court against a teacher in a State school who, during a school

3767, para. 27.
[93] *Stone P.,* EU Private International Law: Harmonization of Laws, Edward Edgar Publishing, 2006, p. 3.
[94] *E.g*. the status or legal capacity of natural persons, social security, arbitration, etc.
[95] *Bogdan, M.,* Concise Introduction to EU Private International Law, Europa Law Publishing, Groningen 2006, p. 37.
[96] Case 29/76, *LTU Lufttransportunternehnem GmbH & Co. KG v. Eurocontrol,* [1976] ECR 1541, para. 2.

trip, caused injury to a pupil through a breach of his duties of supervision; even if where the cover is provided under a social insurance scheme governed by public law.[97]

It is no surprise that the Article 23 follows and materially corresponds with the general scope of application of the Brussels I. Regulation. Therefore, the material scope of application, civil and commercial matters, is likewise applicable. Consequently, the parties may not rely on the provisions of the Brussels I. Regulation, when choice-of-court clause is connected to a contract concerning matters falling outside the scope of its application. In such situations the issue shall be determined either in accordance with intrastate procedural law or followed by rules of international law.

4.2.2. Territorial Scope of Application

Secondly, the territorial aspect of the application is answering the question, where is it possible to use a concrete legal act *i.e.* the respective territory, where the legal act is in force. At the outset, it is sufficient to say that the Article 23(1) requires at least one of the parties to be domiciled within the territory of EU Member State.[98]

4.2.3. Temporal Scope of Application

Thirdly, the temporal scope of application represents the effectiveness of a particular provision in time, precisely setting date since when the regulated social relationships are to be governed therewith. Consequently, the possibility of the parties to rely on the provisions of the Regulation is dependent on its entry into force.[99] For the former 15 Member States, except of Denmark[100], the Brussels I. Regulation entered into force on March 1, 2002. For the 10 new Member States, including Czech Republic, admitted in the fifth EU enlargement, it was May 1, 2004 and for Bulgaria and Romania it was January 1, 2007.

At this stage I would like to point out the curious difficulty of the Supreme Court of the Czech Republic with respect to the temporal scope of application of the Brussels I. Regulation.

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[97] Case C- 172/91, *Volker Sonntag v. Hans Waidman, Elisabeth Waidmann and Stefan Waidmann,* [1993] ECR I-1963, para. 1.

[98] The issue of interconnection of the concept of domicile and the Article 23 shall be discussed in the Section 4.7.Domicile and the Prorogation of Jurisdiction.

[99] Article 66(1) provides that the Regulation shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof.

[100] *Article* 1(3) of the Brussels I. Regulation.

The wording of the Article 66(1) clearly indicates that the Brussels I. Regulation shall apply only to legal proceedings instituted after its entry into force.[101] In spite of more-or-less straightforward formulation of the Article 66(1) the Supreme Court applied the provisions of the Brussels I. Regulation to the proceedings commenced in 1998.

The case[102] involved two legal persons, one having seat in Czech Republic, the other one in Slovakia. The proceedings were initiated before the District Court in Prague on 20th October 1998. Furthermore, the jurisdiction of the Czech Courts was claimed on the grounds of the choice-of-court clause embodied in an agreement of receivables cession.

The courts of first and second instance regarded the clause as ambiguous, incapable to establish the jurisdiction of the Czech courts and consequently stayed the proceedings due to the lack of Czech court's jurisdiction. However, the Supreme Court felt that the clause fulfils the requirements of the Article 23 of the Brussels I. Regulation. Consequently, the rulings of the lower courts were annulled and the case was brought back before the court of first instance.[103]

First of all, the Article 66(1) makes it clear that the institution of the proceedings is the crucial determinant for the temporal applicability of the Brussels I. Regulation. Secondly, the moment of initiation of the proceedings has to be assessed according to the provisions of national law.[104]

Accordingly, if we draw a comparison between the moments of initiation of the proceedings in the case at hand, with the date of entry of the Brussels I. Regulation into force we are able to regard the ruling of the Supreme Court, in this case, as incorrect.[105] Hence, it is not possible to apply the provision of the Brussels I. Regulation to the proceedings initiated before its entry into force.

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[101] With respect to Czech Republic it is 1st May, 2004.

[102] Ruling of the Supreme Court of the Czech Republic, of 27.10.2005, sp. zn. 29 Odo 425/2005, available at www.nsoud.cz.

[103] *Simon, P.,* Problematické určení časové působnosti Nařízení Brusel I. v rozhodnutích Nejvyššího a Ústavního soudu, Právní Rozhledy, No. 13/2007, p. 482.

[104] *Ibid.,* With reference to the Section 82(1) of the CPC, which provides that: *The proceedings shall be considered commenced on the day when a petition for the commencement thereof was delivered to the court or when a ruling on commencement of the proceedings without a petition was issued.*

[105] *Ibid.,* p. 482. It should be noted that the case at hand is quite exceptional. The other rulings of the Supreme Court in this respect *e.g.* The ruling of the Supreme Court of the Czech Republic, of 16.02.2005, sp. zn. 29 Od 87/2004 tend to apply the provisions governing the temporal scope of application of the Brussels I. Regulation in correct way. *I.e.* if the proceedings were initiated after the 1st May 2004, the Article 23 was held applicable.

4.2.4 Personal Scope of Application

Finally, the personal scope of application consists of specific determination of legal subjects that are bound by the legal act in question. However, neither the Brussels I. Regulation nor the Article 23 requires such specific determination with respect to personal scope of application. It is sufficient to say that the Brussels I. Regulation is likewise applicable to both natural and legal person. This conclusion may be supported by the wordings of Article 59 and 60 of the Regulation that are providing guidelines for the determination of domicile. Moreover, it should be noted that the Article 2(1) makes it clear that not even the nationality of the parties is regarded as a determining factor for the personal scope of application of the Brussels I. Regulation.

4.3. Agreement between the Parties

As a starting point for any further assessment of the concept of prorogation of jurisdiction, the importance of an agreement between the parties shall be examined. The agreement is a central element for the validity of a choice-of-court clause.[106] Moreover, free and independent intention of the parties to enter into such agreement represents a crucial element of prorogation of jurisdiction.

Furthermore, as indicated by the case-law of the ECJ, the question of formation of a consensus between the parties as to the competent court, clearly and precisely expressed,[107] is subject to its initial review. Consequently, upon fulfilment of both formal and material requirements[108] set forth in the Article 23, the agreement coffering jurisdiction may be regarded as valid.

[106] *Magnus/Mankowski,* Brussels I. Regulation (2007), European Law Publishers, 2007, Art. 23, note 75.
[107] Case-C 25/76, *Galeries Segoura SPRL v. Societe Rahim Bonakdarian,* [1976] ECR 1851, para. 6.
[108] While having in mind correspondence of such clause with the specific jurisdictional rules set forth in Articles 13, 17, 21 and 22.

4.4. The Requirement of Certainty

In order to maintain the ties between the preceding sections I shall focus on the question of admissibility of a choice-of-court clause and consequential requirement of certainty.

The possibility of the parties to include a contractual provision, where they establish the place (*e.g.* the country, state, or type of court) for specified litigation between them[109], is generally recognized by the Article 23. However, the fact that the parties are given the possibility to conclude such choice-of-court clause is duty-bound to satisfaction of the requirement of certainty in order to exclude any ambiguity as to the competent court.

The wording of Article 23(1) refers to *"disputes which have arisen or which may arise in connection with a particular legal relationship"*. Hence, it is necessary to examine the nexus between the principle of legal certainty and the choice-of-court clause.

First of all, the attention should be paid to the certainty of the legal relationship. It is evident that the choice-of-court clause is entered into for the purpose of settling disputes that arose from a particular legal relationship that pre-existed prior the proceedings was initiated. This requirement does not only limit the scope of an agreement conferring jurisdiction to disputes which arise from a particular legal relationship, but logically provides the parties with possibility to rely on the jurisdiction agreement if the dispute is connected with the legal relationship.

Therefore, when there it is insufficient to prove the nexus between the dispute and the legal relationship then the possibility build on such agreement is fairly limited.[110] Secondly, the certainty of a dispute under Article 23 requires that the dispute must be connected with the relationship for which the agreement has been concluded.[111] Thirdly, the certainty of the chosen court, which shall or ought to have jurisdiction to decide the potential disputes between the parties, is recognized. In this respect a clear indication of a *"...court or the courts of a Member State..."* is vital.

Hence, sufficiently clear and precise guidelines must be indicated for the designation of a competent court. It seems that this requirement is fulfilled in situations

[109] *Garner, B.,* Black's Law Dictionary, Seventh Edition, West Group Publishing, 1999, p. 665.
[110] Case C- 214/89, *Powell Duffryn plc v. Wolfgang Petereit,* [1992] ECR I-1745, para. 30-31.
[111] *Magnus/Mankowski,* Brussels I Regulation (2007), European Law Publishers, 2007, Art. 23, note 69.

e.g. where the parties refer to a court of the place where one of them has the place of business[112], or point out to the courts of particular country (e.g. Slovak courts) without any further specification of the competent court, or by naming directly the agreed upon court.

4.5. Designating the Competent Court

The incorporation of a choice-of-court clause into a contract is followed by basically two consequences. On the one hand, it is securing the jurisdiction of the chosen court and on the other hand, it excludes the jurisdiction of all other courts, even though they would be competent to hear the case, if the choice would have not been made. Unsurprisingly, the designation of the competent court may be performed in numerous ways, which will be discussed below.

4.5.1. Explicit Prorogation

First possibility, expressly afforded by the Article 23, is to agree on the *"court or the courts of a Member State"*. Then, the further method of designation of the competent court comes from the arrangement of the parties. It is therefore permissible to designate the court *e.g.* by naming it directly (*e.g.* District Court in Prague[113]) or to incline to more general designation (*e.g.* Courts of Slovakia) or to confer the jurisdiction of courts of two or more Member States, with the possibility to choose therefrom.

However, the proper designation represents only one aspect leading towards the validity. Additionally, it is necessary for the parties to comply with the requirements presumed by the Article 23, while respecting the territorial scope of application of the Brussels I. Regulation.

4.5.2. Choice of a Court in a Third Country

Secondly, it is possible that the parties designate a competent court which is however situated outside the territorial scope of application of the Brussels I. Regulation (e.g. court(s) of Egypt). However, situations like these create a degree of ambiguity as

[112] Case C- 387/98, *Coreck Maritime GmbH v. Handelsveem BV,* [2000] ECR I-9337, I-9372, para. 15.
[113] However, the parties should be aware of national rules applicable with respect to the designation of competent court. It is not excluded that the parties will by virtue of mistake establish the competence of *e.g.* regional court in a case where the matter falls within scope of decision making of the district court. These issues will be discussed below.

to the applicability of the Article 23. The case law of the ECJ inclines towards the inapplicability of the Article 23. This approach may be seen in the case *Coreck Maritime v. Handelsveem*[114]*,* where the Court stated that the Article 23 does not apply to clauses designating a court in a third country.[115] Then, the jurisdiction of the prorogated court shall be decided in accordance with its own national procedural law.

Moreover, certain scholars and legal practitioners expressed additional concerns in this respect. The argumentation is based on the logical effect of the prorogation of jurisdiction; the designation of a competent court encompasses the derogation from a jurisdiction of otherwise competent Member State court(s). It has been argued that by designation of competent court in a third country, the derogation may be connected with a deprival of the special rules afforded by Articles 13, 17 or 21 (protection of weaker parties) and Article 22 (exclusive jurisdiction).

4.5.3. Mere Derogation

Practically, it is possible that the parties only agree that the jurisdiction of certain court is to be excluded. However, such possibility is again linked with a degree of ambiguity and in fact contradicts the principles of the Regulation.

Besides that, by mere exclusion of jurisdiction of certain courts the purpose of designation is vanished. The potential exclusion of all competent courts would mean that the jurisdictional rules would be disregarded their high predictability, making it inaccessible for the defendant to rely on his/her *forum domicili*, which, according to *Recital 11* to the Regulation, must be always available to him/her. Moreover, it is not permitted to derogate from the exclusive and weak-party protective jurisdiction provisions of the Regulation.

4.5.4. Tacit Prorogation

Apart from the situations where the parties physically designate the competent court, the Regulation recognizes, in Article 24, the possibility of "*tacit prorogation*".[116]

This provision establishes the jurisdiction of a court of a Member State before which the defendant enters appearance. This instrument is however reliant on several

[114] Case C- 387/98, *Coreck Maritime GmbH v. Handelsveem BV,* [2000] ECR I-9337, I-9372 para. 19.
[115] *Ibid.* para. 19.
[116] *Bogdan, M.,* Concise Introduction to EU Private International Law, Europa Law Publishing, Groningen 2006, p.67.

conditions. First of all, the initiation of the proceedings by the plaintiff, before a court of a Member State, is required. Thereafter, the defendant is required to enter an appearance before this court, without the intention to contest its jurisdiction. Consequently, jurisdiction of this court is in fact established. However, it should be born in mind that the submission is not admissible in situations where another court has exclusive jurisdiction pursuant to Article 22.

4.5.5. Effect of the Designation

To conclude, the parties are, by virtue of Article 23, basically free to choose any court they want. Moreover, it is not necessary for them to establish the existence of a connecting factor between designated court and dispute.[117] The effect of a choice-of-court clause validly incorporated into the contract, while fulfilling the requirement set forth in the Article 23, is that the parties may rely on the jurisdiction of the designated court.

Consequently, the designated court, if seized, has to accept its jurisdiction. However, if the designated court is seized as second, it must nevertheless stay the proceedings until the court first seized has declared that it has no jurisdiction.[118] Moreover, by virtue of Article 26(1) the court whose jurisdiction was validly derogated from, must of its own motion, declare inadmissible any proceedings which are contrary to the choice-of-court agreement it is invoked by the defendant.[119]

4.6. Exclusivity vs. Non-exclusivity

The second sentence of the Article 23(1) indicates that unless otherwise agreed by the parties the jurisdiction of the designated court shall be exclusive. This presumption creates a logical effect of the choice-of-court clause. In practice it means that if the parties agree on the jurisdiction of the Slovak courts, then the plaintiff cannot bring an action before the Czech court even though, the jurisdiction of the Czech court could be established *e.g.* following the *forum domicili* rule. Moreover, the procedural aspect of the exclusivity is the obligation of the other courts in the Member States to

[117] Case C-159/97, *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA,* [1999] ECR I-1597, para. 50.
[118] Case C-116/02, *Erich Gasser GmbH v. MISAT Srl.,* [2003] ECR -14693, para. 54.
[119] *Magnus/Mankowski,* Brussels I Regulation (2007), European Law Publishers, 2007, Art. 23, note 164.

decline their jurisdiction pursuant to the Articles 25 and Article 26. This however does not mean that the exclusivity of an agreement cannot be broken through.[120]

On the other hand the non-exclusivity of an agreement establishes more generous possibilities for the parties, allowing them to bring proceedings either before the court designated in the choice-of-court clause or the court deriving from the other provisions of the Chapter II of the Brussels I. Regulation. However, apart from this generosity, the parties are exposed to a degree ambiguity as to the foreseeability of the competent court. Hence, in order to prevent further complications, the exclusivity of the choice-of-court agreement seems more desirable.

Furthermore, it should be noted the question of determination a choice-of-court clause as exclusive or non-exclusive is a matter of construction, which, in principle, ought to be answered by reference to the law governing the agreement.[121]

4.7. Domicile and the Prorogation of Jurisdiction

Throughout the Brussels I. Regulation, the concept of domicile is regarded as a basic determinant for the establishment of jurisdiction of a particular court. The main rule, *forum domicili*, is provided by the Article 2. Subsequently, the Articles 59 and 60 purvey guidelines for the determination whether or not a person is to be considered as domiciled in a Member State(s). Undoubtedly, the domicile of the parties to the contract is influencing the applicability of the Article 23.

