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TÉMA: MEZINÁRODNÍ PRÁVO SOUKROMÉ OPTIKOU EVROPY

EDITORIAL

Časopis Acta Universitatis Carolinae – Iuridica (AUCI) je hlavním časopisem Právnické fakulty Univerzity Karlovy a patří mezi tradiční právnické časopisy teoretického zaměření v České republice. Je evidován v Index to Foreign Legal Periodicals, který je veden American Association of Law Libraries. AUCI je tzv. časopisem otevřeným a veškerý jeho obsah je zveřejňován jak na webu Právnické fakulty, tak na webových stránkách Nakladatelství Karolinum [https://karolinum.cz/casopis/auc-iuridica].

Předkládané číslo je věnováno srovnávacímu mezinárodnímu právu soukromému se zvláštním zaměřením na Evropskou unii, často v pohledu, který unijní právo přesahuje, ať již směrem k právu národnímu, nebo k mezinárodnímu právu veřejnému, k mezinárodnímu obchodnímu právu, či obecně ke globálnímu právu.

Toto číslo bylo připravováno v souvislosti s výročním zasedáním GEDIP, Evropské skupiny pro mezinárodní právo soukromé (Group européen de droit international privé, European Group for Private International Law), které se mělo konat ve dnech 18.–20. září 2020 na Právnické fakultě UK v Praze.

Zasedání GEDIP jsou tradičně organizována v září každého roku na základě pozvání jednoho ze svých členů. GEDIP je pracovní skupinou specializovanou na evropské mezinárodní právo soukromé, která byla vytvořena v r. 1991 a od r. 2004 je sdružením podle lucemburského práva. Její činnost je zaměřena na analýzu vzájemného vlivu mezinárodního práva soukromého a evropského práva. Tématy, jimiž se zabývá, jsou kromě mezinárodního práva soukromého, ať již unifikovaného, či autonomního, unijní právo a obecně Evropská unie, Haagská konference mezinárodního práva soukromého, Evropský soud pro lidská práva, Evropská úmluva o ochraně lidských práv, a související právní otázky, vždy se zvláštním zaměřením na přeshraniční právní poměry. Texty, které GEDIP připravila, tedy pracovní dokumenty GEDIP, jsou předkládány jako doporučení a návrhy evropských i mezinárodních instrumentů, adresátem bývá většinou Evropská komise.

Projekty GEDIP významně ovlivnily přijetí takových předpisů, zásadních pro evropské mezinárodní právo soukromé, jako jsou – v časové posloupnosti – unijní nařízení v oblasti mezinárodní soudní příslušnosti ve věcech rodinných, v oblasti práva použitelného na mimosmluvní závazky, na smluvní závazky, a na rozvod. Výsledky práce GEDIP dále výrazně ovlivnily rozšíření úpravy původního nařízení Brusel I o pří-

slušnosti a uznání a výkonu rozhodnutí ve věcech občanských a obchodních o otázky externích vztahů a přesnějšího vymezení vztahů soudního a rozhodčího řízení (nařízení Brusel I bis), otázky rodičovské odpovědnosti a mezinárodních únosů, dědictví v mezinárodním právu soukromém, manželských majetkových režimů a režimů registrovaných partnerů. Zvláštní pozornost byla dále věnována otázkám, jako jsou konflikty státní příslušnosti, aplikace zahraničního práva, použití imperativních norem v přeshraničních vztazích, kodifikace obecné části mezinárodního práva soukromého, návrh nařízení o právu použitelném na společnosti, připravuje se návrh nařízení o právu použitelném na věcná práva, a další. Tyto návrhy a diskuse, které o nich proběhly a které jsou podrobně registrovány na webové stránce GEDIP [https://bleuciel.lu/gedip-d/fr/], se často promítly do přípravy právních instrumentů v rámci Evropské unie. Těžiště mezinárodního práva soukromého ovšem tradičně spočívá v jeho obecné části a v mnoha obecných otázkách, které jsou předmětem cenných diskusí na zasedáních této skupiny, od připomínek k judikatuře Soudního dvora EU a Evropského soudu pro lidská práva, až po vyjádření k budoucím trendům.

Členy GEDIP jsou profesoři mezinárodního práva soukromého z evropských univerzit nebo z mezinárodních organizací a je mi ctí, že jako první členka reprezentující tzv. nové členské státy EU jsem byla kooptována já, účastním se práce GEDIP od r. 2005.

Jak již bylo zmíněno, pro rok 2020 měla být hostitelkou Praha a Právnická fakulta UK, z důvodu koronavirové pandemie bylo pražské zasedání přesunuto na 17.–19. září 2021. Příspěvky plánované v souvislosti s pražským zasedáním GEDIP však vycházejí v původně plánovaném termínu, tak, aby neztratily na aktuálnosti. A aktuální opravdu jsou, jejich autory jsou známí odborníci na mezinárodní právo soukromé jednak přímo ze skupiny GEDIP, jednak z Právnické fakulty UK, v rámci které je vyučován povinný předmět mezinárodní právo soukromé. Příspěvky se zaměřuji předně na obecné otázky, jako jsou globalizace v přeshraničních sporech a Evropská unie, vliv práva EU na mezinárodní právo soukromé v Norsku, Evropská úmluva o lidských právech z pohledu mezinárodního práva soukromého, a spory o změně klimatu v občanskoprávním řízení. Příspěvky věnované rodinnému právu se zamýšlejí nad relevancí statusu rodinného příslušníka získaného v zahraničí pro volný pohyb osob, kodifikací mezinárodního rozvodu v připravovaném projektu GEDIP, a limity pravomoci ve věcech rozvodu z hlediska českého práva. Třetí okruh příspěvků lze systematicky podřadit pod obchodní právo, tématy jsou právo rozhodné pro mezinárodní insolvenční řízení, platnost mezinárodních rozhodčích doložek uzavřených prostřednictvím e-mailu, a výkon rozhodnutí v obchodních věcech vydaných v nečlenských státech v České republice. Příspěvky odrážejí aktuální otázky mezinárodního práva soukromého, které se v posledních letech objevují v praxi, zároveň však naznačují, jak by mohla a měla na tyto nové jevy reagovat teorie, jaké jsou trendy do budoucna.

