

ABSTRACT

The dissertation thesis deals with choice of law and choice of court in the area of international trade, as governed by the EU and international legal instruments.

The thesis is divided into 4 basic chapters, its centerpiece being chapters II and III, which contain a detailed analysis of choice of law and choice of court in the EU legal instruments and also in international agreements. Chapter I is an introduction of the topic, while chapter IV brings a summary of findings and conclusions made throughout the thesis.

The introductory chapter brings about the justification, why it was choice of law and choice of court, which have become the subject matter of the thesis. Right at the beginning, the importance of these tools for international transactions is demonstrated; principle of party autonomy, which is reflected in these tools, plays a key role here. It is party autonomy principle and its history, what is analyzed in the first part of this chapter, while the author comes back to this pivotal (and nowadays in principle universally respected) principle also in other chapters, always in relation to the specific legal instruments dealt with therein. The introductory chapter also discusses the reasons, why parties conclude choice of law agreements and it also analyses under which circumstances they do so. Chapter I further tries to show the extraordinary importance that is connected with the forum that adjudicates upon the given dispute. A separate part is devoted to the analysis of the concept of overriding mandatory norms and public order reservation; next separate part deals with the procedural impacts of *lex fori* and further implications, be it speed of the judicial proceedings or court fees, costs of the proceedings, etc. The thesis shows that regardless the enforceability of the choice of law agreement, the parties still have enough reasons to speculate as to in which court they should commence the proceedings. This generally negatively perceived phenomenon called *forum shopping* should be, to some extent, prevented by a choice of court agreement. Although it is not 100% effective tool, surely it is the most effective one. At the end of the introductory chapter it is stressed that the ideal situation is when both choice of law and choice of court agreement point to the very same country.

The second chapter is divided into two basic parts: II.A and II.B. The former analyses in quite some detail the legal regulation of choice of law agreements in international trade at the EU level. This part is supplemented by part II.B that offers a view on some international instruments, which also deal with choice of law agreements in international trade. Part II.A specifically deals with the Rome Convention (the “Convention”) and the Rome I Regulation. The thesis discusses their scope and temporal applicability and also substantial changes, which the regulation brings, compared to the Convention, as far as the choice of law agreement is concerned. The author also deals with the relationship between the Convention (Rome I Regulation) and other international legal instruments and the rules of interpretation. Next parts are devoted to substantial issues, namely to basic elements of choice of law agreement under the Convention (Rome I Regulation). The party autonomy principle enshrined in the freedom of choice of law applies here, which is explicitly reflected both in the text of the Convention and the regulation. The thesis answers the question to which point in time one should assess the prerequisites of (valid) choice of law agreement – according to the author the most advisable solution is to fix this assessment to the moment of conclusion of given choice of law agreement, i.e., to the moment when choice of law was made. The thesis also deals from different angles with the requirement of foreign element, whose existence is necessary for a full scale choice of law agreement. The attention is paid to the so-called purely domestic and purely EU situations.

The author further shows that neither the Convention nor the Rome I Regulation allow for the choice of a “non-state law”; they only allow for a choice of effective law of an existing state. It is not required that the chosen law has any connection whatsoever to a contractual relationship at hand; the author in this respect pleads (in light of the respect to freedom of choice principle) for the widest possible choice among legal orders.

The author also deals with not too often discussed question, whether EU Law allows for a choice of a law valid at some specific point of time. He comes to the conclusion that such a “freezing” of applicable law is not probably permitted under the Rome I Regulation, at least not without limited effects only. The important question discussed in chapter II.A is the means of choice of law. The author shows on practical examples the boundaries between implicit (and yet real) and hypothetical choice of law. The thesis analyses also the regime of partial choice of law and the so-called “contract splitting.” In relation to the latter, the thesis shows under which conditions the separate legal regime of different contract clauses is possible. The author also explains that the analyzed instruments leave enough room both for additional choice of law and for the change of chosen law. Also quite specific questions interesting for practitioners (though not much discussed in theory) are being analyzed in this part of the thesis, namely, e.g., the conditional choice of law and floating choice. The substantial part of chapter II.A is also devoted to essential questions of formal and material validity of choice of law agreement. The thesis deals, in particular, with not quite clear an issue of determination of applicable law for the material validity of choice of law agreement. The different academic views are being discussed in this respect. In relation to formal validity, the „pro-validation“ and flexible nature of the regulation is stressed.

Of crucial importance is also the part devoted to limitations of chosen law. It is those potential limitations and their extent, what is quite essential for practice, as they may partially or fully impair the purpose, for which the parties concluded choice of law agreement. Therefore the thesis consecutively discusses the limiting effects on choice of law (or chosen law) caused by (simple) mandatory norms, overriding mandatory norms and public order reservation. The thesis notes the changes brought in this area by the Rome I Regulation, be it a definition of overriding mandatory norms or significant limitation of influence of overriding mandatory norms of third states.