The Article 23(1) "*only*" requires at least one of the parties[122] to be domiciled within the territory where the Regulation is applicable. Flawlessly, such requirement is fulfilled when the parties are domiciled in the different Member States. However, the "real-life" situations are not that clear-cut. Therefore, it is possible that the parties, both domiciled in the same Member State, designate a court of that Member State and do not derogate from an otherwise competent court in another Member State. In this respect, the doctrine holds the view that the Article 23 is not applicable. The reasoning behind is that the Article 23 does not cover purely internal cases, lacking the aspect of internationality.[123]

[120] *E.g.* by voluntary submission pursuant to the Article 24 of the Brussels I. Regulation.
[121] *Clarkson and Hill*, The Conflicts of laws, Third Edition, Oxford University Press, New York 2006,p. 68.
[122] It follows from the wording of the Article 23(1) "*one or more of whom*".
[123] *Magnus/Mankowski,* Brussels I Regulation (2007), European Law Publishers, 2007, Art. 23, note 49.

Another situation inclining towards the inapplicability of the Article 23 is that the parties' domicile is located in a third country. However it is not excluded that the parties none of whom is domiciled in a Member State, *e.g.* two foreign companies[124] designate a court in Prague. Then, such situation is to be considered in accordance with the Article 23(3). Accordingly, unless the court(s) chosen by the parties rejected its jurisdiction, the all other courts of other Member States shall have no jurisdiction over the dispute between these foreign parties. And again, it is for the first court seized to adjudicate on the validity of the prorogation of the court(s) in a Member State.

To keep on to the business sphere, it is not unusual that the companies have multiple places of domicile or statutory seats. Moreover, it is also possible that the seat of a company may change from time to time. Thus, for the application of the Regulation it is sufficient that at least one of the multiple places of domicile is to be found within the territory where the Regulation is in force.

4.8. Formal Requirements of a Choice-of-court Agreement

Commonly, a written form of a legal act presumes, besides the other general essentials, a particular demonstration of will taken down on a medium which satisfies the legal format of a document (*e.g.* deed). Moreover, such demonstration has to be signed by the parties. Consequently, the satisfaction of formal requirements is sufficiently giving evidence that a consensus was reached between the parties.

However, the formal requirements regarding the agreements may differ from one Member State to another. For example, the Czech law does not contain exact legal definition of "*writing*". It merely states, when a written form of a particular legal act is required. "*Writing*" under English law, requires the communication to be in some visible form,[125] unless there is legislation which specifically provides to the contrary.

The formal requirements of a choice-of-court agreement are to be found the paragraphs (1) and (2) of the Article 23. Thereby, the parties may efficiently direct the form of the agreement to fit their reciprocal needs and may rely, as to the matter of form, on this provision, due to fact that the Member States are not free to impose any

[124] Meaning, the domicile of which is not situated within the territory of any Member State.
[125] *Interpretation Act* 1978, Sch 1., *In: Reed Ch. and Angel J.,* Computer Law. The law and Regulation of Information Technology, Sixth Edition, Oxford University Press, 2007.

additional formal requirements other that those contained therein.[126] It should be noted that the list of the formal requirements in the Article 23 is exhaustive.

Hence, it is possible to conclude a valid choice-of-court agreement either in from of writing or evidenced in writing or in a form which accords with practices between the parties or according to international trade practice's. Moreover, the paragraph (2) of the Article 23 randomizes the communication by electronic means, if capable of providing durable record of the agreement, to "*writing*".

4.8.1. In Writing

To lock on to the aforesaid, it should be emphasized that the purpose of the formal requirements imposed by the Article 23 is to ensure that the consensus between the parties is in fact established.[127] However, the real-life situations may bring doubts as to whether or not a consensus was actually reached or even if a contracting party had the knowledge about a presence of a choice-of-court clause in the contract. One can imagine situations, where the choice-of-court clause is printed in a microscopic letters on the back of a contract, or even in a different language other than the one used in the remaining provisions of the contract, which the other party does not understand.

In *Estasis Salloti v. RŰWA*[128] the court was asked whether a clause conferring jurisdiction, which is included among general conditions of sale, printed on the back of a contract signed by both parties, fulfills the requirement of writing under Article 23.[129] The court pointed out that a mere presence of a choice-of-court clause printed on the reverse of the contract is not sufficient for the purposes of the Article 23, due to the fact that there is no guarantee that the other party actually agreed and was aware of such clause diverting from the normal rules of jurisdiction.[130] Hence, it is necessary that the contract itself contains an express reference, which must be clear and precise, to the general conditions containing the choice-of-court clause. Additionally, such clause can be checked by a party exercising reasonable care and that the general conditions

[126] Case C – 150/80, *Elefanten Schuh GmbH v. Pierre Jacqmain*, [1981] ECR 1671, para. 26**.**

[127] Case C- 214/89, *Powell Duffryn plc v. Wolfgang Petereit,* [1992] ECR I-1745, para. 24 and Case 24/76, *Estasis Salotti di Colzani Aimo and Gianmario Colzanie v. RUEWA Polstereimaschinen GmbH,* [1976] ECR 1831, para. 7

[128] Case 24/76, *Estasis Salotti di Colzani Aimo and Gianmario Colzani v. RUEWA Polstereimaschinen GmbH,* [1976] ECR 1831.

[129] *Ibid.*, para. 8.

[130] *Ibid.*, para. 9.

including the choice-of-court clause have been communicated to the other party with the offer to which reference is made.[131]

A similar approach can be seen in the case *Tilly Russ v. Nova*.[132] The court pointed out that choice-of-court agreement is presumed to be "*writing*" if it is included in a document signed by both of the parties[133] demonstrating the consent. It was held that a mere printing of a jurisdiction clause on the reverse of the bill of lading is not sufficient for the purposes of Article 23, due to the fact that there is no guarantee that the other party actually consented to the choice-of-court agreement.[134]

In *Powell Duffryn plc v. Petereit*[135] the Court was faced, besides other references, with the issue of satisfaction of formal requirements under Article 23 with regard to choice-of-court clause contained in the statutes of a company limited by shares. It was held that the requirement of writing had been fulfilled, due to the fact that the statutes of the company were invariably in writing. Moreover, the Court regarded the choice-of-court clause, inserted in the statutes of a company limited by shares, as forming a binding agreement between the company and its shareholders.[136] Subsequently, such choice-of-court clause is enforceable against shareholders as long as it has been inserted into the company's statutes in accordance with provisions of the applicable national law[137] and those statutes are lodged in a place to which the shareholder may have access, e.g. seat of the company, or are contained in a public register.[138]

To conclude, several outcomes should be observed from the decision-making procedure of the ECJ with regard these indistinct situations. First of all, a mere legibility and presence of such choice-of-court clause wheresoever in a contract is not sufficient. Secondly, the ECJ's aims towards the factual knowledge of the party that a jurisdiction clause is incorporated in the contract and as such shall not get away the party's attention. It is no surprise that the ECJ approached this issue from the point of ensuring

[131] *Ibid,.* para 12.
[132] Case-C71/83, *Partenreederei MS "Tilly Russ" and Ernst Russ v. NV Haven & Vervoerbedrijf Nova and NV Goeminne Hout*, [1984], ECR 2417.
[133] *Ibid*., para. 16.
[134] *Ibid*., para. 16.
[135] Case C- 214/89, *Powell Duffryn plc v. Wolfgang Petereit*, [1992] ECR I-1745.
[136] *Ibid*., para.17.
[137] *Ibid*., para. 27.
[138] *Ibid.,* para. 28.

that the affected parties are certainly aware of the possibility of the being sued in the agreed upon court.

4.8.2 Evidenced in Writing

The Article 23(a) affords the parties with a possibility to orally agree on the jurisdiction of particular court. It should be also noted that the Regulation does not expressly require that the written confirmation[139] of an oral agreement should be given by the party who is to be affected by the agreement. However, for the purposes of establishing consensus between the parties, a mere oral agreement on the jurisdiction is inadequate. Consequently the parties may not entirely evade the necessity of writing.

In order to comply with the formal requirement of *"evidenced in writing"* it is indispensable to proof the following:

- Prior oral agreement between the parties relating to the choice-of-court clause, [140] and
- Written confirmation of that agreement by one of the parties was received by the other,[141] and
- The latter party raised no objection within a reasonable time, after the receipt of the confirmation.[142]

Notwithstanding, the foregoing conditions created by the ECJ, there is a still certain inconveniences with respect to the requirement of *"evidenced in writing"*. First of all, the national courts approach with respect to an "oral" choice-of-court clause is quite often connected with the refusal of enforcement. For example in situations where the clause is contained in only in the documents concluded after the contract. Preferably, it is, in my opinion, more desirable to conclude a written choice-of-clause and consequently offer the parties with more degree of security.

Moreover, it is remarkable to compare English and French text version of the Regulation 44/2001, both published in the *Official Journal* of the European Union. The French version of the Regulation 44/2001 in the Article 23(a) provides that *"par écrit*

[139] At least the English version of the Brussels I. Regulation.
[140] Case-C71/83, *Partenreederei MS "Tilly Russ" and Ernst Russ v. NV Haven & Vervoerbedrijf Nova and NV Goeminne Hout*, [1984], ECR 2417, para. 17.
[141] Case 221/84, *F. Berghoefer GmbH & Co. KG v. ASA SA*, [1985] ECR 2699, para. 16.
[142] *Ibid.*, para. 15.

ou verbalement avec confirmation écrite'' which means "*in writing or orally confirmed in writing*".

Even though I'm aware of equality of the versions or more precisely of the fact that discrepancies between the versions may not lead to implication of wider meaning of the extending one,[143] but it is interesting to witness that the English version has to be given the interpretation of *"evidenced in writing"* while the French version contains the partial outcome of the interpretation in itself.

4.8.3. Practices Established between the Parties

The Article 23(1)(b) refers to an agreement conferring jurisdiction concluded in a form which accords with the practices which the parties have established between themselves. However, the implicit agreement requires the consensus of parties as to the choice of a court, regularity, continuity and multiplicity of such practices between them to be sufficiently established.

4.8.4. International Trade or Commercial Usage

The Article 23(1)(c) refers to an agreement conferring jurisdiction concluded, in international trade or commerce, in a form which accords with a usage of which parties are or ought to have been aware and which in such trade or commerce is widely know, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

In *MSG v. Les Gravières Rhénanes*[144] the issues was connected with an orally concluded contract for inland-waterway transport service, provided by vessel operating a shuttle service on the river Rhine, between parties established in different Member States. The wording of the Article 23(1)(c) was held to be applicable in a situation where one party to the contract did not react or remained silent to a commercial letter of confirmation or repeatedly paid invoices without objection where those documents contained a pre-printed reference to the choice-of-court clause.[145]

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[143] Case C-45/83, *Ludwig-Maximilians-Universität München v. Hauptzollamt München-West,* [1984] ECR 00267, para. 13.
[144] Case C-106/95, *Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL,* [1997] ECR I-00911.
[145] *Ibid.*, para. 25.

In *Trasporti Castelletti v. Trumpy*[146] the wording of the Article 23(1)(c) was held to be applicable in a situation where the choice-of-court clause was printed on the reverse of the bill of landing, but the text of the contract was signed by both parties and contains an express a reference to general conditions which contained a choice-of-court clause. The issue at hand involved a contract of bills of landing for the carriage of goods from Argentina to Italy and compensation of damage, whereby *Trumpy* relied on the clause 37, which conferred the jurisdiction of High Court of Justice in London.

In both cases the court emphasized that the crucial issues relates to the existence of a usage which is capable of establishing the existence of agreement on jurisdiction and subsequently the formal validity. It should be noted that a determination of whether or not the contract falls within the scope of international trade or commerce, or the existence of practice or whether the parties to the contract were aware of such practice, is for the national court to determine.[147]

In this respect, the ECJ pointed out a three stage objective test for the national courts to make the determination. First of all, it necessary to determine whether or not a particular contract falls under the head of international trade or commerce.[148]

Undoubtedly, the concept or existence of practice represents a crucial issue. Such practice shall not be determined neither by reference to the law of the Member States nor in relation to international trade or commerce in general, but in relation to a branch of trade or commerce in which the parties to the contract operate. Such practice exists where a particular course of conduct is generally and regularly followed by operators in that branch when concluding contracts of a particular type. [149]

Thirdly, the establishment of the actual or presumptive awareness of such practice of the parties to a contract; meaning that, in the sector of their operations (either of trade or commercial nature), a particular course of conduct is generally and regularly followed in the course of conclusion of a contract, with the result that it may be regarded as being a consolidated practice.[150]

Hence, only well established practice generally and regularly observed by the operators is capable of giving sufficient evidence to proof the existence of such usage.

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[146] Case C-159/97, *Trasporti Castelletti SpA v. Hugo Trumpy SpA,* [1999] ECR I-1597.
[147] Case C-106/95, *Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL,* [1997] ECR I-00911, para. 21.
[148] *Ibid.,* para. 22.
[149] *Ibid.,* para. 23.
[150] *Ibid.,* para. 24.

4.8.5. Electronic Communication

As regards the electronic communication, the paragraph (2) of the Article 23 randomizes the communication by electronic means, if capable of providing durable record[151] of the agreement, to "writing".

This provision is of particular importance with respect to needs of nowadays fast communication and electronic exchange of data. Moreover, it complements with the aims set forth by the Directive on E-commerce[152], meaning that national laws of the Member States allow the possibility to conclude contracts by electronic means and as such, are not deprived of legal effectiveness and validity.

4.9. Summary

To summarize the foregoing content of this section, I would like to make a short resume of necessities which shall be followed in order to secure the validity of a choice-of-court clause. The following conditions shall be observed:

- a contract, embracing a choice-of-court clause, shall fall within the scope of application of the Brussels I. Regulation,
- formation of an agreement between the parties as to the jurisdiction of a court(s) of a Member State,
- Requirement of domicile for at least one of the parties in a Member State,
- Connection of a choice-of-court agreement with a "*particular legal relationship",*
- Fulfillment of the presumed formal requirements, and
- Conformity with the Articles 13, 17, 21 and 22 of the Brussels I. Regulation.

[151] *E.g*. hard disks of computers, memory sticks or email accounts.

[152] EC Directive 2001/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ EC 2000 L 172/1.

5. Prorogation of Jurisdiction in Selected Situations

5.1. Statutes of a Joint Stock Company

Throughout this section I purport to discuss the question of incorporation of a choice-of-court clause into the statutes of a joint stock company. Attention will be paid not only to the EC legislation and viewpoint of the ECJ, but I would like to consider the admissibility of such incorporation from the prospective of Czech law. Furthermore, I attempt to balance the theoretical possibilities thereof with the solutions used by practicing lawyers.

5.1.1. Position under the EC Law

The starting point is the case *Powell Duffryn plc v. Wolfgang Petereit*[153] where the ECJ was faced with issue of a binding effect of choice-of-court clause embodied in the statutes of a company limited by shares and subsequently, whether or not such clause may constitute an agreement between a company and its shareholders.

ECJ in its reasoning was aware of the contrasts in legal concepts governing the law of companies through the European Community. It points out that the relationship between a company limited by shares and its shareholders differs from one Member State to another. In some legal systems the relationship is characterized as contractual while in others as institutional, normative or sui generis.[154]

The arguments of the parties were again unsurprisingly antagonistic. *Powell Duffryn plc* argued that the company statutes are normative by nature and their content is not opened to discussion by the shareholders. Moreover, it was argued that the shareholders are facing potential risk of clauses being introduced against their express wishes if such possibility is allowed by the statutes or national law.[155]

On the other hand, the standpoint of Mr. *Petereit* and the *Commission* was that the statutes of a company limited by shares are, on the grounds of German law, contractual by nature and a choice-of-court clause incorporated therein constitutes an agreement within the meaning of *Article 17* of the Brussels Convention 1968.

[153] Case C-214/89, *Powell Duffryn plc v. Wolfgang Petereit*, [1992] ECR I-1745.
[154] *Ibid.,* para. 10.
[155] *Ibid.,* para. 8.