Tyto příspěvky, propojující zájmy členů GEDIP a učitelů mezinárodního práva soukromého na pražské Právnické fakultě, ve svém celku představují jeden z významných výstupů grantového projektu Právnické fakulty UK Progres Q03 Soukromé právo a výzvy dneška.

Mezinárodní právo soukromé je oblastí soukromého práva, která dosáhla výrazných úspěchů při mezinárodním sjednocování právních pravidel a jejich kodifikaci. Je to

obor, který si postupně probojovává své místo na slunci a získává pozornost, kterou si určitě zaslouží, i když je v rámci soukromého práva stále ještě spíše přehlížen. I přes některá opatření států v souvislosti s koronavirovou krizí, která omezují přeshraniční styk, se soukromoprávní poměry s mezinárodním prvkem budou nepochybně dále rozvíjet a nadále přinášet složité otázky spojené s tak obtížnou disciplínou, jakou je mezinárodní právo soukromé, a na tyto otázky bude třeba kvalifikovaně reagovat. Věřím, že příspěvky v tomto čísle AUCI čtenáře zaujmou.

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The journal Acta Universitatis Carolinae – Iuridica (AUCI) is the leading journal published by the Law Faculty of Charles University and belongs amongst the long-established, theoretically oriented legal journals published in the Czech Republic. AUCI is registered in the Index to Foreign Legal Periodicals, produced by the American Association of Law Libraries. AUCI is an open access legal journal with its contents published both on the website of the Law Faculty and the website of Karolinum Press [https://karolinum.cz/en/journal/auc-iuridica].

The present issue is focused on comparative private international law, with emphasis on the European Union but often looking beyond the EU law, by references to national law, public international law, international trade law or global law in general.

The present issue was put together on the occasion of the annual GEDIP meeting (Group européen de droit international privé, European Group for Private International Law), which was to take place between 18th to 20th September 2020 at the Law Faculty of Charles University.

GEDIP is a working group specializing in European private international law, set up in 1991 and officially incorporated as association under Luxembourg law since 2004. GEDIP meetings are traditionally organized each September at the invitation of one of its members. Activities of the group are centred around the analysis of the mutual influence of private international law and European law. In addition to the private international law, whether autonomous or uniform, the main topics include the European Union and EU law, the Hague Conference on Private International Law, the European Court on Human Rights, the European Convention on Human Rights and related legal issues, always with emphasis on cross-border situations. The texts prepared by GEDIP, i.e., the GEDIP working documents, are submitted as recommendations and proposals for European and international instruments; their addressee is usually the European Commission.

By its activity, GEDIP has a significant impact on the adoption of legislation essential for European private international law such as – listed chronologically – EU regulation of international jurisdiction in family matters, law applicable to non-contractual and contractual obligations, and international divorce. The results of GEDIP's work further influenced and expanded contents of the original Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters with respect to the issues of external relationships and more precise regulation of judicial proceedings and arbitration (Brussels I bis Regulation) as well as issues of

parental responsibility and international child abduction, regulation of succession and matrimonial property regimes in private international law. Particular attention was paid to issues such as conflicts of nationality, application of foreign law and mandatory rules in cross-border situations, codification of general part of private international law, draft rules on the law applicable to companies and other bodies, draft rules on the law applicable to rights in rem, which are currently being prepared, and others. These suggestions and in-detail discussions are published on the GEDIP website [https://bleuciel.lu/gedip-d/fr/] and are often reflected during the legislative process within the European Union. The backbone of the private international law is formed by its general part and regulation of many general issues which are subject to the numerous rewarding discussions taking place during GEDIP meetings with their focus, ranging from comments to the case-law from the EU Court of Justice or the European Court of Human Rights, to comments on the future trends of the field.

GEDIP members are professors in the field of private international law associated with European universities or international organizations. I am honoured to participate on GEDIP's work since 2005 as the first national from the group of the Member States joining during 2004 enlargement who was accepted as GEDIP member.

Unfortunately, the coronavirus pandemic affected 2020 GEDIP meeting hosted in Prague by Law Faculty of Charges University, which was moved to 17th–19th September 2021. Nevertheless, the contributions to AUCI prepared for the GEDIP meeting do not lose their relevance and as such are published as planned. The authors included in the present issue are well-known experts in the field of private international law, forming an unique mix of GEDIP members and academics of Law Faculty of Charles University, where the subject of private international law counts among the compulsory course.

Contributions may be divided among three groups. Firstly, there are papers which address general issues such as globalization in cross-border disputes and the European Union, the European Convention on Human Rights from the point of view of private international law, and climate change disputes in civil proceedings, as well as topics including national point of view, the example of which is the impact of EU law on private international law in Norway. Secondly, the issue includes also papers devoted to more specific topic, such as family law, even more specifically the relevance of status gained by a family member while abroad for the free movement of persons, the codification of international divorce, which is also included in the current GEDIP project, and the limits of jurisdiction in matters of divorce from the Czech law point of view. The third set of contributions is oriented towards commercial law, with topics dealing with the law applicable to international insolvency proceedings, the validity of international arbitration clauses concluded via email, and the enforcement of decisions in commercial matters issued in non-member countries in the Czech Republic. Generally, all contributions address issues of private international law that have emerged in practice in recent years, but also indicate how theories and trends in the future could and should respond to these new phenomena.