In chapter II.B the Hague Convention of 1955 on the Law Applicable to International Sales of Goods (governing choice of law in its Article II) and Mexico Convention of 1994 (an analogue to the Rome Convention, applicable in Mexico and Venezuela) are analyzed. A short comparative notice is devoted also to the Hague Convention of 1986 on the Law Applicable to Contracts for the International Sale of Goods (which has never entered into force) and to the Hague Convention of 1978 on the Law Applicable to Agency. The thesis tries, in particular, to highlight some interesting solutions and differences, which these instruments bring, compared to the Convention and the Rome I Regulation. At the end of this part, all the international agreements that prevail over the Rome I Regulation, are binding upon the Czech Republic and regulate choice of law in international trade are mentioned.

Chapter III dealing with choice of court is, together with chapter II, the main part of the dissertation thesis. Similarly to chapter II, an analysis of the EU instrument (Brussels I Regulation) in part III.A is in part III.B supplemented by an analysis of some international instruments regulating choice of court. Chapter III.A primarily deals with choice of court under the Brussels I Regulation. Also the amendments thereof, which at time of the writing were being discussed within the EU decision-making bodies, are mentioned. The thesis analyses both typical choice of court via

jurisdiction agreement under Article 23 and entering an appearance under Article 24 of the Brussels I Regulation.

As the Brussels I Regulation in its current form does not cover all jurisdiction agreements, but only those that point to a court seated within EU and whose at least one party is domiciled in the EU, the dissertation thesis deals with the precise delimitation of the scope and its temporal fixation. The thesis also focuses on (potential) impact of the Brussels I Regulation on agreements pointing to choice of third states courts. In this respect the “infamous” Owusu case is being discussed. Also in this chapter the author tries to express his opinion on questions not solved (or at least not solved unequivocally) in the literature or in case-law. This goes both for the temporal applicability of Brussels I Regulation as to choice of court and for the question, whether choice of court in purely domestic situation falls within the scope of the regulation or not.

Chapter III.A deals with particular elements and aspects of choice of court. It copes with a question, whether for a valid choice of court it suffices to choose jurisdiction of courts of a particular state or if it is necessary to pick a specific court; whether a choice of court of more than one state is possible. The thesis also deals with a question, how sufficiently consent with a jurisdiction of a particular court should be expressed, as well as with (non)exclusivity of jurisdiction agreements. All permissible forms of jurisdiction agreements are dealt with, as well as their formal and material validity. The thesis also tries to cope with a question, what room the Brussels I Regulation in fact gives for use of applicable law to question of validity (especially the substantive one).

A significant part of chapter III.A is devoted to limitations, which the Brussels I Regulation brings in relation to the effectiveness of choice of court agreements within the EU. It is not only a “popular” problem of an “Italian torpedo”, but also other limitations stemming from the text of the regulation or case-law. Chapter III.A deals also with possible (permitted) sanctions for a breach of jurisdiction agreement.

In relation to Article 24, the thesis aims to answer an unclear question of Article 24 scope, in particular whether this provision is applicable also in situations, where the defendant is not domiciled in the EU. The author holds a view that under the current circumstances the prevailing arguments support the conclusion that defendants domiciled outside the EU should not be covered by this provision. Similarly to Article 23, also in relation to Article 24 the cases in which this provision is not applicable, since other provision of the regulation has priority, are discussed. Chapter III.A also deals at least briefly with a question that might become obsolete after revision of the Brussels I Regulation is effective: it is the legal regime of jurisdiction agreements that do not fall under the Brussels I Regulation. The Czech law, which is applicable in these situations, is analyzed in more detail. At the end of chapter III.A the changes that should be brought about by the revision of the Brussels I Regulation are critically analyzed.

Chapter III.B deals at the outset with international agreements that extend the Brussels I Regulation regime to Denmark and EFTA countries. Namely it is the agreement of 2005 between the EU and Denmark and the new Lugano Convention of 2007. The thesis deals in this part also with further international agreements binding upon the EU and thus prevailing over the Brussels I Regulation. In this respect it is the Montreal Convention of 1999 governing some aspects of air carriers’ liability, which allows to bring a claim under the convention only in exhaustively listed fora (see its Article 33).

The main attention of part III.B is, however, drawn to the Hague Convention of 2005 on choice of court agreements. This modern instrument of potentially universal impact amounts to a big promise for the area of international trade. The thesis shows the advantages of this international agreement, such as a solution to the Italian torpedo problem or the uniform means of determination of applicable law to material validity of choice of court agreement.

Chapter III.B also touches upon some conventions regulating choice of court, not binding upon the EU though, but the Czech Republic. It is, by way of example, Convention on the Contract for the International Carriage of Goods by Road, signed in Geneva on 19 May 1956, namely its Art. 31 para. 1, or the so-called Warsaw Convention from the area of carriage by air, which in its Art. 28 exhaustively limits fora available for claims arising out of this convention.

The final chapter of the thesis sums up the previous discussion, makes some comparisons and outlines also an outlook into the future.