Upon the consideration of the arguments and contrasts in legal concepts governing law of companies throughout the European Community, the ECJ ruled that the statutes of a company are contractual by nature. Moreover, a clause contained in the statutes of a company limited by shares and adopted in accordance with the provisions of the applicable national law and those statutes are conferring jurisdiction on a court of a Contracting State constitutes an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention 1968.[156]

Moreover, the company's statutes were regarded as contract covering both the relations between the shareholders and the relations between them and the company.[157] The court, again, pointed out, by referring to its previous case law,[158] that by fulfilling formal requirements the expression of consensus between the parties is in fact established. Accordingly, the formal requirements laid down in Article 23 must be considered to be complied with, if the clause is contained in the company statutes and those are lodged in a place to which the shareholder may have access or are contained in a public register.[159] It added that the requirement that a dispute must arise in connection with a particular legal relationship is satisfied if the clause conferring jurisdiction contained in the statutes of a company applies to the disputes between the company and its shareholders as such.[160]

5.1.2. Position under the Czech Law

The standpoint of ECJ concerning the differences among the legal systems of the Member States as to the regulation of the relationship between a joint stock company and its shareholders is absolutely correct. It is apparent from the judgment that the choice-of-court clause has to be adopted in accordance with the applicable national and shall confer jurisdiction of a court of a Member State. What is the position under Czech law? The answer to the question whether or not it's possible to validly include a choice-of-court clause into company statutes is not that clear-cut. It certainly requires further assessment that will be discussed below.

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[156] *Ibid.,* para. 21.

[157] *Ibid*., para. 19; The reasoning behind this was that by having a status of a shareholder in a company, it is presumed that the shareholder agrees to be the subject to all provisions appearing the statutes and decisions undertaken by the organs of the company, even if he does not agree with some of those provisions or decisions.

[158] Case 24/76, *Estasis Salotti di Colzani Aimo and Gianmario Colzanie v. RUEWA Polstereimaschinen GmbH,* [1976] ECR 1831, para.7.

[159] Case C-214/89, *Powell Duffryn plc v. Wolfgang Petereit,* [1992] ECR I-1745, para. 29.

[160] *Ibid.,* para.34.

5.1.3. Nature of the Statutes; Certainly a Contract?

Following our doctrine and case law of the courts,[161] statutes of a joint stock company are generally considered as a contract *sui generis.*[162] Without any doubt, it is for the statutes to govern the internal relationships of a joint stock company after its incorporation. This includes the relationships between the company and its shareholders, status and interrelationship of the organs and finally the determination of rules, which are not provided by law and which are adjusting the dispositive enactment to the interests and benefits of the company.[163] Hence, the statutes incorporate information, which are individualizing the joint stock company as such.[164]

However, if the statutes of a joints stock company are to be considered as a contract then it is reasonable to assume two-sided act in law. Then it is suitable to ask what about the formation of a joint stock company by a single entity? According to *Černá*[165] the conclusion about the contractual nature of statutes is relativized by the fact that, by forming (founding) of a joint stock company by a single person, the statutes are not being a result of an expression of will of two or more contractual parties but rather this single entity. It is regarded as an exception to the principles governing the law of contracts.

On the other hand, the opponents of the contractual nature of statutes argue that if the modification of the statutes may be decided by the general meeting by a qualified majority this fact is contrary to the principle of contractual freedom. This argument may not remain unnoticed.

The strict observance of this principle would mean that any decision, which entails the modification of statues, shall be based upon the consent of all shareholders. On one hand, by respecting this rule we would create a balanced and equal environment, but on the other hand it would be onerous to reach the approval of the entirety of the shareholders to the proposed changes. Therefore the legislator chooses the lesser evil. The majority decision-making and the principle of voting power dependent upon the amount of shares[166] are given preference to the potential

[161] Judgment of the Supreme Court of the Czech Republic 29 Cdo 2024/200-43, published in Právní rozhledy, No. 9/2001.
[162] *Černá, S.,* Obchodní právo, Akciová Společnost. 3. Díl, Praha: ASPI, 2006, p. 52.
[163] *Dědic, J. a kol.,* Obchodní zákoník – Komentář, Prospektum, 1997, p. 476.
[164] *Pelikanova, I.,* Obchodní právo, 1. Díl. Codex Bohemia, 1998, p. 386.
[165] *Černá, S.,* Obchodní právo, Akciová Společnost. 3. Díl, Praha: ASPI, 2006, p. 52.
[166] *Ibid.*, p.169.

paralyzation of the company. Consequently, the minority shareholders are given additional protection in order to defend themselves against the misuse of power of the majority shareholder.[167]

The balancing between the contractual nature of the statutes in contrast to internal self standing documents is fairly complicated. The fact remains that the statutes are a result of an agreement.[168] Additionally, the statutes are effective only *inter partes* and are not capable to oblige third parties standing outside of the company.[169]

5.1.4 Light behind the Clouds; Theoretical Possibility?

Above the scope of the obligatory content of the statutes[170], it is possible for them to contain facultative elements capable to fully adjust to the needs of the joint stock company in question. In order to answer the main question a further assessment has to be done.

The relationships governed by the Section 261(3)(a) of the Commercial Code[171] are regarded as the absolute business obligations. This means that these business obligations are to be governed by the provisions of Commercial Code[172] regardless of their nature, nature of the parties and irrespective of origin of the obligation in question.

However, the Commercial code does not contain a provision which would allow the parties to agree upon the local competence. Therefore, we have to take into consideration the provisions of the CPC. Following the Section 89a of the Code,[173] the prorogation of local competence is only possible in commercial cases unless the rules on exclusive competence apply. As mentioned in the previous section[174] the commentary to the CPC is referring, in matter of commercial cases, to the Section 9 of

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[167] *E.g.,* petition the competent court in order to nullify a resolution of the general meeting.
[168] *Černa, S.,* Obchodní právo, Akciová Společnost. 3. Díl, Praha: ASPI, 2006, p. 54.
[169] *Ibid.* p. 54.
[170] Principally Section 173 of the Act No. 513/1991 Coll., as subsequently amended.
[171] Irrespective of the nature of the parties, this Part of the Code regulates relationships of obligations (contractual obligations): (a) between the founders (promoters) of business companies, and between a member (partner) and a business company (partnership), as well as between the members (partners) themselves, if these obligations concern participation in the company or if they arise from contracts under which a member's (partner's) ownership interest (business share or holding) is transferred. *In:* COMMERCIAL CODE "Obchodní zákoník", Act No. 513/1991 Coll., as subsequently amended, Translation and Commentary by Tradelinks, TRADELINKS, August 2005, p. 354.
[172] And by virtue of Section 1(1) and 1(2) of the Commercial Code.
[173] The parties to proceedings involving a commercial case (matter) may agree in writing to the local competence of another court of first instance, unless the law stipulates exclusive competence.. Such an agreement must be distinguished from *prorogatio fori* under Section 37 of the Act on Private and Procedural International Law - No 97/1963 Coll., as subsequently amended.
[174] Section 3.2. *Prorogatio fori* under the CPC.

the CPC which governs the subject-matter competence.

At this stage I would like to focus on those provisions of the Section 9(3) of the CPS which are, in my opinion, relevant to the raised question. Due to the fact that matters related to the statutes represent one of the central issues of a joint stock company, the attention will be paid to the subject-matter competence of regional courts.

First of all, the regional courts are competent to adjudicate in matters related to the legal status of business companies, co-operatives and other legal entities under the First, Second and Fourth part of the Commercial Code.[175] The scope of this provision covers matters related to the core issues of corporate bodies mainly the fundamental features of operation of legal persons (e.g. questions regarding the legal form, partners, statutory and other organs, winding up of a legal person, etc.)[176] If this provision would prove inappropriate it is suitable to consider the residual category provided by the Section 9(3)(g) of the Code. It follows that the regional courts are competent settle disputes stemming from legal relationships between the business companies and the founders (partners or members) thereof, as well as in mutual disputes between the partners (members or founders) as for relationships concerning participation in the company (membership in the co-operative)….if the competence under letter (b) is not given. This provision creates a residual category of disputes regarding the legal relationship concerning the internal circumstances of corporate bodies which are not covered by Section 9(3)(b).

In my opinion, the combined reading of the Section 89a and the Section 9(3)(g) does not *a priori* preclude the validity of incorporation of a choice-of-court clause into the statutes of a joint stock company. The scope of the Section 89a is quite wide and it could permit the presence of a prorogation agreement, with respect to the local competence, in the statutes of a company in relation to disputes under Section 9(3)(g) of the CPC.

5.1.5. One Way to Go; Shareholders Agreement

The truth is that the statutes of the joint stock company, under Czech law, do not frequently contain a choice-of-court clause. Or if so, it is very rare. One of the reasons

[175] Part two of the Commercial Code includes the provisions governing joint stock companies.
[176] *Bureš, J., Drápal, L., Krčmář, Z. a kol.* Občanský soudní řád, Komentář. I. díl. 7. vydání. Praha : C.H.Beck, 2006, p. 32.

may be the ambiguity as to the position of the courts in this respect.

Nevertheless, if the shareholders of a particular company wish to regulate their rights and duties more in detail, one way how to resolve this problem is to incorporate such clause into a shareholders' agreement. Even the legal practice shows that this solution is very viable.[177] However, the Commercial Code does not contain special provisions, which would govern the shareholders agreement as a particular type of a contract. Therefore, if the parties purport to arrange their rights and obligation by means of a shareholders' agreement they should follow the Section 269(2) of the Commercial Code and conclude an *innominate contract.*

The created rules, as a subject-matter to the shareholders agreement, are subsequently resulting into an agreement of the shareholders regardless of the majority of shares. This certainly does not leave behind the minority shareholders and certainly creates balanced insider environment.

The other way to go is to use the possibility of alternative dispute resolution and agree upon the arbitration clause incorporated into the shareholders agreement. Truthfully, this is probably the most frequently used tool. The efficiency and swiftness of this solution are the reasons which make the arbitration more favorable than the services of judiciary. For example the overall statistics of the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic show significant increase in alternative dispute resolution. While in the year 2000 the Arbitration Court reports 192 cases, in 2008 it is 1402 decided cases.[178]

5.1.6. Solution?

Ultimately, it is for the national court to examine, whether or not a choice-of-court clause fulfills the requirement provided by the law. This is true with respect to both lanes, whether the one containing an international implication or the intrastate one.

The former requires giving precedence to the EC law due to the doctrine of supremacy and application priority thereof. Therefore, the Czech court has to follow the interpretation of the ECJ reached in the *Powell Duffryn* case with respect to Article 17 of the Brussels Convention 1998.

[177] *E.g.* shareholders agreements containing the forum selection clause are frequently used in joint ventures.
[178] *Source*: www.arbcourt.cz.

The latter requires an agreement[179] of the participants of the proceedings. Hence, it would be up to the court to examine the binding effect of such clause. Especially in a situation where one of the parties to the proceedings would raise an objection against the local competence and would prove its contrary vote to the acceptance of the prorogation agreement. As mentioned above, it is not unusual that the majority shareholder is capable to push through the choice of court clause to the exclusion of minority shareholders and consequently such provision of statutes may not be in essence considered as an agreement.

Moreover, the alternative afforded to the shareholders by virtue of the shareholders agreement is rather sufficient, but it creates an obligation only between the shareholders, which consequently does not cover the relationship of the shareholders and the company.

Therefore, the choice-of-court clause embodied in the statutes of a joint stock company comes, in my opinion, as the most viable solution.

5.2. Weak Parties and *Forum Prorogatum*

Notwithstanding the appearance of a choice-of-court clause in a certain contracts there are several situations covered by the Brussels I. Regulation, which are capable to disregard its legal effectiveness.

Protection of weaker parties (*e.g.* in consumers, employees or insurance disputes) is generally recognized throughout the Brussels I. Regulation. Due to their delicate position, these specific categories of persons are afforded a wider range of protection capable of safeguarding their rights in dealings with co-contractors.

The Brussels I. Regulation neither outlaws the possibility to agree on jurisdiction nor excludes the presence of a choice-of-court clause in these types of contracts. However, the be excluded therewith, is to have exclusive jurisdiction by virtue of Article 22. However, it shall not be put out of mind that Articles 13(1), 17(1) and 21(1) do not prohibit the parties to validly enter into an agreement conferring jurisdiction after the dispute has arisen. The reasoning behind is that it is assumed that by entering into an agreement conferring jurisdiction after the dispute has arisen, the weak party is capable

[179] The Section 89a of the CPC provides that the parties to proceedings involving a commercial case (matter) may agree in writing to the local competence of another court of first instance, unless the law stipulates exclusive competence.

to presume both the choice of particular forum and consequences of such selection. Evidently, in cases of insurance, consumer or employment contracts, the agreements conferring jurisdiction, concluded prior to the litigation, will not have legal effect.

In matters falling within the scope of Article 22, the rules on exclusive jurisdiction are not providing the parties with the possibility to agree on the jurisdiction after the initialization of the proceedings. Hence any jurisdictional agreements in this respect will be deemed invalid.

Conclusively, the forum-selection agreements in weak party disputes require conformity with the Articles 13, 17, 21 and 22, accompanied with the fulfillment of the formal requirements laid down in Article 23.

To conclude, it is possible to have a valid and legally effective agreement conferring jurisdiction as long as it tends to positively affect the rights of consumers, employees or insured. It is not, however, forbidden to provide them with preferably greater range of possibilities, others than provided by the Brussels I. Regulation. In situations other than those listed by Article 23(5), the Brussels I. Regulation does not restrict the effect of a jurisdiction agreement.[180]

6. Forum Shopping, Italian Torpedo and Related Matters

6.1. Forum Shopping

Forum shopping represents a technique, where the plaintiff considers international jurisdiction of several courts in order to reach the most favorable outcome of the dispute resolution. This process, especially in common law countries, balances *e.g.* the reputation of the judge(s), composition of jury *etc.*

Nowadays, the *forum shopping* does not appear as negative as in the past, especially in the context of EU where it is reasonable to predict a certain standard of the judicial proceedings within the Member States.[181]

[180] *Magnus/Mankowski,* Brussels I Regulation (2007), European Law Publishers, 2007, Art. 23, note 132.
[181] *Pauknerová, M.,* Evropské mezinárodní právo soukromé, 1. vydání. Praha : C.H.Beck, 2008, p. 137.

6.2. Italian Torpedo

Even if a party was attentive enough and included a choice-of-court clause into a contract, has not, by doing so, ensured that it will not first find itself having to contest proceedings in the courts of other Member State.[182] Truthfully, it is not rare that the jurisdiction of the courts of different Member State may collide over the same case.

In order to avoid concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States, the Brussels I. Regulation makes an effort to establish clear and effective mechanism for resolving cases of *lis pendens* and related actions.[183]

Therefore, where the proceedings involving same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until the jurisdiction of the court first seized is established. Consequently, if the jurisdiction of the court first seized is established, then any court other that the first seized shall decline its jurisdiction in favor of that court.[184]

By virtue of this Article, the first court seized is given the space to consider whether or not is given the jurisdiction. So far, so good. However, the time boundaries for the establishment of its jurisdiction are not set and this time span differs from one Member State to another. This, at first sight, innocent factor led to the development of a technique, purpose of which is to commence the proceedings in a Member State the courts of which are well known for their slowness. Let me introduce you the *"Italian torpedo."* This technique is not designed to commence the proceedings in order to win the case, but rather to gain time until the courts will decline jurisdiction.[185]

6.3. Gasser v. Misat[186]

The proceedings involved the Austrian company Gasser and the Italian company Misat. The Italian company Misat brought proceedings against Gasser before District Court in Rome[187] seeking the termination of a contract. Consequently, Gasser brought

[182] *Peel, E.,* Forum Shopping in the European Judicial Area – Introductory Report, University of Oxford, Faculty of Law, Legal Studies Research Paper Series, Working Paper No 39/2006, September 2006, p. 4.
[183] Recital 15 to the Brussels I. Regulation.
[184] Article 27 of the Brussels I. Regulation.
[185] *Bogdan, M.*, Talianske torpédo a nariadenie Brusel I., *In*: Komunitárne právo a súkromné právo členské štátu, Univerzita Mateja Bela v Banskej Bystrici, Právnická fakulta, Banská Bystrica, 2007, p. 86.
[186] Case 116/02, *Erich Gasser GmbH v. MISAT Srl,* [2003] ECR I-14693.
[187] Tribunale Civile e Penale, Rome, Italy.

an action against Misat before Regional Court in Austria[188] in order to obtain payment of outstanding invoices. Moreover, Gasser supported the jurisdiction of Austrian court on the basis of the place of performance of the contract[189] and a choice-of-court clause apparent on all invoices sent by Gasser to Misat, pointing out the established trade practices and usage between the parties.