The contents of the current issue represent interests of GEDIP members as well as professors and other associates who teach private international law at the Law Faculty

of Charles University, and as a whole form an important output within the Progress Q-03 grant project "Private Law and Challenges Today" which is operated at the Law Faculty of Charles University.

Private international law is an area of private law that has achieved significant success in the international unification of legal rules and their codification. It is a field that is gradually gaining its place in the sun and well-deserved attention of the law practitioners, although it still remains rather overlooked when compared to other fields of the private law. Regardless of recent national restrictions on cross-border relations imposed because of the coronavirus crisis, presence of international elements in private law relationships will undoubtedly continue to grow, bringing forward complex issues for the private international law to face and ultimately answer. I believe that the contributions in the present AUCI issue are step forward in this quest and will interest its readers.

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Nous sommes très reconnaissants à la Revue Acta Juridica Carolina d'accueillir les contributions des membres du Groupe européen de droit international privé (GEDIP) à la requête de notre éminente Collègue et Amie Monika Pauknerova qui doit être remerciée ici pour tout le travail qu'elle a effectué afin d'assurer au GEDIP un « *safe harbour* » à Prague pour sa réunion 2020. L'histoire retiendra qu'un vilain virus a attaqué la population d'un grand nombre de pays, y compris de pays membres de l'Union européenne, exigeant des mesures de distanciation physique ainsi que l'arrêt complet, temporaire mais prolongé, des voyages transfrontières. Malgré ces vicissitudes, les contributions ayant été écrites, la publication a donc été maintenue malgré le report à 2021 de la réunion du GEDIP à Prague.[1]

Quand, en 1991, le GEDIP a été créé, le droit international privé européen n'était pas étudié en tant que tel. La Conférence de La Haye de droit international privé avait le monopole de la codification du droit international privé et si les Etats européens représentaient une grande proportion des Etats membres de la Conférence, la construction européenne n'avait pas encore l'influence qu'elle a aujourd'hui sur les méthodes et le contenu du droit international privé.

Toutefois, les initiateurs du GEDIP avaient d'ores et déjà pris conscience que le socle, un peu bancal, constitué par la Convention de Bruxelles de 1968 (texte ancré dans le droit européen par le truchement de l'article 220 du Traité de Rome, disparu aujourd'hui) et la Convention de Rome de 1980 (qui n'avait pas sa source dans le Traité de Rome, mais avait été considérée comme un complément indispensable à la Convention de Bruxelles), devait se développer en raison de l'intégration progressive de l'essentiel du droit international privé dans le droit européen. La suite leur donna raison : l'intégration définitive du droit international privé, en tant que l'une des compétences conférées à l'Union européenne, fut actée par le Traité d'Amsterdam en 1997. Et même si les recours devant la Cour de Justice de l'Union demeuraient encore spécifiques dans ce Traité, il ne faudra pas attendre longtemps avant que le régime juridique de droit commun des questions préjudicielles s'applique aussi au droit international privé.

La Cour de justice elle-même ne fut pas en reste. Sa jurisprudence concernant le droit international privé est abondante. Elle n'a pas hésité à s'emparer de questions

[1] Le GEDIP s'est réuni néanmoins par visio conférence en septembre 2020.

difficiles et à élargir, au besoin, le droit européen grâce à des grands principes comme l'effet utile ou le devoir de coopération loyale ou le principe de sécurité juridique.

Enfin, la dernière pierre à la construction de l'édifice du droit international privé européen fut consolidée quand l'Union est devenue membre à part entière de la Conférence de La Haye de droit international privé. Pour cela il fut nécessaire de modifier les statuts de la Conférence qui ne prévoyaient pas qu'une « organisation d'intégration régionale », telle que l'on nomme l'Union dans le jargon internationaliste, put devenir membre. Une fois cette modification entrée en vigueur, l'Union pouvait devenir candidate et être admise au même titre qu'un Etat.[2] Ceci, ainsi que l'élargissement successif de l'Union, ont entraîné une modification profonde des méthodes de négociation et d'adoption des textes. Auparavant, les textes étaient discutés à la virgule près ; les options de rédaction mises sur la table avec précision, le choix se faisant in fine par des votes sur des dispositions précises. A partir du moment où l'influence de l'Union européenne se fit sentir, et encore plus après son adhésion, il n'était plus question de procéder ainsi, la majorité étant très rapidement atteinte lorsque tous les Etats européens faisaient bloc, conformément à la « discipline européenne ». Le vote fut ainsi abandonné au profit d'une adoption par consensus, entraînant alors l'adoption de textes plus vagues et imprécis. Une autre modification importante influence la texture des dispositions adoptées : l'utilisation prédominante de l'anglais comme langue de travail au détriment d'une construction bilingue et donc biculturelle des textes.

A cet égard, le GEDIP demeure l'un des rares groupes de travail dont le français constitue la langue principale, même si l'anglais a fait une entrée marquante dans les récentes années par le truchement d'une génération de membres plus jeunes qui se sont plus à l'aise pour s'exprimer dans cette langue, même si la condition d'une connaissance au moins passive du français demeure encore une exigence pour devenir membre.

Ceux de nos lecteurs qui ont consulté de manière attentive les documents préparatoires des institutions de l'Union européenne, durant les années d'intense activité législative en droit international privé, ont pu remarquer que des références multiples ont été faites aux travaux du GEDIP dans les documents issus notamment de la Commission européenne. Le GEDIP n'est certes pas principalement un groupe de codification. Son rôle, dès l'origine, a été conçu comme lieu d'échange et d'exploration de l'interaction du droit de l'Union et du droit international privé, tout en privilégiant une méthode basée sur l'écriture de textes, en vue d'appréhender cette interaction, jugée plus efficace que la préparation de rapports. Au fil du temps, il est devenu une force de proposition pour des textes nouveaux venant combler les lacunes. Cette tradition se poursuit encore aujourd'hui. C'est ainsi que plusieurs projets sont en cours de discussion : un projet sur le droit des biens ; un projet sur les grands principes de droit international privé européen ; un projet sur des règles de droit international privé en matière de responsabilité sociétale des entreprises.

Trente ans après la première réunion du GEDIP qui s'est tenue à l'Université de Louvain, le GEDIP « *is alive and kicking* ».

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[2] Ceci pause évidemment des difficultés en substance, ce que nous ne pouvons aborder dans cette brève introduction.

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We are most grateful to the journal Acta Juridica Carolina for giving space to the contributions of members of the European Group for Private International Law (EGPIL) at the request of our eminent colleague and friend Monika Pauknerova, whom I would like to thank here for all the work she has done to find a 'safe harbour' for EGPIL in Prague for its 2020 meeting. History will relate how a vicious virus has attacked the populations of numerous countries, including the Member States of the European Union, requiring physical distancing measures as well as bringing cross-border travel to a complete standstill, for a temporary but prolonged period. In spite of these setbacks, the contributions have been written and the publication is going ahead, though the EGPIL meeting in Prague has been postponed until 2021.[3]

In 1991, when EGPIL was set up, European private international law was not studied as such. The Hague Conference on Private International Law had the monopoly on codification of private international law, and though European states accounted for a high proportion of the Member States of the Conference, the European construct did not yet have the influence it does today on the methods or content of private international law.

However, the founders of EGPIL understood, even then, that the somewhat shaky foundation provided by the 1968 Brussels Convention (an instrument anchored in European law by means of Article 220 of the Treaty of Rome, which no longer exists) and the 1980 Rome Convention (which did not derive from the Treaty of Rome, but had been considered as an essential adjunct to the Brussels Convention), must be built up further as the key elements of private international law gradually became integrated into European law. Subsequent developments proved them right: the full integration of private international law was enshrined as one of the competences conferred on the European Union by the Treaty of Amsterdam in 1997. And though that treaty still provided only specific grounds for recourse to the Court of Justice of the European Union, it was not long before the general legal regime of preliminary rulings was also being applied to private international law.

Nor has the Court of Justice itself been found wanting, with its wealth of case-law on private international law. It has not shrunk from tackling difficult issues and expanding European law where necessary, relying on broad principles such as those of effectiveness, the duty to cooperate in good faith, and legal certainty.

The final building block in the edifice of European private international law was put in place when the European Union became a full member of the Hague Conference on Private International Law. For that to happen it was necessary to amend the Statute of the Conference, which did not allow for a "regional integration organisation", as the European Union is described in the international jargon, to become a member. Once that amendment had come into force, the European Union could apply and be admitted on the same footing as a state.[4] This, along with the progressive expansion of the Union, has brought about a radical change in the methods used for negotiating and adopting

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[3] Nonetheless, EGPIL met via visio-conferencing in September 2020.

[4] Obviously, this causes difficulties for the substance of the texts prepared, but this brief introduction is no place to discuss the point.

texts. Previously, the texts of instruments were discussed down to the finest detail, with very precise drafting options on the table and votes taken on specific provisions. From the moment the influence of the European Union started to be felt, and even more after it acceded to membership, there was no longer any question of proceeding in that way: a majority was reached as soon as all the European states came together as a bloc, as they had learned to do. Voting was thus abandoned in favour of consensus, leading to the adoption of texts that were more vague and less precise. Another major shift has influenced the texture of the provisions adopted: the predominant use of English as the working language at the expense of the bilingual, and thus bicultural, construction of texts.

In this respect, EGPIL is one of the rare working groups that still uses French as its main language, though English has made strong inroads in recent years with the arrival of a new generation of younger members who do not feel comfortable expressing themselves in French, though a passive understanding of that language, at least, is still a requirement for becoming a member.

Those of our readers who have been paying close attention to the preparatory documents of the European Union institutions throughout the years of intense legislative activity in private international law will have seen the multiple references made to the work of EGPIL, especially in documents produced by the European Commission. The main function of EGPIL is, admittedly, not that of a codification group. From the outset, its intended role was that of a forum for discussion and exploration of the interaction of European Union law and private international law, with the emphasis on capturing that interaction by drafting instruments, this method being seen as more effective than writing reports. Over the years, it has become a respected source of proposals for new instruments to fill lacunae, and that tradition continues today. There are currently several drafts under discussion: one on property law, one on the major principles of European private international law, and another on the rules of private international law on corporate social responsibility.

Thirty years after its first meeting at the University of Louvain, EGPIL is alive and kicking.

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THE "LOGIC OF GLOBALIZATION" VERSUS THE "LOGIC OF THE INTERNAL MARKET": A NEW CHALLENGE FOR THE EUROPEAN UNION

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Abstract: Globalization confronts the European Union with many new challenges. One of these concerns the applicability of harmonized EU law to cross-border situations involving third countries. In its recent judgment in *Google/CNIL* (C-507/17), on the territorial reach of the EU data protection rules and the "right to be forgotten", the CJEU introduces a new "logic of globalization" which must be distinguished from the traditional "logic of the internal market". While the latter justifies extraterritoriality in case internal market interests are affected, restraint characterizes the former. The global horizon does not diminish pertinent EU interests and objectives, but their effective implementation is threatened by the absence of the ensured enforcement of EU law and potential countermeasures. In context of globalization, it is international collaboration rather than unilateralism that would enable the EU to protect its interests and those of its citizens more adequately.

Keywords: European Union; globalization; internal market; harmonization; conflict of laws

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Starting from the analysis of the CJEU's recent judgment in *Google/CNIL*, this contribution attempts to contribute to the way conflict of laws, in a broad sense but with particular attention to EU law, may serve to solve 21st century transborder conflicts in Europe and beyond, the overarching theme of the current edition of the *Acta Universitatis Carolinae Iuridica*. Globalization confronts the European Union with a vital new challenge that obliges it to implement a new "logic of globalization" rather than the more traditional "logic of the internal market".