Even though Misat never raised an objection with respect to the designation by virtue of choice-of-court clause it contested the existence of a choice-of-court clause and stated that, before the action was brought by Gasser in Austria, it has commenced proceedings before the Roman court in respect of the same business relationship.[190]

In December 2001 the Austrian court, decided of its own motion, pursuant to Article 21 of the Brussels Convention[191], to stay the proceedings until the jurisdiction of the Roman court has been established. Following this, Gasser appealed to the Oberlandesgericht in Innsbruck seeking declaration of jurisdiction of the Austrian Regional Court in Feldkirch.

The Oberlandesgericht used the preliminary ruling procedure and asked, above other questions, to what extent the slowness of legal proceedings in the Contracting State, where the court first seized is established, is liable to affect the application of Article 21 of the Brussels Convention.[192]

Gasser and the Government of United Kingdom suggested that the ECJ should recognize an exception to the Article 21, which would allow the second seized court to examine the jurisdiction of the first court seized where:

- The claimant used the Article 21 in bad faith, in order to block the proceedings before a court which enjoys the jurisdiction under the Brussels Convention, and
- The first court seized has not adjudicated its jurisdiction within reasonable time.[193]

On the other hand Misat and the Italian government argued that the applicability of the Article 21 may not be questioned notwithstanding the excessive duration of the proceedings.[194] Moreover the Commission pointed out that the Brussels Convention is

[188] Landesgericht Feldkirch, Austria.
[189] Article 5(1) of the Brussels Convention.
[190] Case 116/02, *Erich Gasser GmbH v. MISAT Srl,* [2003] ECR I-14693, para. 14.
[191] Now Article 27 of the Brussels I Regulation.
[192] Case 116/02, *Erich Gasser GmbH v. MISAT Srl,* [2003] ECR I-14693, para. 19.
[193] *Ibid.,* para. 63.
[194] *Ibid.,* para. 65.

based on mutual trust and on the equivalence of the courts of the Contracting States and establishes a binding system of jurisdiction which all courts are required to observe.[195]

The ECJ pointed out that the length of proceedings before the courts of the Contracting State does not constitute an exception which would cause the Article 21 not to be applicable.[196] Moreover, the court second seized whose jurisdiction has been claimed by virtue of choice-of-court clause must nevertheless stay the proceedings until the first court seized has declared that it has no jurisdiction.[197]

Hence, Misat successfully and legally managed to postpone the proceedings before the competent Austrian court, notwithstanding the choice-of-court clause establishing exclusive jurisdiction of the Austrian courts.[198]

The judgment of the ECJ in the case GASSER v. MISAT was subject to criticism, due to the fact that established the possibility to misuse the *lis pendens* rule in order to block the proceedings and consequently delay the judgment in case at hand.

6.4. Anti-suit Injunctions

One of the possibilities how to deal with the *"Italian torpedoes"* seemed to lay in the anti-suit injunctions issued by the court(s).

Anti-suit injunction is a remedy in the form of court order that prevents a particular person (other party) from commencing or continuing proceedings in another jurisdiction. The anti-suit injunction would be a useful tool in urgent cases and could be granted at special hearings.[199]

The ECJ was faced with this issue in the case *Turner v. Grovit*.[200] It has been logically contended that the anti-suit injunction would contribute to the attainment of the objectives of the Brussels Convention; *in concreto* minimizing the risk of conflicting decisions and the avoidance of multiplicity of the proceedings.

Even thought the ECJ balanced the pros and cones of the contended arguments, it pointed out that application of national procedural rules may not impair the

[195] *Ibid.,* para. 67.
[196] *Ibid.,* para. 71.
[197] *Ibid.,* para. 54.
[198] *Bogdan, M.*, Talianske torpédo a nariadenie Brusel I., *In:* Komunitárne právo a súkromné právo členské štátu, Univerzita Mateja Bela v Banskej Bystrici, Právnická fakulta, Banská Bystrica, 2007, p. 88.
[199] *Martin, E.A., Law, J.,* Oxford Dictionary of Law, 6th Edition, Oxford University Press, 2006, p. 274.
[200] Case C 159/02, *Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd, Changepoint SA,* [2004] ECR I-3565.

effectiveness of the Brussels Convention.[201] The allowance of anti-suit injunction would imply unlawful interference to the jurisdiction of Spanish courts. Moreover, it would give rise to the situations involving conflicts for settlement of which the Brussels Convention does not provide sufficient basis and furthermore there is still a possibility of facing contradictory injunctions.[202]

The clear message of the ECJ from the judgments in the cases *Gasser* and *Turner* is that the Court gives preference to the principle of mutual trust and the equivalence of the courts of the Member States which overweighs its willingness to prevent the misuse of the Article 27 of the Brussels I. Regulation.[203]

6.5. Forum non Conveniens

For a stake of consistency I consider it needful to briefly deal with the doctrine of *forum non conveniens.* The doctrine allows a court to decline jurisdiction over a case, so that the case may be tried in an alternative forum[204], *i.e.* there are objective factors to decline jurisdiction on the grounds that there is more appropriate forum for the trial.

The ECJ reviewed the compatibility of the doctrine of *forum non conveniens* with the provisions of the Brussels Convention[205] in the case *Owusu v. Jackson.*[206]

First of all, the starting points of the ECJ's assessment are the principles of legal certainty and predictability. Due to the fact that by allowing the court seized discretion as regards the question whether a foreign court would be more appropriate forum for the trial of an action, is liable to undermine both principles.[207]

Moreover, allowing the doctrine of *forum non conveniens* in the context of the Brussels Convention would not even undermine the legal protection of persons within the Community, but would affect the uniform interpretation of the jurisdictional rules contained therein.[208] Consequently, it was held that the doctrine of *forum non conveniens* was precluded under the provisions of the Brussels Convention.[209]

[201] *Ibid.,* para. 29.
[202] *Ibid.,* para. 30.
[203] *Bogdan, M.*, Talianske torpédo a nariadenie Brusel I., *In*: Komunitárne právo a súkromné právo členské štátu, Univerzita Mateja Bela v Banskej Bystrici, Právnická fakulta, Banská Bystrica, 2007, p. 89.
[204] *Martin A. E., Law, J.,* A Dictionary of Law, Sixth Edition, OXFORD UNIVERSITY PRESS, 2006, p. 230.
[205] *In concreto:* the Article 2 of the Brussels Convention.
[206] Case C-281/02, *Andrew Owusu v. N.B.Jackson, traiding as "Villa Holidays Bal-Inn Villas", Mammee Bay Resorts Ltd, Mamme Bay Club Ltd, The Enchanted Garden Resort & Spa Ltd, Consulting Services Ltd, Town & Country Resorts Ltd.,* [2005] ECR I-1383.
[207] *Ibid.,* para. 39-41.
[208] *Ibid.,* para. 42-43.
[209] *Ibid.,* para. 46.

6.6. Revision Needed

In April 2009 the Commission of European Communities issued the Green Paper on the review of the Brussels I. Regulation.[210] One of the declared purposed thereof is to improve the operation of the Brussels I. Regulation. Moreover, beside other issues, the Commission aims to strengthen the effect of prorogation agreement, in particular in the event of parallel proceedings. The text itself contains several propositions in this respect which are intended to initiate a further discussion.

First proposition is the exception to the *lis pendens* rule, *i.e.* the court designated in the choice-of-court clause would be able to deviate from its obligation to stay the proceedings. However, such solution increases the possibility of irreconcilable judgments.[211] The second solution affords the designated court a priority to determine its jurisdiction and requires any other court seized to stay the proceedings, until the former establishes its jurisdiction.

Third solution aims towards maintenance of the *lis pendens* rule and at the same time the court first seized would be given a temporal deadline to decide whether or not it has jurisdiction. Furthermore the courts would be under obligation to report each other the progress of the proceedings.[212]

The suitability of the proposed solutions or even several new ones will be definitely subject to further discussion. Undoubtfully, it is necessary to adopt such scheme which does not exhaust the national courts, either by time or by unnecessary bureaucracy and affords the parties the proper forum. Especially, in order to increase the standards of the judicial proceedings within the Member States.

[210] COM (2009) 175/F of 21/04/2009 GREEN PAPER ON THE REVIEW OF COUNCIL REGULATION (EC) No 44/2001 ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS.
[211] *Ibid.,* p. 5.
[212] *Ibid.,* p. 5.

7. Formulation of a Choice-of-court Clause

The physical formulation of a choice-of-court clause may be done quite easily and in different manners the consequences of which shall be discussed below. By gathering the pieces of knowledge from the preceding sections I would like give couple of examples of choice-of-court clauses and analyze their impact.

7.1. Mere Establishment of International Jurisdiction

1st Example: "*The parties hereby agree that any dispute arising out of, or in relation to, this contract shall be heard by Czech courts."*

This example establishes only the international jurisdiction of the Czech courts. Consequently the local competence will be determined in accordance with the provisions of the CPS. As mentioned above, even if the parties by virtue of their agreement establish the jurisdiction of the Czech court, but the requirements for local competence are not present or cannot be determined, it would be for the Supreme Court to decide which court is competent to hear and settle the dispute.[213]

7.2. Establishment of Local and Subject-matter Competence

2nd Example: "*The parties hereby agree that any dispute arising out of, or in relation to, this contract shall be heard by the District Court in Prague."*

Formulation of this clause establishes both the local and subject-matter competence of the court in Prague. However, the Section 37(2) of the IPPA expressly excludes the possibility of the parties to agree upon the subject-matter competence. Same conclusion may be reached with respect to the Article 23 of the Brussels I. Regulation, even though the impossibility of choice of the subject-matter competence is not expressly stipulated.[214]

The commentary to the IPPA provides a guideline in this respect. It regards the agreement as to the subject-matter competence invalid due to the breach of law, natheless without any endangerment of the rest of the prorogation agreement.[215]

Another issue connected with this exemplary clause is that it may not be ruled

[213] The ruling of the Supreme Court of the Czech Republic: R 50/2004, with reference to the Section 11(3) of the CPC.
[214] *See,* the reasoning of *Doležel, V., In:* Formulace prorogační doložky, Právní rádce, 2007, No. 12. Moreover, *Doležel* concludes that neither the IPPA nor CPC or Brussels I. Regulation allow to agree upon the subject-matter competence.
[215] *Kučera, Z., Tichý, L.,* Zákon o mezinárodním právu soukromém a procesním, Praha : Panorama, 1989.

out that the parties made a mistake with respect to the subject-matter competence and the case falls within the subject-matter competence of *e.g.* circuit court. Due to their unawareness it would mean that one of the multiple circuit courts in Prague is competent to hear and settle the dispute.[216] However, such choice with respect to the local-competence would be invalid on the grounds of uncertainty according to the Section 37 of the Civil Code.[217]

7.3. Derogation Agreement

For a stake of consistency I consider it needful to give likewise an example of the derogation clause:

3rd Example: *"The parties agree that for any disputes arising out of, or in relation to, this contract the jurisdiction of Czech courts shall be excluded."*

As mentioned in the preceding section,[218] the possibility of the parties to use a derogation agreement is linked with a degree of ambiguity and is in fact contradictory to the principles of the Brussels I. Regulation.

7.4. Proper Way?

4th Example: *"The parties hereby agree that any dispute arising out of, or in relation to, this contract shall be heard by a Court of Czech Republic, competence of which shall be determined according to the address Jihlava, Novákova 10."*

According to *Doležel*[219] this is the most suitable formulation. It establishes the international jurisdiction and local competence while at the same time does not intervene the subject-matter competence.

However, it should be noted that not all legal orders of the Members afford the parties with the possibility to establish the competence of the court.[220] Hence, in international disputes, it seems more desirable to evade the designation competence and establish only jurisdiction. Thereafter, the national law shall provide sufficient guidelines to determine the competency of the court.

[216] By analogy with: *Doležel, V.,* Formulace prorogační doložky, Právní rádce, 2007, No. 12.
[217] Act No. 40/1964 Coll., Civil Code, as subsequently amended.
[218] *See:* Section 4.5. Designating the Competent Court.
[219] *Doležel, V.,* Formulace prorogační doložky, Právní rádce, 2007, No. 12.
[220] *E.g.* in Slovakia the parties to the contract are not, by virtue of Slovak Civil Procedure Code, given the possibility to agree upon the territorial competence. The former Section 89a, governing the prorogation of territorial competence, of the Slovak Civil Procedure Code was effective until September 2004.

8. The Hague Convention on Choice-of-Court Agreements

While having in mind the scope of the thesis I consider it needful to make a reference to the Hague Convention on Choice of Court Agreements[221] (hereinafter the "Hague Convention"), concluded on June 30th, 2005. It regards the establishment of the uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matter as one of its principal aims, achievable throughout enhanced judicial cooperation.[222]

This multilateral treaty creates an international legal regime, governing and attempting to provide a greater certainty and effectiveness of the exclusive choice of court agreements concluded in civil or commercial matters[223] between the parties mostly involved in business-to-business (B2B) agreements and international dispute resolution.

The Hague Convention is designed to fulfill the needs of businesses by an effective and efficient dispute resolution, while compromising the differences of jurisdictional principles between the Contracting States. It will not, however, apply to the consumer agreements or employment contracts[224]. This limitation is being justified on the grounds of the existence of more specific international instruments, and national, regional or international rules, that claim exclusive jurisdiction for some of these matters.[225]

Moreover, it shall not apply to entirely domestic cases in which *"the parties are resident in the same Contracting State and…all other elements relevant to the dispute… are connected only with that State."*[226] Furthermore, the Article 2 provides a list of several additional exclusions from the scope of the Hague Convention, *e.g.* maintenance obligation, wills and succession, liability for nuclear damage, *etc.*

The exclusive choice-of-court agreement is defined as an agreement concluded by two or more parties designating the court(s) of one Contracting State in order to exclude the jurisdiction of any other court(s), unless otherwise agreed by the parties. However, the formal requirements set forth in the Article 3(c) have to be complied with.[227]

[221] Text available at http://www.hcch.net/index_en.php?act=conventions.text&cid=98.
[222] Preamble to the Hague Convention on Choice of Court Agreements.
[223] Article 1 of the Hague Convention on Choice of Court Agreements.
[224] Article 2(1)(a) and Article 2(1)(b).
[225] HCCH, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, Outline Hague Choice of Court Convention, 2008, p.1. Available at www.hcch.net .
[226] Article 1(2) of the Hague Convention on Choice of Court Agreements.
[227] Article 3(a) of the Hague Convention on Choice of Court Agreements.

Moreover an exclusive choice of court agreement is regarded as independent agreement if it forms part of a contract, validity of which cannot be contested solely on the grounds that the contract is not valid.[228]

Subject to certain exceptions[229] the Hague Convention formulates three basic rules:

- Primary jurisdiction of the court designed by the parties in an exclusive choice of court agreement to decide a dispute,[230]
- Upon the existence of an exclusive choice of court agreement, a court not chosen by the parties does not have jurisdiction and consequently shall suspend or dismiss proceedings to which an exclusive choice-of-court agreement applies[231], and
- Judgment given by the designated court must be recognized and enforced in the courts of other Contracting States[232] (meaning the other countries that are parties to the Hague Convention).

Notwithstanding the previous rules, the Hague Convention is providing, in Article 22, further option for the Contracting States. These are given the possibility to declare that their courts will recognize and enforce judgments given by courts of other Contracting states designated in a non-exclusive choice-of-court agreement.[233]

Apart from the foregoing, it is of the essence to consider the relationship of the Hague Convention with other international instruments (e.g. treaties in force for Contracting States), especially its relationship with the rules of a Regional Economic Integration Organizations, such as EU.