1. THE CJEU'S JUDGMENT IN *GOOGLE/CNIL*

On September 24, 2019, the Court of Justice of the European Union rendered its long-awaited judgment in *Google/CNIL*.[1] This judgment has attracted much attention both from media and academia. Quite fittingly, it was almost immediately sub-

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1 ECJ, 24 September 2019, Google LLC, successor in law to Google Inc./Commission nationale de l'informatique et des libertés (CNIL), case C-507/17, ECLI:EU:C:2019:772, hereinafter referred to as *Google/CNIL*.

ject to comments and analysis in several online blogs that examined the judgment from various perspectives[2] and specifically attempted to bring some nuance, from the broader perspective of EU law, to the media headlines that Google had won a landmark case.[3]

Our aim is not so much to focus on the precise contribution of *Google/CNIL* to the interpretation of the pertinent EU legislation on data protection, but rather to use this judgment and the preceding Opinion of Advocate General (AG) Szpunar as a starting point to reflect on the global role that the EU can assume, the position of (EU) private international law in that respect and the concept of globalization as such.[4]

In *Google/CNIL*, the EU Court of Justice responded to the preliminary questions submitted to it by the French Council of State (*Conseil d'État*) on the interpretation of Directive 95/46.[5] Google had applied to the Council of State to seek annulment of the fine that the French Data Protection Authority – the *Commission nationale de l'informatique et des libertés* (CNIL) – had imposed on it, after Google had refused to comply with its earlier formal notice that, when granting a request from a natural person for links to web pages to be removed from the list of results displayed following a search conducted on the basis of that person's name, Google must apply that removal to all its search engine's domain name extensions. Google, on the contrary, wished to confine itself to removing such links from the results displayed following searches conducted from the domain names corresponding to the versions of its search engine in the EU Member States, complementing this refusal by a "geo-blocking" proposal.

As from 25 May 2018, Directive 95/46, the so-called Data Privacy Directive, which was based upon former Art. 100A EC Treaty (today Art. 114 TFEU), has been repealed and replaced by the new EU General Data Protection Regulation (GDPR),[6] which is based upon Art. 16 TFEU and which the CJEU also involved in its preliminary judgment.

Essentially at stake in this case was the territorial reach of the "right to de-referencing", also called the "right to erasure" or the "right to be forgotten", which had been examined earlier in the CJEU's 2014 judgment in *Google Spain*[7] and has been laid down in Art. 17 GDPR. The CJEU was asked, through several preliminary questions, whether, if all pertinent conditions are fulfilled, EU law requires de-referencing at national, European (i.e., all EU Member States) or worldwide level. In its judgment, the CJEU gave a (solely) EU-wide reach to the right to de-referencing. It held more precisely that the

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2 See e.g., https://europeanlawblog.eu/2019/10/29/google-v-cnil-case-c-507-17-the-territorial-scope-of-the-right-to-be-forgotten-under-eu-law/, https://verfassungsblog.de/the-judgment-that-will-be-forgotten/, https://www.huntonprivacyblog.com/2019/09/26/cjeu-rules-right-to-be-forgotten-on-google-limited-to-the-eu-in-landmark-case/.

3 See e.g., https://www.bbc.com/news/technology-49808208.

4 See also the anticipatory remarks on this case by DASKAL, J. Microsoft Ireland and content regulation: data, territoriality, and the best way forward. In: MUIR WATT, H. et al. (eds.). *Global Private International Law*. Cheltenham: Edward Elgar, 2019, pp. 410–413.

5 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995, L 281, 31.

6 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46, OJ 2016, L 119, 1.

7 ECJ, 13 May 2014, Google Spain SL, Google Inc./Agencia Española de Protección de Datos (AEPD), Mario Costeja González, case C-131/12, ECLI:EU:C:2014:317.

pertinent provisions of the Data Privacy Directive and the GDPR must be interpreted in the sense that where a search engine operator grants a request for de-referencing pursuant to their provisions, the operator "is not required to carry out that de-referencing on all versions of its search engine, but on the versions of that search engine corresponding to all the Member States, using, where necessary, measures which, while meeting the legal requirements, effectively prevent or, at the very least, seriously discourage an internet user conducting a search from one of the Member States on the basis of a data subject's name from gaining access, via the list of results displayed following that search, to the links which are the subject of that request".[8] The Court thus followed AG Szpunar's plea for "a European de-referencing".[9] In order to come to its conclusion, the CJEU referred to the objective of the GDPR and the earlier directive (paragraph 54), the EU legislature's competence (paragraph 58), the scope that should be attributed to de-referencing "beyond the territory of the Member States" (paragraph 62) and, last but not least, the "globalized world" in which access to the internet (i.e., a "global network without borders") takes place (paragraphs 56–57). While the Court interpreted EU law as not requiring a search engine operator to carry out de-referencing on all, worldwide versions of its search engine, it added that EU law does not prohibit this either, and that the Member States hence have the power to order a search engine operator to do so anyway, after weighing the data subject's right to privacy and the protection of personal data on the one hand, and the right to freedom of information on the other hand (paragraph 72).

In this judgment, as well as in other recent cases,[10] the CJEU tackled contemporary issues of "cyberspace" that affect important societal interests. Still, our contribution will not so much focus on the Court's interpretation of substantive EU law, but rather on the way it approaches a subject-matter that has, or could have, global ramifications that extend well beyond the territory of the EU Member States. *Google/CNIL* indeed constitutes a prime example of the way that the CJEU involves issues and concerns of globalization within its interpretation of EU law and, when doing so, appears to make use of particular conflict-of-laws methodology.