On 5 September 2008 the Commission presented the Proposal for a Council Decision on the signing by the European Community of the Hague Convention on Choice-of-Court Agreements.[234]

First of all, it should be borne in mind that the European Community is capable to act on behalf of the Member States in matters where the Member States transferred a part of their sovereign powers to the Community.

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[228] Article 3(d) of the Hague Convention on Choice of Court Agreements.

[229] *E.g.* In a situation where the exclusive choice of agreement is null and void or due to the lack of capacity to conclude such agreement under the law of the State of the court seized.

[230] Article 5 (1) of the Hague Convention; Moreover this court shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.

[231] Article 6 (1) of the Hague Convention on Choice of Court Agreements.

[232] Article 8 (1) of the Hague Convention on Choice of Court Agreements.

[233] Article 22(1) of the Hague Convention on Choice of Court Agreements.

[234] COM (2008) 538 final, Brussels 05.09.2008. PROPOSAL FOR A COUNCIL DECISION ON THE SIGNING BY THE EUROPEAN COMMUNITY OF THE CONVENTIONON CHOICE-OF-COURT AGREEMENTS.

According to Article 300 of the EC Treaty the European Community is afforded the prerogative to conclude agreements with one or more States or international organizations which shall be binding on the institutions of the Community and on Member States. Furthermore, the consent of the Member States is not required. Consequently, the international treaties concluded by the European Community are considered as legitimate source of EC law. Moreover, if there is a collision between a regulation (secondary legislation) and an international treaty concluded by the European Community, it is a conflict between the sources of EC law. Briefly, the application of international law prevails over the secondary EC legislation.[235]

To conclude, certain scholars consider the Hague Convention as viable document with remarkable potential, providing a greater certainty to businesses and global commerce. Currently 69 States, including European Community, are Members of the Hague Conference on Private International Law. So far, only Mexico has acceded to the Hague Convention, and no State has ratified it. If either the EC[236] or US ratify it (having already signed it), or a non-signatory State accedes to it, or another Hague member state signs and ratifies it, then the Hague Convention will enter into force.[237]

Undoubtedly, the ratification and accession processes require spacious considerations by the Contracting States, which may to some extent cause unwelcomed prolongation. However, upon the ratification by a sufficient number of Members it may become a promising tool in the commercial practice.

[235] *Pauknerová, M.,* Evropské mezinárodní právo soukromé, 1. vydání. Praha : C.H.Beck, 2008, p. 63.

[236] On 1 April 2009 the Czech minister of Justice signed the Convention on behalf of the European Community.

[237] *George, M.,* EC Signs Hague Choice of Court Convention, available at http://conflictoflaws.net/2009/ec-signs-hague-choice-of-court-convention, reasoning on the grounds of Article 31(1) of the Hague Convention on Choice of Court Agreements.

9. Heading Forward

At this stage, I would like to briefly point out the multiple amendments or more precisely revisions that are taking or are going to take place and will affect the enactment of the prorogation of jurisdiction. Due to the fact that the amendments are rather complex, thus will influence multiple sources of law and the relationships governed thereby, it is not off my intention to discuss them in an exhaustive way.

9.1. New Act on International Private and Procedural Law

Without any doubt, one of the most discussed topics with respect to the Czech legal order is the reform of justice.[238] Due to the fact that the recodification of private law will undergo fundamental changes the need to amend the IPPA was certainly required. The explanatory report to the new IPPA justifies its revision on the grounds of necessity, *i.e.* if the reform would deal with the civil, family, business or labor norms only, than the contemporary appearance of the IPPA would be outdated.[239]

Since the recodification of private law is a project of very wide range the legislator did not obey the observation of the erudite public, practicing lawyers and performed some modifications to the proposal to the new IPPA. Naturally, the provisions governing the prorogation of jurisdiction are also given a new glance.[240]

9.2. New Lugano Convention

As mentioned above[241] in 1988 the EFTA and EC Members State adopted a self-standing convention in order to create a comparable system to that provided by the Brussels Convention. These efforts led into adoption of the Lugano Convention 1988.[242]

Due to the fact that the Brussels Convention was replaced by the Brussels I. Regulation it was felt necessary to review 1988 Convention and bridge these two documents in order to create more flexible cooperation and to achieve the same level of circulation of judgments between the EU and EFTA Member States.

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[238] More information available at: www.reformajustice.cz.
[239] *See:* Explanatory Report to the Proposal of the Proposal to the Act on International Private and Procedural law, available at http://obcanskyzakonik.justice.cz/cz/zakon-o-mezinarodnim-pravu-soukromem/duvodova-zprava.html.
[240] In general, the possibility of the parties to establish, by virtue of a written agreement, the jurisdiction of the Czech courts is afforded by the Sections 85 and 86 of the Proposal to the new IPPA.
[241] *See:* The Chapter I. Historical background.
[242] Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters, LUGANO CONVENTION.

However, there has been a lot of polemics whether or not the European Community has exclusive or shared competence to conclude the new Lugano Convention. The answer to this question was provided by the ECJ which stated that the European Community has exclusive competence to conclude the new Lugano Convention.[243] Consequently the Council of the European Union approved the signing of the new Lugano Convention on behalf of the Community.[244]

The new Lugano Convention was signed on 30 October 2007 in Lugano, however it has not yet been ratified by all contracting parties. With respect to the European Community on 18th May 2009 the EC ratified the new Lugano Convention with the effect for all of the Member States, with the exception of Denmark. Its entry into force is expected on 1st January 2010.

Due to the fact that the Convention becomes a part of Community rules the Protocol 2 to the Convention affords the ECJ jurisdiction to give rulings on the interpretation of the provision of the Convention as regards the application by the courts of the Member States of the European Community.[245]

Moreover, with respect to Czech Republic, as not being a member of the former Lugano Convention 1988, it should be noted that the territorial scope of the new Convention extends towards the new EC Member States as well.

9.3. Revision of the Brussels I. Regulation

In April 2009 the Commission of European Communities issued the Green Paper on the review of the Brussels I. Regulation.[246] Its main purpose it to launch a broad consultation in order to improve the operation of the Regulation.

Even though, that the Regulation is being regarded as a highly successful instrument, the Commission emphasizes prospective improvement. The Green Paper points out several areas[247] where, according to the Commission, the Community

[243] OPINION 1/03 OF THE EUROPEAN COURT OF JUSTICE, PRESS RELEASE No 10/06.
[244] COUNCIL OF THE EUROPEAN UNION, Brussels, 10 September 2007, (OR. en), 12247/07, COUNCIL DECISION, on the signing, on behalf of the Community, of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[245] Protocol 2 to the new Lugano Convention, On the Uniform Interpretation of the Convention and on the Standing Committee, Preamble.
[246] COM (2009) 175/F of 21/04/2009 GREEN PAPER ON THE REVIEW OF COUNCIL REGULATION (EC) No 44/2001 ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS.
[247] *E.g.* Choice of court clauses, lis pendens rule, abolition of exequatur, provisional measures, establishment of autonomous concept of domicile within the Community, removal of obstacles to the free circulation of judgments.

legislation may become even better. In the words of Jacques Barrot , the the Vice-President of European Commission *"Time has come now to achieve a true free circulation of civil and commercial judgments within the EU. Abolishing the remaining obstacles will make it easier and speedier for citizens and business to have access to justice abroad. It will thus complete the European area of justice and profit the functioning of the internal market."*[248]

Indisputably, the Green Paper is providing promising guidelines of future development which are capable to strengthen the performance of the Regulation. However, the Green Paper is only the first step of the revision; the formal proposal is expected at the end of the year 2009.

9.4. Mutual Coexistence

At this stage it is necessary to shift the focus to the coexistence of these legal documents, with respect to the future regulation of the relationship containing international implication.

First of all, it is the relation between the national law of the Member States and the EC law. Due to the afforded application priority of EC law, by virtue of the doctrine of supremacy, it is the clearest one.

With respect to the relationship of the EU law and the Hague Choice of Court Convention, the answer is provided in the EC Treaty. Thereby, the European Community is afforded to conclude agreements with one or States or international organizations which shall be binding on the institutions of the Community and on Member States.[249] As previously mentioned, in case of a collision between a regulation and an international treaty concluded by the EC, it is a conflict between the sources of EC law, which is governed by the Section 300(7) of the EC Treaty. Briefly, the application of international law prevails over the secondary EC legislation.[250]

It remains, that upon the entry into force of the relevant sources of law, the prorogation of jurisdiction will be governed by the provisions of multiple legal documents. This might create the intended predictability as to the court competent to

[248] *See:* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/606&format=HTML&aged=0&language=EN&guiLanguage=en.
[249] *See:* The Article 300 of the EC Treaty.
[250] *Pauknerová, M.,* Evropské mezinárodní právo soukromé, 1. vydání. Praha : C.H.Beck, 2008, p. 63.

hear and decide the dispute and afford the parties with more effective tools to secure their legal rights and obligations. On the other hand, it is assumable that such triplicity may give rise to potential complicatedness. One way or the other it will be only the mutual co-existence of these legal document that will be provide the appropriate answers.

Conclusion:

The question of understanding the content and meaning of a particular legal act, embodying certain legal institutes, is essential for the realization of law. The issue of prorogation of jurisdiction represents only a partial institute resulting from the Brussels I. Regulation. Notwithstanding such partiality, Article 23 is being often labeled as one of the most important ones. Its significance is stemming from the governance of crucial aspect: freedom of the parties to, by means of an agreement, designate a competent court and partially create a secure and predicable area of their contractual relationship.

However, no legal act is able to predict and be adapted to presume entire situations which may occur during its legal force. Lawyers, in understandable protection of the interests of their clients, are often digging for escape routes which are not always decorous. For instance balancing multiple forums that are available for the dispute resolution that is rather wise than wrongful, or many times initiating proceedings in the courts of a Member State in order to simply gain more time.

It is not only the practice that may cause concerns. As pointed out in preceding sections, certain parts of the Article 23 are indeed doubtful. The subsequent examples shall illustrate certain ambiguities that stand out from the Article 23. First of all, it is the differences between the language versions of the Brussels I. Regulation, which may cause some degree of interpretational confusion. Furthermore, the form of international trade usage has been criticized due to its ambiguity which increases the uncertainty of predictability, as to whether or not a court seized will be able find the existence of the international trade usage. As to the changes of domicile, after the conclusion of jurisdiction agreement, the doctrine points out that it is doubtful whether the requirement of Article 23(1) must be met when the jurisdiction agreement was concluded or when court proceedings were initiated.[251]

The foregoing analysis of the prorogation of jurisdiction, within the meaning of Article 23 of the Brussels I. Regulation, was aimed to discuss the pros and cones of this legal institute while taking into consideration the opinions of respected scholars and decision making procedure of European Court of Justice. On one hand, there has been several, and often rightful, critiques raised. On the other hand, only by critique followed

[251] *Magnus/Mankowski,* Brussels I Regulation (2007), European Law Publishers, 2007, Art. 23, note 52.

by a discussion and legal writing balancing multiple viewpoints, it is possible to afford the subjects of the legal act desirable level of protection.

Furthermore, the issue was not only assessed from the perspective of EC law. Quite contrary. The issue of prorogation of jurisdiction was also considered from the point of national and international law, which may not be obeyed in this respect. It has been shown that the current usage of the relevant provisions of national legislation is fairly limited, due to the existence of prevailing supranational sources of law. Besides that, the regime afforded by the Hague Convention on Choice of Court Agreements is dependent on the ratification and accession of other Member States of the Hague conference of private international law. Upon the entry into force of these legal documents it is assumable to predict more efficient protection and legal regulation of this institute. However, the revisions and amendments that are taking or are going to take place are rather complex and their effect will be seen upon their entry into force. Even though several impacts may be theoretically presumed and assessed even today, it will be their mutual interplay that will provide sufficient answers.

Notwithstanding the objections raised and hopefully promising future for the legal regulation of the institute of prorogation of jurisdiction, I consider it as a very effective tool within the field of European Private International Law.

Abbreviations

Brussels Convention	- Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.
Brussels I. Regulation	- The Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
CPC	- Act No. 99/1963 Coll., the Civil Procedure Code, as subsequently amended.
EC	- European Community.
EC Treaty	- Consolidated versions of the treaty on European Union and of the Treaty establishing the European Community.
ECJ	- European Court of Justice.
EFTA	- European Free Trade Association.
Hague Convention	- Convention of 30 June on Choice of Court Agreements.
IPPA	- Act No. 97/1963 Coll., on International Private and Procedural Law, as subsequently amended.
Lugano Convention	- Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters.
Supreme Court	- The Supreme Court of the Czech Republic.

Bibliography

Doctrine

- ***Bogdan, M.,*** Concise Introduction to EU Private International Law, Europa Law Publishing, Groningen 2006.
- ***Clarkson and Hill,*** The Conflicts of laws, Third Edition, Oxford University Press, New York 2006.
- ***Craig and De Burca*****,** EU Law, Text, Cases, and Materials, Oxford University Press, 2007.
- ***Černá, S.,*** Obchodní právo. Akciová Společnost. 3. Díl, Praha: ASPI, 2006.
- ***Garner, B*****.,** Black's Law Dictionary, Seventh Edition, West Group Publishing, 1999.
- ***Kučera,Z.,*** Mezinárodní právo soukromé. 6 vydání. Brno : Doplněk, 2004.
- ***Magnus/Mankowski,*** Brussels I Regulation (2007), European Law Publishers, 2007.
- ***Martin A. E., Law, J.,*** A Dictionary of Law, Sixth Edition, OXFORD UNIVERSITY PRESS, 2006.
- ***Nietzshe, F.,*** - Die Götzen-Dämmerung - Twilight of the Idols, [1895] , Text prepared from the German original and translated by Walter Kaufmann and R.J. Hollingdale.
- ***Pauknerová, M.,*** Evropské mezinárodní právo soukromé. 1.vydání. Praha : C.H.Beck, 2008.
- ***Pelikánová, I.,*** Obchodní právo 1. Díl, Codex Bohemia, 1998.
- ***Stone P.,*** EU Private International Law: Harmonization of Laws, Edward Edgar Publishing, 2006.
- ***Reed Ch. and Angel J.,*** Computer Law, The law and Regulation of Information Technology, Sixth Edition, Oxford University Press, 2007.
- ***Terret, S.,*** Introduction to the Law of International Trade, Workbook 1, International Jurisdiction, University of Cambridge – Introduction to English and EU Law – *A Course by Correspondence with Tutoring*.
- ***Vaške, V.***, Přehled judikatury ve věcech civilního řízení s mezinárodním prvkem. ASPI, a.s., Praha 2006.

Commentaries and Explanatory Reports

- ***Bureš, J., Drápal, L., Krčmář, Z. a kol.,*** Občanský soudní řád, Komentář. I. díl. 7. vydání. Praha : C.H.Beck, 2006.
- ***Dědic, J. a kol.,*** Obchodní zákoník – Komentář, Prospektum, 1997.
- ***Kučera, Z., Tichý, L.,*** Zákon o mezinárodním právu soukromém a procesním. Praha : Panorama, 1989.
- ***Pokorný, M.,*** Zákon o mezinárodním právu soukromém a procesním. Komentář. 2 vydání. Praha: C.H.Beck, 2004.
- COMMERCIAL CODE "Obchodní zákoník", Act No. 513/1991 Coll., as amended, Translation and Commentary by Tradelinks, TRADELINKS, August 2005.
- Explanatory report to the Proposal of the new Act on International Private and Procedural law, available at www.reformajustice.cz.