2. GLOBALIZATION AND THE LAW: A MULTITUDE OF QUESTIONS FOR EU LAW AND PRIVATE INTERNATIONAL LAW

Few topics of legal research are as trending today as the impact of globalization on the law. For a number of years, scholars in a great variety of fields have explored whether and, if so, to what extent and in what sense, legal systems are transformed by or should adapt to the ever increasing, and apparently ever faster, globalization of personal, social and economic relations and the legal means through which private and public,

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[8] *Google/CNIL*, paragraph 73.

[9] Opinion of AG Szpunar in *Google/CNIL*, point 2.

[10] See in particular the Court's judgment of the same day in *GC and Others/CNIL*, case C-136/17, ECLI:EU:C:2019:773, as well as its judgment of 3 October 2019 in *Glawischnig-Piesczek/Facebook Ireland Limited*, case C-18/18, ECLI:EU:C:2019:821.

individual or institutional actors worldwide respond to it. They have also explored new paths of legal theory that integrate the (assumed) structural change of the law in this era of globalization.

Although the debate on globalization affects many fields, one may readily assume that it is particularly relevant for both EU law and private international law. While the debate on the EU as a "global actor" to a large extent focuses on more traditional topics of EU external relations law, though approached from the new institutional perspectives provided by the Treaty of Lisbon as they have been interpreted recently by the CJEU,[11] it appears that the phenomenon of globalization truly renews traditional academic approaches to private international law.

Undoubtedly, private international law today has a "global horizon", that manifests itself in very diverse forms.[12] Groundbreaking work in that regard has been accomplished recently by Horatia Muir Watt, who, mostly in collaboration with select international colleagues, has both identified its most pertinent issues, questions and cases and, starting from a clear dissatisfaction with current conflict of laws doctrine, proposed new academic thinking on "global" private international law.[13]

At the occasion of receiving a doctorate *honoris causa* from the University of Silesia in Katowice, in 2019, prof. Paul Lagarde expressed some further ideas on this topic and pointed in particular to the effects, through the shifting and weakening of the territorial and temporal connection of international situations that it implies, of globalization on the methodology of private international law.[14] He illustrated his position on the best way for private international law to remedy possible problems linked with globalization with references to the recent collection by Muir Watt et al. of globalization cases.[15] He specifically referred to cases that arose through specific technological evolution of various kinds: the *Yahoo! v. Licra* case on illegal internet sales (nazi memorabilia) and the *Blood* and *Gomez* cases on the cross-border transfer of sperm samples for *post mortem* insemination.[16]

While these cases testify of the important effect that new technological evolutions can have on globalization, they also raise questions on the concept of globalization itself.

While *Yahoo!* involved a French–American legal dispute, *Blood* and *Gomez* related to UK–Belgian and French–Spanish legal diversity respectively. The examination of

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[11] See e.g., the topics covered by DE WAELE, H. *Legal Dynamics of EU External Relations. Dissecting a Layered Global Player*. 2nd edition. Heidelberg: Springer, 2017.

[12] Cf. VAN LOON, H. The Global Horizon of Private International Law. *Rec. Cours*, 2016, no. 380, pp. 41–108.

[13] See e.g., amongst many of her other writings, MUIR WATT, H. et al. (eds.). *Global Private International Law.* Cheltenham: Edward Elgar, 2019, and MUIR WATT, H. – FERNÁNDEZ ARROYO, D. P. (eds.). *Private International Law and Global Governance.* Oxford: OUP, 2014, but also, not accidentally, the many contributions touching upon globalization that have been collected in MUIR WATT, H. (ed.). *Private International Law and Public Law.* Cheltenham: Edward Elgar, 2015 (2 volumes).

[14] LAGARDE, P. La globalisation du droit international privé. In: *Paul Lagarde. Doctor Honoris Causa Universitatis Silesiensis*. Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2019, pp. 59–69.

[15] MUIR WATT, et al. (eds.), *Global Private International Law*.

[16] LAGARDE, P. La globalisation du droit international privé, pp. 63–68. These cases are explained and discussed more extensively in MUIR WATT, et al. (eds.), *Global Private International Law*, pp. 392–414 and 510–528.

the underlying fact situations makes one wonder about the definition of globalization. Aren't the latter cases foremost characterized, and hence interesting for further academic debate, by the challenges that new technological evolutions pose for the law? Why characterize such intra-EU disputes on assisted reproductive treatment, which is the subject of unharmonized, different legislative approaches in the respective Member States involved, as prime examples of globalization? In the *Blood* case, the legal debate even centered specifically on the interpretation of the free movement of services under Articles 56 and 57 of the Treaty on the Functioning of the European Union (TFEU). In that sense, these cases remind us, to name but one example, of the well-known 1991 judgment of the Court of Justice in *Grogan* on the application of the Treaty's free movement provisions on the distribution in Ireland of information regarding abortion in the United Kingdom.[17] Of course, contrary to *Grogan*, the *Blood* and *Gomez* cases were characterized, as Paul Lagarde rightly emphasized, by a very specific time element, as they related to the legal possibilities for posthumous insemination.[18] Still, this doesn't take away that such cases can be categorized under a pure internal market analysis. Actually, a closer look reveals that the cases examined under the title of "global private international law" include those that involve third countries but fall within the reach of EU legislation (e.g., *Owusu*, one of the most controversial ECJ judgments on the EU jurisdiction rules, involving a UK–Jamaica fact situation[19]) as well as those such as *Centros*[20] and *Laval*[21] which are almost archetypical internal market cases that, however, cannot be separated from their conflict-of-laws dimensions.

Yahoo!, for its part, raised the issue of extraterritoriality as regards jurisdiction (in France, over Yahoo.com and non-French websites) and enforcement (in California, of the French court order). Such case obviously transgresses EU law, as it would – today – not be covered by the EU legislation on that matter (in particular, the "Brussels I*bis*" regulation[22]). While the issues at stake – extension of jurisdiction to "cyberspace" and the interaction with constitutional norms such as freedom of expression – could have arisen within a purely EU-internal context as well, and then probably have triggered debate as well, they would in that hypothesis have fallen within the scope of Brussels I*bis*.

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17 ECJ, 4 October 1991, The Society for the Protection of the Unborn Child Ireland (SPUC)/Grogan et al., case 159/90, ECLI:EU:C:1991:378.

18 LAGARDE, P. La globalisation du droit international privé, pp. 67–68.

19 ECJ, 1 March 2005, Owusu/Jackson, case C-281/02, ECLI:EU:C:2005:120; cf. the analysis by CHALAS, C. – FENTIMAN, R. Judicial discretion. In: MUIR WATT, H. et al. (eds.). *Global Private International Law*, pp. 35–54, under the heading of "judicial discretion".

20 ECJ, 9 March 1999, Centros Ltd/Erhvervs- og Selskabsstyrelsen, case C-212/97, ECLI:EU:C:1999:126; cf. the analysis by HEYMANN, J. – BISMUTH, R. Free movement of corporations. In: MUIR WATT, H. et al. (eds.). *Global Private International Law*, pp. 436–455, under the heading of "Free movement of corporations".

21 ECJ, 18 December 2007, Laval un Partneri Ltd/Svenska Byggnadsarbetareförbundet and Others, case C-341/05, ECLI:EU:C:2007:809; cf. the analysis by GRUŠIĆ, U. – PATAUT, E. Global labour market. In: MUIR WATT, H. et al. (eds.). *Global Private International Law*, pp. 472–492, under the heading of "Global labour market".

22 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012, L 353, 1.

That such a broad variety of cases, with divergent European and/or international connections, can be categorized under a joint term "globalization" can only be explained by a substantive, rather than spatial, understanding of this concept. In the book project on "global private international law" (*supra*), globalization is understood as "the specific compression of time and space which coincides with late modernity; the coming of risk society, global neo-liberal economics (...); the paradoxical 'return of science' in a period of increasing disbelief in the values of modernity; and (...) the 'liquidification' of sovereignty".[23] While this approach at least has the advantage of transparency – as the definition of globalization is all too often considered self-evident or perhaps even deliberately omitted – the added value of such substantive understanding as compared to a more traditional, spatially oriented definition of globalization is subject for debate. At the very least it is clear, somewhat surprisingly, that there is no real doctrinal consensus on the concept of globalization.

The recent CJEU judgment in *Google/CNIL*, as well as AG Szpunar's Opinion in that case, offer food for thought, both with respect to the concept of globalization and as regards the analysis of the interests at stake. More particularly, there appears to exist a new and specific "logic of globalization", that appears to inspire (to a certain degree, at least) the Court of Justice when interpreting the application of EU law to particular cross-border disputes.

3. A CLOSER LOOK AT THE COURT'S AND THE AG'S REASONING: THE "LOGIC OF GLOBALIZATION", AS APPROACHED THROUGH EU-STYLE INTEREST ANALYSIS

Rather than focusing upon the search for an appropriate, comprehensive concept of globalization, which would require an in-depth analysis that cannot be done within the contours of this brief contribution, it seems worthwhile to take a closer look at the CJEU's reasoning in those cases that at least appear to be "globalized", as they require the examination of the applicability of harmonized EU law to cross-border situations that are not intra-EU but involve third, European and/or non-European, countries as well. *Google/CNIL* is such a case, and its analysis sheds some light on the importance that the CJEU attaches to a "logic of globalization", which apparently can be differentiated from an internal market logic.

In *Google/CNIL*, the CJEU is actually very cautious when interpreting the (extra-) territorial reach of the relevant EU legislation on privacy and data protection. According to the CJEU, the objective of the GDPR, and of the earlier Data Privacy Directive, is to guarantee a high level of protection of personal data throughout the Union (paragraph 54). The Court admits that "a de-referencing carried out on all the versions of a search engine would meet that objective in full" (paragraph 55) and that internet access outside the Union to the referencing of a link referring to information regarding a person whose centre of interests is situated in the Union is likely to have "immediate

[23] MUIR WATT, et al. (eds.), *Global Private International Law*, p. 1, footnote 1.

and substantial effects on that person within the Union itself" (paragraph 57), which justifies legislative competence on the part of the EU (paragraph 58). While these considerations appear to announce that a broad reach should be granted to the pertinent EU legislation, the Court refuses to take the next step, which actually would have been understandable in light of those considerations, to interpret the GDPR as imposing an obligation to worldwide de-referencing (paragraph 64). On the contrary, this de-referencing is only imposed in respect of all EU Member States (paragraph 66) and the CJEU does not go further than a reminder that EU law does not prohibit worldwide de-referencing (after weighing the fundamental rights involved) (paragraph 72).

In order to explain its prudent approach, the Court refers to the fact that "numerous third States do not recognize the right to de-referencing or have a different approach to that right" and that the balance struck between the two fundamental rights involved – the right to privacy and the right to the protection of personal data on the one hand and the freedom of information of internet users on the other hand – "is likely to vary significantly around the world" (paragraph 59), as well as to the absence of a (clear) decision in that respect of the EU legislature (paragraphs 61–62). While the latter justification is not that convincing in view of the CJEU's much more active, often controversial or according to some even "activist" approach to the interpretation of EU law in many other cases,[24] the former argument is also quite remarkable. It testifies to a great reticence on the part of the EU to impose its policy beyond its territory, at least in a case such as *Google/CNIL*.