Articles

- ***Bělohlávek, A.J.,*** Prorogace pravomoci soudů v majetkových sporech s mezinárodním prvkem a otázka vzájemnosti, Právní rádce, 2002, č.12.
- ***Bogdan, M.,*** Talianske torpédo a nariadenie Brusel I., *In*: Komunitárne právo a súkromné právo členské štátu, Univerzita Mateja Bela v Banskej Bystrici, Právnická fakulta, Banská Bystrica, 2007.
- ***Čech, P.***, Neslučitelnost českého obchodního práva s právem ES se dále prohloubila, Právní zpravodaj, 2007, č.2.
- ***Doležel, V.,*** In: Formulace prorogační doložky, Právní rádce, 2007, č. 12.
- ***Doležel, V.,*** Quo vadis prorogace?, *In:* COFOLA 2009: the Conference Proceedings, 1. edition. Brno : Masaryk University, 2009, ISBN 978-80-210-4821-8.
- ***George, M.,*** EC Signs Hague Choice of Court Convention, available at http://conflictoflaws.net/2009/ec-signs-hague-choice-of-court-convention.
- ***Kapitán, Z.,***Volba sudiště v soukromoprávních vztazích s mezinárodním prvkem. Časopis pro právní vědu a praxi, 2004, č.1.
- ***Kapitán, Z.,*** Uznání a výkon rozhodnutí podle nařízení Rady (ES) č. 44/2001. Právní forum, 2005, č.7.
- ***Knapová, J.,*** K prorogačním dohodám, Právní rádce, 2007, č. 7.
- ***Pauknerová, M.,*** Evropské mezinárodní právo soukromé a procesní – aktuální otázky, Právní rozhledy, 2003, č.8, v příloze Evropské právo.
- ***Pauknerová, M.,*** Mezinárodní civilní procesní právo po vstupu České republiky do EU – vybrané otázky, Právní rozhledy, 2004, č.9.
- ***Pauknerová, M.,*** Perspektivy mezinárodního práva soukromého a procesního v Evropské unii, Právník, 2005, č.12.
- ***Pauknerová, M.,*** Kolizněprávní úprava obchodních společností, Právní rozhledy, 2005, č.7.
- ***Peel, E.,*** Forum Shopping in the European Judicial Area – Introductory Report, University of Oxford, Faculty of Law, Legal Studies Research Paper Series, Working Paper No 39/2006, September 2006.
- ***Pelikánová, I.,*** Význam komunitárního práva pro právni praxi stále roste, Právní zpravodaj, 2007, č. 5.
- ***Rozehnalová, N.,*** Určení fóra a jeho význam pro spory s mezinárodním prvkem, Bulletin Advokacie, 2005, č.4.
- ***Rozehnalová, N.,*** Nařízení 44/2001, o příslušnosti a uznávání a výkonu soudních rozhodnutí v občanských a obchodních věcech. Charakteristika, vztah k jiným normám, rozsah, působnost. Právní forum, 2005, č.3.
- ***Rozehnalová, N.,*** Nařízení 44/2001, o příslušnosti a uznávání a výkonu soudních rozhodnutí v občanských a obchodních věcech. Pravomoc výlučná, pravomoc dohodnutá a podřízení sa zahájenému řízení. Právní forum, 2005, č.6.
- ***Simon, P.,*** Problematické určení časové působnosti Nařízení Brusel I. v rozhodnutích Nejvyššího a Ústavního soudu, Právní Rozhledy, č. 13/2007.
- ***Valdhans, J., Pavlová, B.,*** Speciální pravomoci podle Nařízeni Rady ES č.44/2001/ ES. Právní forum, 2005, č. 5.
- ***Trooboff, P.,*** Choice-of-Court Clauses, The National Law Journal, January 19, 2004.

EC Primary Legislation

- OJ 2006, C 321 E/1, CONSOLIDATED VERSIONS OF THE TREATY ON EUROPEAN UNION AND OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY.

EC Secondary Legislation

- The Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *Text see*: *Official Journal L 012, 16/01/2001 P. 0001 – 0023*.
- EC Directive 2001/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ EC 2000 L 172/1.

Opinions of the European Court of Justice

- OPINION 1/03 OF THE EUROPEAN COURT OF JUSTICE, PRESS RELEASE No 10/06: T.

European Commission

- COM (2009) 175/F of 21/04/2009 GREEN PAPER ON THE REVIEW OF COUNCIL REGULATION (EC) No 44/2001 ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS.
- COM (2008) 538 final, Brussels 05.09.2008. PROPOSAL FOR A COUNCIL DECISION ON THE SIGNING BY THE EUROPEAN COMMUNITY OF THE CONVENTIONON CHOICE-OF-COURT AGREEMENTS.

Council Decision

- COUNCIL OF THE EUROPEAN UNION, Brussels, 10 September 2007, (OR. en), 12247/07, COUNCIL DECISION, on the signing, on behalf of the Community, of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Protocols

- Protocol On The Position Of The United Kingdom And Ireland On Policies In Respect Of Border Controls, Asylum And Immigration, Judicial Cooperation In Civil Matters And On Police Cooperation.
- Protocol on the Position of Denmark.

Table of Cases

- Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nderlandse Administratie der Belastingen,* [1963] ECR 1.
- Case 6/64, *Flaminio Costa v. ENEL,* [1964] ECR 585, 593.
- Case 34/73, *Variola v. Amministrazione delle Finanze,* [1973] ECR 981.
- Case 24/76, *Estasis Salotti di Colzani Aimo and Gianmario Colzanie v. RUEWA Polstereimaschinen GmbH,* [1976] ECR 1831.
- Case-C 25/76, *Galeries Segoura SPRL v. Societe Rahim Bonakdarian,* [1976] ECR 1851.
- Case 29/76, *LTU Lufttransportunternehnem GmbH & Co. KG v. Eurocontrol,* [1976] ECR 1541.
- Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthlas Spa,* [1978] ECR 629.
- Case C-25/79, *Sanicentral v. Collin,* [1979] ECR 3423.
- Case 66/80, *International Chemical Corporation v. Amministrazione delle Finanze dello Stato,* [1981] ECR 1191.
- Case C – 150/80, *Elefanten Schuh GmbH v. Pierre Jacqmain*, [1981] ECR 1671.
- Case C-38/81, *Effer v. Kantner,* [1982] ECR 825.
- Cases C-34/82, *Peters v. ZNAV,* [1983] ECR 987.
- Case C-45/83, *Ludwig-Maximilians-Universität München v. Hauptzollamt München-West,* [1984] ECR 00267.
- Case-C71/83, *Partenreederei MS "Tilly Russ" and Ernst Russ v. NV Haven & Vervoerbedrijf Nova and NV Goeminne Hout*, [1984] ECR 2417.
- Case 221/84, *F. Berghoefer GmbH & Co. KG v. ASA SA*, [1985] ECR 2699.
- Case C – 45/86, *Commission v. Council,* [1987] ECR 1493.
- Case C- 214/89, *Powell Duffryn plc v. Wolfgang Petereit,* [1992] ECR I-1745.
- Case C - 325/91, *France v. Commission,* [1993] ECR I – 3283.
- Case C-125/92, *Mulox v. Geels,* [1993] ECR I-4075.
- Case C- 172/91, *Volker Sonntag v. Hans Waidman, Elisabeth Waidmann and Stefan Waidmann,* [1993] ECR I-1963.
- C-288/92*, Custom Made Commercial v. Stawa Metallbau,* [1994] ECR I-2913.
- Case C-106/95, *Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL,* [1997] ECR I-00911.
- Case C-269/95, *Francesco Benincasa v. Dentalkit Srl,* [1997] ECR I-3767.
- Case C-159/97, *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA,* [1999] ECR I-1597.
- Case C- 387/98, *Coreck Maritime GmbH v. Handelsveem BV,* [2000] ECR I-9337, I-9372.
- Case C-116/02, *Erich Gasser GmbH v. MISAT Srl.,* [2003] ECR -14693.
- Case C 159/02, *Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd, Changepoint SA,* [2004] ECR I-3565.
- Case C-281/02, *Andrew Owusu v. N.B.Jackson, traiding as "Villa Holidays Bal-Inn Villas", Mammee Bay Resorts Ltd, Mamme Bay Club Ltd, The Enchanted Garden Resort & Spa Ltd, Consulting Services Ltd, Town & Country Resorts Ltd.,* [2005] ECR I-1383.

International Conventions and Protocols

- Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, BRUSSELS CONVENTION.
- Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters, LUGANO CONVENTION.
- Protocol 2 to the new Lugano Convention, On the Uniform Interpretation of the Convention and on the Standing Committee, Preamble
- Convention of 30 June 2005 on Choice of Court Agreements, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW. Text available at: www.hcch.net

National Legislation

- Act No. 1/1993 Coll., the Constitution of the Czech Republic, as subsequently amended
- Act No. 97/1963 Coll., on International Private and Procedural Law, as subsequently amended
- Act No. 99/1963 Coll., the Civil Procedure Code, as subsequently amended
- Act No. 513/1991 Coll., the Commercial Code, as subsequently amended
- Act No. 40/1964 Coll., the Civil Code, as subsequently amended

Rulings of the Supreme Court of the Czech Republic

- The ruling of the Supreme Court of the Czech Republic: R 37/1997
- The ruling of the Supreme Court of the Czech Republic: 29 Cdo 2024/200-43
- The ruling of the Supreme Court of the Czech Republic: R 50/2004
- The ruling of the Supreme Court of the Czech Republic of 27.10.2005, sp. zn. 29 Odo 425/2005
- The ruling of the Supreme Court of the Czech Republic, 32 Odo 183/2006 with reference to the rulings dated 28.05.1997, sp. zn. 1 Odon 39/97, and ruling dated 21.02.2007, sp.zn. 29 Odo 22/2006

UNIVERZITA KARLOVA V PRAZE
Právnická fakulta
Katedra obchodního práva

TÉZY DIPLOMOVEJ PRÁCE

Meno študenta:

Matúš Sura

Názov práce:

Prorogation of jurisdiction within the meaning of the Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Vedúci diplomovej práce:

JUDr. Bc. Jan Brodec, PhD., LL.M.

Európske právne systémy vo všeobecnosti rozpoznávajú zmluvnú slobodu strán, ktorá zo sebou prináša slobodnú voľbu vstupovania do, upravovania, ako aj uzatvárania vzájomných zmluvných záväzkov. Vďaka tomu je fyzickým a právnickým osobám ponúknutá možnosť voľby. Voľba, ktorá v sebe zahŕňa slobodné rozhodnutie či vôbec určitú zmluvu uzatvoriť a v prípade, že áno, tak s kým. Na viac, je zmluvným stranám poskytnutá možnosť rozhodovať o obsahu svojich perspektívnych zmluvných záväzkov. Avšak, každá poskytnutá sloboda nie je bezhraničná a je spojená s nevyhnutou dávkou zodpovednosti.

V súčasnej dobe nie je nezvyčajné, že zmluvné strany, po prípade ich právny zástupcovia, zakomponujú do zmluvy aj ustanovenie zakladajúce medzinárodnú právomoc súdov určitého štátu, po prípade aj určenie, ktorý súd bude príslušný prejednať ich prípadný spor a rozhodnúť následne vo veci. Napriek tomu, že je relatívne ľahké takéto ustanovenie do zmluvy začleniť, sú to práve jeho následky, ktoré sú omnoho závažnejšie a vyžadujúce pozornosť.

Existuje mnoho dôvodov, pre ktoré si zmluvné strany upravia voľbu právomoci súdu. V prvom rade to môže byť snaha zvýšiť predvídavosť strán v podobe istoty súdu určitého štátu, ktorý, pre prípad nezrovnalostí v ich zmluvnom vzťahu, bude kompetentný vyriešiť prípadnú nezhodu. Ďalším dôvodom môže byť zaistenie určitosti resp. jasnosti vzhľadom na súd príslušný vo veci jednať a rozhodovať. Cieľom zmluvných strán môže byť aj snaha o zníženie poplatkov spojených so súdnym konaním, minimalizácia rizika korupcie alebo iných nežiaducich vplyvov. Ako ďalší z možných dôvodov prichádza do úvahy voľba právneho poriadku štátu, ktorý účastník konania dobre pozná[252] a tým pádom je schopný efektívnejšie hájiť svoje práva, po prípade využívať túto svoju znalosť vo svoj prospech.

[252] *Knapová, J.,* K prorogačním dohodám, Právní rádce, 2007, č. 7.

Prostredníctvom mojej diplomovej práce by som sa chcel zamerať na problematiku ujednania o voľbe právomoci súdu, obsiahnutú v Oddiely 7. Nariadenia Rady (ES) o právomoci a o uznávaní a výkone rozsudkov v občianskych a obchodných veciach[253] (ďalej len ako „"Nariadenie Brusel I).

Ako bolo naznačené, kým samotná voľba súdu je predmetom ujednania zmluvných strán, článok 23 Nariadenia Brusel I. upravuje podmienky voľby vrátane predpokladov, ktoré musia byť splnené za účelom zabezpečenia platnosti tejto voľby.

Je potrebné pamätať na to, že síce Nariadenie Brusel I a jeho článok 23 predstavujú východzí právny rámec úpravy prorogácie, je to práve Európsky súdny dvor (ďalej len ako "ESD"), ktorý hrá rovnako významnú úlohu v tejto oblasti. Konkrétne ide o odstraňovanie nejasností medzi interpretáciou a aplikáciou príslušného ustanovenia, teda v našom prípade článku 23.

Problematika ujednania o voľbe súdu reprezentuje iba parciálny inštitút upravovaný Nariadením Brusel I. Napriek tomu, je však článok 23 často krát označovaný ako jeden z najdôležitejších. Jeho význam spočíva aj v tom, že upravuje práve slobodu zmluvných strán, prostredníctvom vzájomného súhlasu, označiť príslušný súd a tým vytvoriť dostatočne bezpečný a predvídateľný priestor ich vzájomného zmluvného záväzku.

Je potrebné uviesť, že diplomová práca nebude pojednávať o voľbe právomoci len s pohľadu európskeho práva, aj keď jej gro je tvorené práve právom európskym. V dôsledku toho, budú zohľadnené aj ustanovenia medzinárodného práva ako aj práva národného. Zároveň bude predostreté aj vzájomné prepojenie týchto prameňov práva.

Cieľom diplomovej práce nie je len predstaviť resp. uviesť do problematiky ujednania o voľbe právomoci súdu. Práve naopak. Pri spracovaní diplomovej práce sa chcem venovať resp. načrtnúť akými spôsobmi sa prax vyrovnáva s určitými vybranými problémami spojenými s voľbou právomoci súdu, ako aj perspektívnemu vývoju v tejto oblasti. Na druhej strane, som si zároveň vedomý toho, že rozsah diplomovej práce neumožňuje pojať túto v skutku zaujímavú problematiku komplexne a preto niektoré, aj keď veľmi zaujímavé otázky budú bohužiaľ obsiahnuté len okrajovo.

[253] Nariadenie Rady (ES) č. 44/2001z 22. Decembra 2000 o právomoci a o uznávaní a výkone rozsudkov v občianskych a obchodných veciach. Text: : *Official Journal L 012, 16/01/2001 P. 0001 – 0023.*

Dôvodom pre výber diplomovej práce bol predovšetkým záujem o obor európskeho medzinárodného práva súkromného a procesného, nakoľko sa jedná o jedno z najviac rozvíjajúcich sa právnych odvetví v rámci európskeho práva.

V súčasnej Európe dochádza často krát k uzatváraniu obchodov, nákupom a predajom tovaru, poskytovaniu služieb medzi subjektmi pochádzajúcimi s rôznych členských štátov. Práve táto prepojenosť si vyžaduje flexibilnú a účinnú právnu úpravu, ktorá nekladie zbytočné bariéry a dokáže pohotovo reagovať na potreby business-u. Sú to práve právne vzťahy s medzinárodným prvkom, ktoré v záujme tohto rozvoja musia byť prepracovane a upravené právnou normou tak, aby zefektívnili jeho priebeh.

Významným spôsobom k môjmu záujmu o predmetný obor prispel aj môj pobyt na University of Lund vo Švédsku, kde pod vedením pána Prof. Michaela Bogdana som mal tú možnosť oboznámiť sa s týmto právnym odvetvím. Na viac, vďaka tomuto pobytu som mal možnosť sa detailnejšie, v rámci absolvovaných kurzov, zoznámiť s európskym právom, ktoré ma v skutku veľmi oslovilo.

Úvod diplomovej práce je tradične venovaný predstaveniu predmetu diplomovej práce v širšom slova zmysle. Teda problematike ujednania o voľbe súdu, ktorej definícia bude na úvod podaná. Následne bude v krátkosti načrtnutý obsah diplomovej práce, resp. stručné predstavenie jednotlivých kapitol, so zameraním sa na ich obsah. Snahou je nepochybne uviesť čitateľa do problematiky a opísať o čom bude pojednávané v nadchádzajúcich kapitolách.

Prvá kapitola diplomovej práce si kladie za cieľ predstaviť a oboznámiť čitateľa s krátkym historickým vývojom, ktorý vyústil do súčasnej podoby článku 23 Nariadenia Brusel I. Je potrebné upozorniť na to, že sa nejedná o vyčerpávajúci výklad všetkých udalostí, ktoré predchádzali dnešnému článku 23. Cieľom je jednak predstaviť historický a nemenej známy Bruselský dohovor (1968) o súdnej právomoci a výkone rozhodnutí v občianskych a obchodných veciach (ďalej len ako "Bruselský dohovor").[254] Je nepochybné, že sa jedná o dokument kľúčového významu, ktorý je mnohými akademikmi označovaný za veľký úspech.

Je potrebné zdôrazniť, že rozsudky, ktoré boli vyslovené vo vzťahu k Bruselskému dohovoru sú dodnes používané a výklad ESD v nich podaný zostáva naďalej významným vodítkom pri interpretácii a aplikácii Nariadenia Brusel I.

Na viac, aj samotné Nariadenie Brusel I. sa otvorene prihlasuje k zabezpečeniu kontinuity výsledkov dosiahnutých Bruselským dohovorom.[255] Navyše, článok 68(1) Nariadenia Brusel I. vyslovene stanoví, že toto nariadenie nahrádza medzi členskými štátmi Bruselský dohovor. Pozornosť bude nepochybne venovaná aj článku 17 Bruselského dohovoru, z ktorého súčasný článok 23 vychádza.

Nakoľko nie všetky štáty starého kontinentu sú členskými štáty Európskeho Spoločenstva kapitola pojednáva aj o paralelnom Luganskom dohovore (1988)[256], ktorý vytvára obdobný právny rámec pre členské štáty Európskeho Združenia Voľné Obchodu (ďalej len ako "EZVO"). Keď porovnáme predmetné dohovory, je na prvý pohľad jasné, že sú si v mnohom podobné. Táto podobnosť môže byť pripisovaná úmyslu vytvoriť systém pravidiel porovnateľný s pravidlami obsiahnutými

[254] Dohovor zo 27. septembra 1968 o súdnej právomoci a výkone rozhodnutí v občianskych a obchodných veciach. BRUSELSKÝ DOHOVOR.
[255] Rovnako to platí aj pre LUGANSKÝ DOHOVOR.
[256] Dohovor zo 16. septembra 1988 o súdnej právomoci a výkone rozhodnutí v občianskych a obchodných veciach. LUGANSKÝ DOHOVOR.

v Bruselskom dohovore ako aj snahe prepojiť tieto dva dokumenty za účelom flexibilnej spolupráce medzi členskými štátmi Európskeho Spoločenstva a EZVO.

Následne je pozornosť sústredená na Nariadenie Brusel I. V prvom rade je to vymedzenie jeho právneho základu v Zmluve o založení ES. Ďalej bude pojednávané o špecifickom postavení určitých členských štátov, konkrétne Dánska, Írska a Veľkej Británie vo vzťahu k Nariadeniu Brusel I, nakoľko ich pozícia v tomto smere ovplyvňuje samotnú viazanosť týchto členských štátov Nariadením Brusel I.

Záverom kapitoly bude načrtnuté prepojenie a vzťah Bruselského dohovoru a jeho článku 17 so súčasným článkom 23 Nariadenia Brusel I.

V druhej kapitole je pozornosť venovaná prameňom práva predmetnej oblasti ako aj ich vzájomnej hierarchii. V dôsledku toho, že súčasné právne prostredie nie je založené na samostatne stojacich právnych normách, ale práve naopak na ich vzájomnom prepojení, súslednosti a prednosti, je dôležité na začiatku vymedziť tieto právne normy, s ktorými bude v priebehu diplomovej práce pracované.

Nakoľko Česká Republika je od 1.5.2004 plnohodnotným členom Európskeho spoločenstva (ďalej len ako "ES") je začiatok tejto kapitoly resp. jej prvá podkapitola venovaná práve jeho právnemu režimu. Pramene práva ES je možné v základe rozdeliť na právo primárne a sekundárne. Primárne právo tvorí predovšetkým Zmluva o Založení ES v konsolidovanom znení, teda v znení zmlúv, ktoré ju doplňujú, menia resp. revidujú. Sekundárne právo ES je potom tvorené nariadeniami, smernicami, rozhodnutiami, doporučeniami a stanoviskami. Diplomová práca sa snaží vyvarovať sa notoricky známym deleniam prameňov európskeho práva a preto sú spomenuté tie najdôležitejšie skutočnosti, predovšetkým s s relevanciou vo vzťahu k európskemu medzinárodnému právu súkromnému a procesnému.

Nedovolím si opomenúť ani kľúčovú doktrínu aplikačnej prednosti práva ES pred právom členských štátov spoločenstva, ako aj krátku charakteristiku jednotlivých prameňov práva ES. Zároveň bude pozornosť venovaná aj judikatúre ESD, ktorá, a to nielen vo vzťahu k Nariadeniu Brusel I., hrá významnú úlohu pri odstraňovaní rozporov medzi interpretáciou a aplikáciou príslušného prameňa práva ES. Ako už bolo spomenuté výklad podaný ESD predstavuje v tomto smere dôležité a neopomenuteľné vodítko.

Ďalšia časť druhej kapitoly resp. jej druhá podkapitola, obracia svoju pozornosť na pramene medzinárodného práva, nakoľko je to nielen právo ES, na ktoré je potrebné brať ohľad. V prvom rade bude predstavený vzťah medzinárodného práva a práva českého resp. aplikačná prednosť medzinárodných zmlúv vyplývajúca z Ústavy Českej Republiky.[257] Následne bude spomenutá významná medzinárodná organizácia pôsobiaca na poli medzinárodného práva súkromného - Haagska konferencia medzinárodného práva súkromného a jej Dohovor o dohodách o voľbe súdu z roku 2005. Je potrebné upozorniť, že ES sa dňa 3.4.2007 stalo členom Haagskej konferencie medzinárodného práva ako aj na to, že ES je signatárom Dohovoru o dohodách o voľbe súdu. O možnosti ES uzatvárať medzinárodné zmluvy a tým zaväzovať samotné členské štáty bude detailnejšie pojednávané v ôsmej kapitole.

Predposledná, teda tretia, podkapitola si kladie za cieľ predstaviť právny základ prorogácie v národnom práve. Jednak to bude Zákon o medzinárodnom práve súkromnom a procesnom[258] (ďalej len ako "ZMPS") ako aj Občanský soudní řád[259] (ďalej len ako "OSŘ"). V dôsledku existencie prioritne uplatňujúcich sa prameňov práva európskeho a medzinárodného, si dovolím načrtnúť situácie, v ktorých dochádza k použitiu národného práva v rámci právnych vzťahoch obsahujúcich medzinárodný prvok.

V závere druhej kapitoly bude upozornené na určitú terminologickú nejednotnosť. V dôsledku toho, že oficiálne preklady jednotlivých smerníc a nariadení nie vždy terminologicky korešpondujú s terminológiou používanou v národných právnych predpisoch, upozorňujem a podávam vysvetlenie pojmov, ktoré by mohli spôsobiť čiastočné nedorozumenie.

[257] Ústava České republiky (č. 1/1993 Sb.), v znení neskorších predpisov.
[258] Zákon č., 97/1963 Sb., o mezinárodním právu soukromém a procesním, v znení neskorších predpisov.
[259] Zákon č., 99/1963 Sb. občanský soudní řád, v znení neskorších predpisov.

Tretia kapitola si kladie za cieľ posúdiť problematiku voľby právomoci resp. príslušnosti súdu z pohľadu českého práva. Jej snahou je predstaviť právny rámec úpravy právnych vzťahov s medzinárodným prvkom so zameraním na voľbu súdu resp. jeho právomoci vo veci jednať ako aj rozhodovať, s určitými obmedzeniami vo vzťahu k inštančnej príslušnosti.

Začiatok kapitoly je venovaný prorogácií z pohľadu Zákona o medzinárodnom práve súkromnom a procesnom, *in concreto* §37, ktorý pojednáva o právomoci českých súdov v majetkových veciach. Nakoľko termíny ako "právomoc českých súdov" ako aj "majetkové veci" resp. "majetkové spory" sú ústrednými termínmi §37, je potrebné bližšie objasniť ich význam. Komentáre k ZMPS ako aj judikatúra Najvyššieho Súdu Českej Republiky sú schopné priblížiť význam a obsah týchto termínov a preto bude pozornosť sústredená aj na tieto "výkladové pomôcky".

Predmetom nasledujúcich podkapitol je blížia analýza jednotlivých odstavcov §37.

Na úvod to bude §37 odst.1, ktorý zakladá právomoc českých súdov v majetkových sporoch pokiaľ je, podľa českých právnych predpisov, daná ich príslušnosť. Jedná sa o ustanovenie obecné, ktorého použitie prichádza do úvahy v prípadoch kedy ZMPS neobsahuje odlišnú úpravu právomoci v iných, zvláštnych, ustanoveniach.

Postupne sa dostávam k §37 odst. 2, ktorý umožňuje založiť právomoc českých súdov v majetkových sporoch písomnou dohodou strán. Takéto ujednanie je označované ako prorogačná doložka. Týmto spôsobom je stranám umožnené včleniť do ich zmluvného ujednania ustanovenie, ktoré bude zakladať právomoc českého súdu vo veci jednať a rozhodovať, samozrejme s obmedzeniami vyplývajúcimi zo zákona. Tým je predovšetkým myslená nemožnosť strán zasahovať do resp. meniť príslušnosť vecnú.

Ujednanie o príslušnosti cudzozemského súdu resp. vylúčenie právomoci českého súdu vo veci jednať a rozhodovať je upravené §37 odst.3. V tomto prípade sa jedná o tzv. derogačnú doložku. Pozornosť bude sústredená aj na zaujímavý výkladový problém predmetného odstavca, ktorý navádza k záveru, že ujednanie o príslušnosti cudzozemskému súdu prichádza do úvahy len u právnických osôb.

Predmetom ďalšej podkapitoly bude právna úprava ujednania o súdnej

príslušnosti v zmysle ustanovení OSŘ a pozornosť bude venovaná aj vzájomnému prepojeniu ustanovení ZMPS a OSŘ.

Štvrtá kapitola sa sústreďuje na problematiku ujednania o voľbe právomoci súdu v zmysle Nariadenia Brusel I., *in conreto* jeho článku 23. V jej úvode zameriavam svoju pozornosť na otázky všeobecnejšieho charakteru. Dôvodom pre tento postup je skutočnosť, že na to aby bol dostatočne správne pochopený zmysel, obsah ako aj význam samotného článku 23 je potrebné v prvom rade objasniť základné princípy, na ktorých je založene resp. z ktorých vychádza Nariadenie Brusel I. Nemožno opomenúť ani pôsobnosť Nariadenia Brusel I., nakoľko článok 23 musí logicky korešpondovať s touto pôsobnosťou. Jedná sa o pôsobnosť jednak materiálnu, územnú, časovú ako aj osobnú, ktoré vymedzujú okruh realizácie ako aj aplikácie Nariadenia Brusel I. Zároveň bude upozornené aj na aplikačný problém Najvyššieho súdu Českej republiky vo vzťahu k časovej pôsobnosti Nariadenia Brusel I.

Následne bude predmetom popisu jeden z ústredných prvkov prorogácie a teda dohoda strán a požiadavka dostatočnej určitosti vo vzťahu k súdu, ktorého právomoc má byť založená.

Nasledujúca podkapitola si kladie za cieľ predstaviť vzťah a vzájomné prepojenie princípu právnej istoty resp. dostatočnej určitosti a ujednania o voľbe právomoci súdu.

Ďalšie podkapitoly sa venujú problematike spôsobov voľby súdu a jej následkom z pohľadu Nariadenia Brusel I. V prvom rade to bude tzv. explicitná prorogácia, kedy strany určia konkrétny súd (napr. Krajský súd v Prahe) po prípade sa priklonia k obecnejšiemu určeniu (napr. súd Českej republiky). Následne to bude možnosť strán určiť dohodou súd, ktorý sa však nachádza mimo územnej pôsobnosti Nariadenia Brusel I. teda v tzv. tretej krajine. Ako predposledná bude uvedené následky voľby súdu v súvislosti s derogačnou doložkou. V krátkosti je spomenutá aj možnosť podriadenia sa zahájenému konaniu v zmysle článku 24 Nariadenia Brusel I., ako aj podmienkam, ktoré musia byť pre tento špecifický postup splnené.

Na viac kapitola si kladie za cieľ analyzovať aj efekt spojený s voľbou právomoci súdu ako aj jej výlučnosť resp. nevýlučnosť. Následne bude pojednávane

o súhre resp. prepojení konceptu domicilu (*forum domicili*) a článku 23 Nariadenia Brusel I.

Postupne sa dostávam k formálnym náležitostiam samotnej prorogačnej doložky v zmysle článku 23. V tejto súvislosti budú v nadchádzajúcich častiach analyzované jednotlivé spôsoby akými je možne prorogačnú doložku uzatvoriť. Pozornosť bude venovaná nielen spôsobom ako takým, ale aj judikatúre ESD, ktorá vysvetľuje obsah týchto pojmov vo svetle prípadov resp. predbežných otázok, ktoré národné súdy referovali ESD. Ako bude preukázané, terminológia resp. používané pojmy nie sú úplne jednoznačné a je to práve judikatúra ESD, ktorá napomáha k objasneniu ich významu a zároveň kladie medze ich výkladu.

V prvom rade to bude možnosť uzatvorenia prorogačnej doložky písomnou formou. Upozornené bude aj na to, že písomnosť formy je vnímaná v členských štátoch rôznym spôsobom. Nato, bude pojednávané o situáciách kedy dohoda o voľbe právomoci súdu musí byť písomne potvrdená. Ďalšou formou, ktorá prichádza do úvahy je forma, ktorá je v súlade s praxou, ktorú medzi sebou zaviedli účastníci zmluvy. Postupne sa dostanem k forme, v medzinárodnom obchode, ktorá je v súlade so zvyklosťami, ktoré sú alebo majú byť účastníkom zmluvy známe, a ktorá je v takomto obchode dobre známa a pravidelne dodržiavaná účastníkmi, ktorí uzatvorili zmluvu typickú pre daný obchodný vzťah.

Pozornosť bude ďalej venovaná aj možnostiam, ktoré vo vzťahu k dohodám o voľbe právomoci súdu prináša elektronická komunikácia. Keďže súčasné, a nielen právne, prostredie sa nezaobíde bez prostriedkov elektronickej komunikácie, Nariadenie Brusel I. považuje komunikáciu elektronickou cestou, pokiaľ poskytuje trvalý záznam o dohode , za písomnú.

Záver tejto kapitoly je venovaný stručnému zhrnutiu náležitostí, ktoré by mali strany dodržať v prípade ak chcú zaistiť platnosť prorogačnej doložky.

Piata kapitola prináša detailnejšiu analýzu mnou vybraných situácii. Jedná sa o špecifické prípady, ktoré jednak boli predmetom rozhodovania ESD ale aj tých, ktoré priamo vyplývajú z ustanovení Nariadenia Brusel I. a priamo sa dotýkajú jeho článku 23.

V prvom rade je pozornosť zameraná na problematiku prorogačnej doložky obsiahnutej v stanovách akciovej spoločnosti. Predmetná časť si kladie za cieľ bližšie analyzovať rozsudok ESD vo veci *Powell Duffryn plc. v Wolfgang Petereit*,[260] kde ESD čelil práve otázke platnosti ujednania o voľbe súdu v stanovách akciovej spoločnosti. Bolo vyslovené, že právne poriadky jednotlivých členských štátov nahliadajú na stanovy akciovej spoločnosti rôznym spôsobom. Niektoré považujú vzťah založený stanovami ako vzťah zmluvný, kým iné naň nahliadajú ako na vzťah inštitucionálny, normatívny, po prípade *sui generis*. ESD zároveň vyslovil, že jednou z kľúčových otázok, ktorá musí byť zodpovedaná je práve otázka súladu ujednania o voľbe súdu s aplikovateľnými právnymi predpismi práva členského štátu.

Práve preto je na úvod zohľadnená pozícia českého práva v tomto smere ako aj spôsob akým česká doktrína a judikatúra nahliadajú na stanovy akciovej spoločnosti. Snahou je balansovať pozíciu stanov akciovej spoločnosti ako zmluvy, v kontraste s ponímaním stanov akciovej spoločnosti ako interného samostatne-stojáceho dokumentu.

Následne bude pozornosť venovaná možnostiam, ktoré prináša český právny poriadok a snaha zodpovedať otázku či je možné platne, podľa českého práva, obsiahnuť ujednanie o voľbe súdu v stanovách akciovej spoločnosti. Nielen však to. Nakoľko som túto problematiku konzultoval aj s právnikmi, ktorí sa venujú právu obchodných spoločností, upozornili ma na možnosť obsiahnutia prorogačnej doložky v tzv. akcionárskej zmluve, ktorá takisto prichádza do úvahy, aj keď iba v určitom vzťahu.

Druhá podkapitola si kladie za cieľ predstaviť režim vybraných článkov Nariadenia Brusel I., ktorých cieľom je poskytnúť, v špecifických situáciách, dodatočnú ochranu tzv. slabších zmluvných strán. Jedná sa napríklad o spotrebiteľov, zamestnancov, teda osôb, ktorých pozícia vo vzťahu k ich zmluvným partnerom býva mnohokrát oslabená v dôsledku zneužívania silnejšieho postavenia resp. pozície druhej

[260] Case C- 214/89, *Powell Duffryn plc v. Wolfgang Petereit,* [1992] ECR I-1745.

strany. Ich ochrana je odôvodňovaná skutočnosťou, že v mnohých situáciách je potrebné poskytnúť týmto špecifickým kategóriám subjektov širší okruh disponibilných nástrojov za účelom zaručenia efektívnejšej ochrany ich práv. Preto aj prepojenie tejto ochrany vo vzťahu k článku 23 by nemalo, podľa môjho názoru zostať bez povšimnutia.

Šiesta kapitola sa snaží priblížiť určité praktiky, ktoré sa objavili resp. prichádzajú do úvahy vo vzťahu k prorogácií.

V prvom rade bude pozornosť sústredená na tzv. *forum shopping*. Jedná sa o techniku, kde žalobca zvažuje možnú medzinárodnú právomoc viacerých súdov za účelom dosiahnutia čo najpriaznivejšieho výsledku pre jeho spor. Táto technika, ktorá sa je omnoho častejšie využívaná v krajinách common law, balansuje napríklad zloženie poroty, povesť sudcu *atď*. Aj napriek tomu, že tento jav už nie je považovaný za tak závažný ako v minulosti[261] je určite potrebné naň upozorniť.

Následne bude pozornosť sústredená na problematiku tzv. "talianskych torpéd" , ktoré značne súvisia s litispedenciou. Označenie "talianske torpédo" si vyslúžila práve pomalosť talianskych súdov, ktoré sú práve touto skutočnosťou charakteristické. Táto technika je zameraná na to, že jej cieľom nie je zahájiť konanie v členskom štáte za účelom vyhratia sporu, ale iba získania času, pokiaľ jeho pomalé súdnictvo prehlási svoju nepríslušnosť.

V tejto súvislosti je potrebné upozorniť na značne kritizovaný rozsudok ESD vo veci *Gasser v. Misat*.[262] V tomto rozsudku ESD sa zaoberal otázkou povinnosti súdu, ktorého príslušnosť bola zjednaná prorogačnou doložkou, prerušiť konanie a počkať pokiaľ súd, u ktorého bola žaloba podaná skôr rozhodne, napriek tomu, že je evidentné, že žaloba k tomuto súdu bola podaná iba účelom zneužitia resp. využitia jeho chronickej pomalosti.

Predtým, ako bude odprezentovaný záver ESD v tejto veci si dovolím priblížiť, podľa môjho názoru, zaujímavú argumentáciu jednotlivých účastníkov ako aj samotného ESD.

Ďalšia podkapitola si kladie za cieľ priblížiť ďalšiu možnosť a to tzv. *anti-suit injunction*. Jedná sa o inštitút anglického práva (common law), kedy súdu je umožnené zakázať, v určitých prípadoch, účastníkovi konania zahájenie paralelného konania

[261] *Pauknerová, M.,* Evropské mezinárodní právo soukromé. 1 vydání. Praha : C.H.Beck, 2008, p.181.
[262] Case C-116/02, *Erich Gasser GmbH v. MISAT Srl.,* [2003] ECR -14693.

v inom štáte alebo pokračovanie v ňom, a to s ohľadom na ochranu oprávnených záujmov druhého účastníka.[263] Otázkou súladu tzv. *anti-suit injunctions* a Bruselského dohovoru sa ESD zaoberal v ďalšom z kontroverznejších rozsudkov vo veci *Turner v. Grovit.*[264]

Ako posledná bude predstavená tzv. doktrína *forum non conveniens*. Táto doktrína umožňuje súdu aby vyslovil svoju nepríslušnosť, v dôsledku toho, že existujú objektívne okolnosti pre jej prehlásenie, odôvodnené možnosťou rozhodovania iného vhodnejšieho súdu iného členského štátu rovnako príslušného rozhodovať vo veci. Práve touto doktrínou resp. preskúmaním kompatibility tejto procesnej námietky s ustanoveniami Bruselského dohovoru sa ESD zaoberal v rozsudku *Owusu v. Jackson*[265], na ktorý bude poukázané.

Záver šiestej kapitoly bude venovaný revízii Nariadenia Brusel I práve vo vzťahu k problematickému zneužívaniu litispedencie. Je to práve Európska Komisia, ktorá vydala Zelenú knihu o revízii Nariadenia Brusel I.[266] V tomto dokumente sú práve načrtnuté niekoľké spôsoby, ktorými by bolo možné zamedziť zneužívaniu litispedencie. Je však dôležité, že sa vytvára vôľa pre revíziu Nariadenia Brusel I. a to nielen vo vzťahu k litispedencií. Zelená kniha je však dôležitým predpokladom resp. prvým krokom k tomu aby samotná revízia mohla prebehnúť.

Siedma kapitola sa zaoberá problematikou formulácie prorogačnej doložky. Kým formulácia prorogačnej doložky môže byt prevedená rôznymi spôsobmi a pomerne ľahko, sú to v skutočnosti práve jej dôsledky, o ktorých pojednáva nasledujúca kapitola. Tá, si kladie za cieľ uviesť niekoľko príkladov prorogačných doložiek, ktoré bývajú používané zmluvnými stranami, za účelom voľby súdu. Cieľom tejto kapitoly je uviesť demonštratívne niekoľko príkladov prorogačných doložiek, s ktorými sa je možné v praxi stretnúť.

[263] *Pauknerová, M.,* Evropské mezinárodní právo soukromé. 1 vydání. Praha : C.H.Beck, 2008, p.160.
[264] Case C 159/02, *Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd, Changepoint SA,* [2004] ECR I-3565.
[265] Case C-281/02, *Andrew Owusu v. N.B.Jackson, traiding as "Villa Holidays Bal-Inn Villas", Mammee Bay Resorts Ltd, Mamme Bay Club Ltd, The Enchanted Garden Resort & Spa Ltd, Consulting Services Ltd, Town & Country Resorts Ltd.,* [2005] ECR I-1383.
[266] COM (2009) 175/F of 21/04/2009 GREEN PAPER ON THE REVIEW OF COUNCIL REGULATION (EC) No 44/2001 ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGEMENTS IN CIVIL AND COMMERCIAL MATTERS.

V prvom rade je to prorogačná doložka zakladajúca čisto medzinárodnú právomoc českých súdov rozhodovať vo veci; teda bez toho aby bolo zasahované do miestnej alebo vecnej príslušnosti súdu.

Ďalším príkladom bude prorogačná doložka zakladajúca nielen medzinárodnú právomoc českého súdu ale aj zakladajúca jeho miestnu a vecnú príslušnosť. Tu je potrebné upozorniť na skutočnosť, že právne poriadky členských štátov sa v možnosti zmluvných strán ujednať okrem právomoci aj príslušnosť súdu značne odlišujú.

Bude ukázané, že napr. Český právny poriadok umožňuje, aby si strany, na základe zákonom stanovených podmienkach zvolil aj súd miestne príslušný, kým napr. Slovenský právny poriadok ujednanie o príslušnosti či už vecnej alebo miestnej vylučuje. Tým sa snažím naznačiť, že v niektorých prípadoch bude vhodnejšie založiť iba právomoc súdu (napr. Českého) a vyhnúť sa tak zásahom do súdnej príslušnosti resp. prenechať určenie príslušnosti súdu podľa kritérií, ktoré poskytuje právny poriadok štátu, ktorého súdna právomoc bola založená prorogačnou doložkou.

Ďalším príkladom je tzv. derogačná doložka, teda ujednanie strán o tom, že vylučujú právomoc súdov určitého štátu jednať a rozhodovať vo veci. Zároveň upozorňujem na možnosť potencionálnej neurčitosti tejto doložky ako aj na možnú rozporuplnosť s princípmi, na ktorých je založené nariadenie Brusel I.

V závere kapitoly uvádzam príklad prorogačnej doložky, ktorá síce zakladá medzinárodnú právomoc českého súdu ako aj jeho miestnu príslušnosť, kým zároveň nezasahuje do príslušnosti vecnej.

Napriek tomu, že témou diplomovej práce je problematika voľby právomoci súdu v zmysle Nariadenia Brusel I považujem za dôležité venovať samostatnú ôsmu kapitolu dohodám o voľbe súdu v zmysle Dohovoru o dohodách o voľbe súdu z roku 2005. Jedná sa o medzinárodný dohovor Haagskej konferencie medzinárodného práva súkromného, ako medzinárodnej organizácie vyvíjajúcej svoju pôsobnosť na poli medzinárodného práva súkromného.

Dohovor o dohodách o voľbe súdu predstavuje medzinárodnú zmluvu, ktorá vytvára medzinárodno-právny režim, upravujúci a snažiaci sa poskytnúť väčšiu právnu istotu a efektivitu výlučným dohodám o voľbe súdu uzatvorených v občianskych a obchodných veciach.

Cieľom kapitoly je predstaviť základný právny rámec, ktorý vytvára Dohovor o dohodách o voľbe súdu. Kapitola pojednáva jednak o cieľoch, ktoré si Dohovor kladie k dosiahnutiu. Zároveň sú predstavené základné zásady dotýkajúce sa prorogačných doložiek upravených Dohovorom.

Následne je pozornosť sústredená aj na skutočnosť, že , že ES sa dňa 3.4.2007 stalo členom Haagskej konferencie medzinárodného práva ako aj na to, že ES je signatárom samotného Dohovoru o dohodách o voľbe súdu. Kapitola pojednáva aj o možnosti ES uzatvárať medzinárodné zmluvy a tým zaväzovať samotné členské štáty.

Je dôležité upozorniť, že práve uzatváranie týchto zmlúv je v súčasnosti veľmi horúcou a značne diskutovanou témou nakoľko nie všetky členské štáty sú spokojné s týmto postupom Európskeho Spoločenstva aj napriek tomu Zmluva o založení ES toto právo Európskemu Spoločenstvu výslovne, za určitých podmienok, priznáva. Konkrétne sa jedná o článok 300 Zmluvy o založení Európskeho Spoločenstva.

V deviatej kapitole bude pozornosť sústredená na viaceré novelizácie resp. revízie, ktoré či už priamo prebiehajú alebo sa v blízkej budúcnosti chystajú. Nakoľko predmetné novelizácie sú v skutku komplexné a ovplyvnia mnohé z prameňov práva v relevantnej oblasti ako aj vzťahy nimi upravované, nie je mojím zámerom ich analyzovať vyčerpávajúcim spôsobom.

Je to jednak reforma justície, ktorá v súčasnej dobe prebieha na území Českej republiky, ktorej cieľom je rekodifikácia súkromného práva. V rámci tejto rekodifikácie sa zmeny dotýkajú aj medzinárodného práva súkromného v podobe návrhu nového Zákona o medzinárodnom práve súkromnom a procesnom. V dôsledku novelizácie Zákona o medzinárodnom práve súkromnom a procesnom sa menia aj ustanovenia upravujúce voľbu právomoci súdov.

Následne bude pozornosť venovaná novému Luganskému dohovoru. V dôsledku toho, že Bruselský dohovor z roku 1968 bol nahradený nariadením Brusel I, bola potrebná aj revízia Luganského dohovoru. Cieľom je prepojiť Luganský dohovor a Nariadenie Brusel I tak aby bola dosiahnutá flexibilnejšia spolupráca ako aj rovnaká úroveň obehu rozsudkov medzi členskými štátmi EÚ a dotknutými štátmi Európskeho združenia voľného obchodu. Zároveň bude upozornené aj na zmeny, ktoré prináša revízia Luganského dohovoru oproti jeho predchodcovi z roku 1968.

Ako bolo naznačené revízia sa dotkne aj Nariadenia Brusel I. Európska Komisia vyjadrila vo vydanej Zelenej knihe o revízií Nariadenia Brusel I. záujem zahájiť širokú diskusiu za účelom zlepšenia aplikácie Nariadenia. Napriek tomu, že Nariadenie je považované za vysoko úspešný dokument, Európska Komisia zdôrazňuje jeho možné vylepšenia. Práve Zelená kniha vymedzuje určité oblasti (napr. oblasti prorogačných doložiek, litispedencie, odstraňovanie prekážok pre voľný obeh rozsudkov *atď.*), v ktorých je možné dosiahnuť požadovaného zlepšenia. Je to teda Zelená kniha, ktorá predstavuje spúšťací mechanizmus pre potencionálne vylepšenie Nariadenia Brusel I. Aj keď už určité smerovanie revízie je naznačené je potrebné si počkať na oficiálny návrh, ktorý je očakávaný koncom roka 2009.

Tradične je ukončenie diplomovej práce venované jej záveru. V tejto časti sa snažím poukázať na skutočnosti o ktorých bolo pojednávané v predchádzajú častiach diplomovej práce.

Je nepochybné, že otázka porozumenia obsahu ako aj významu určitého právneho predpisu, upravujúceho príslušné právne inštitúty, je nevyhnutná pre realizáciu práva. Ako bolo naznačené, problematika ujednania o voľbe súdu predstavuje iba čiastkový inštitút obsiahnutý v Nariadení Brusel I. Napriek tomu je často krát označovaný ako jeden z najdôležitejších.

Diplomová práca si kládla za cieľ analyzovať klady a zápory tohto právneho inštitútu a zároveň zohľadniť názory rešpektovaných odborníkov z oblasti medzinárodného práva súkromného. Zároveň sa snaží podať výklad jednotlivých ustanovení či už vo svetle judikatúry Najvyššieho Súdu Českej Republiky ako aj Európskeho súdneho dvora.

Na jednej strane, diplomová práca berie do úvahy aj kritiku, ktorá bola vo vzťahu k tomuto inštitútu vznesená. Na druhú stranu, iba prostredníctvom kritiky, po ktorej nasleduje diskusia a publikovanie právnych názorov, je možne zaistiť subjektom práva žiaduci stupeň ochrany. Avšak napriek tejto kritike považujem možnosť voľby právomoci súdu za veľmi efektívny nástroj v koncepte európskeho medzinárodného práva súkromného.