The reasons given by the CJEU for its cautious approach make sense. And yet, it is not unlikely that the true explanation of the Court's reticence should rather be found in the practical power limits that globalization confronts even the EU with. Suppose that the CJEU orders global de-referencing on the basis of a more affirmative interpretation of the GDPR, would the EU really be able to enforce such order in all circumstances, given – as the Court explicitly mentions – the absence of "cooperation instruments and mechanisms as regards the scope of a de-referencing outside the Union" (paragraph 63)? In that sense, one must assume that the particularities of globalization require the EU to be modest, in particular with respect to extra-EU situations.

This new, "globalized" perspective and its impact on the interpretation (of the reach) of EU law was referred to as well, and more explicitly, by AG Szpunar. Interestingly, the Advocate General points to the differences between, on the one hand, the internal market, "a territory that is clearly defined by the Treaties", and, on the other hand, a global phenomenon such as the internet, which "is present everywhere". This fundamental difference makes it in his view difficult to draw analogies with fields such as EU competition and trade mark law where the CJEU exceptionally admits extraterritorial effects in view of the effects on the internal market (points 50–53). Szpunar's reasoning is further inspired by particular aspects of the globalization that characterizes the internet and the limiting effects flowing from it for the reach of EU law. As regards the balancing of the fundamental rights involved – the right to data protection and privacy versus the interest of the public in access to information – he underlines that Art. 11 of the Charter of Fundamental Rights of the EU (hereinafter: the Charter) protects, with

[24] For a variety of perspectives on the CJEU's case-law, see ADAMS, M. et al. (eds.). *Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice*. Oxford: Hart Publishing, 2015.

respect to the latter right, "not the worldwide public but the public that comes within the scope of the Charter, and therefore the European public" (point 59). To this he adds, in a consideration which has been echoed later by the Court in its judgment (*supra*), that the public interest in access to information necessarily varies, depending on its geographic location, from one third State to another (point 60). Preventing individuals in third countries to get access to information, through an EU de-referencing order, could result in reciprocal de-referencing orders and a race to the bottom (point 61). For those reasons, AG Szpunar concluded that the issues at stake in *Google/CNIL* do not require the application of the pertinent EU legislation outside the EU's territory (which does not exclude the existence of situations in which the EU's interest would require such application) (point 62). Further in his Opinion, AG Szpunar pleads for de-referencing at EU, rather than national level, which suits the nature of the GDPR as a directly applicable EU regulation but in his view holds true as well with regard to the earlier Data Privacy Directive, in view of "the logic of the internal market" (points 75–77).

At times, AG Szpunar's Opinion in *Google/CNIL* carries a far, but noteworthy echo of the reasoning that was made, more than half a century earlier in a very different context of US interstate conflict of laws, by Brainerd Currie when he introduced his so-called governmental interest analysis.

Szpunar insists on the inherent limitations on the reach of the freedom of information in Art. 11 of the Charter, which in his view is self-evidently meant to protect "not the worldwide public" but "the European public", in view of the "connection with EU law and its territoriality" that would be required (point 59). Although the Charter has indeed a limited scope of application, as defined by Art. 51, the AG's focus on a *territorial* limitation is not as obvious as he suggests, as is evidenced by the Court's admission, in principle, of a competence for the EU legislature to lay down a global de-referencing obligation (point 58 of the judgment). Still, Szpunar's interpretation reminds us of Currie's warning that while lawmakers "are accustomed to speak in terms of unqualified generality", these "extravagantly general terms" must not be taken literally.[25] To quote his example: when the legislature of Massachusetts adopts legislation that without further qualification protects "married women", one should understand that this legislation in reality only serves to protect "those [women] with whose welfare Massachusetts is concerned, of course – *i.e.* Massachusetts married women".[26]

Szpunar further makes the decision on the reach of the EU de-referencing rules explicitly dependent on "the interest of the European Union" (point 62). A decision in a different sense would carry a genuine risk of a race to the bottom, to the detriment of the freedom of expression, on a European and worldwide scale (point 61), which obviously wouldn't be in the European interest either.

Last but not least, the AG's plea for moderation[27] in view of the genuine risk for countermeasures and a race to the bottom echoes Currie's rejection of "the ruthless

[25] CURRIE, B. Married Women's Contracts: A Study in Conflict-of-Laws Method. In: CURRIE, B. *Selected Essays on the Conflict of Laws*. Durham, N.C.: Duke University Press, 1963, pp. 81–82.

[26] CURRIE, Married Women's Contracts: A Study in Conflict-of-Laws Method, p. 85.

[27] In his more recent Opinion in *Glawischnig-Piesczek/Facebook Ireland Limited* – case C-18/18, ECLI:EU:C:2019:458, another case regarding online content, though concerning a very different issue than *Google/CNIL*, AG Szpunar in a similar vein pleaded, "in the interest of international comity", that the

pursuit of self-interest by the states", his recognition of "rational altruism" and his plea for "restraint and enlightenment" with respect to the identification of the policies and interests involved.[28]

Neither the particular brand of interest analysis that characterizes AG Szpunar's Opinion nor the Court's reasoning along those same lines result in any conclusion that the EU would not have an interest in worldwide de-referencing, quite to the contrary. Both, however, refrain from pushing the enforcement of that interest to its limits, particularly in view of the risk that such extraterritorial application of EU law would entail as regards potential countermeasures and probably taking into account as well a realistic assessment of the limited chances of full enforcement of a global European de-referencing order (*supra*).

To gain full insight into this reasoning, which appears to rest on a particular "logic of globalization", it is also very interesting to compare the Court's and the AG's prudent approach in *Google/CNIL* to the Court's reasoning, which was based on some type of interest analysis as well, in its earlier judgments in *Ingmar* and *Agro Foreign Trade* on the interpretation of the agency directive.

In *Ingmar*, the Court ruled in favor of the application of the protective rules of the Commercial Agency Directive[29] where the commercial agent carried on his activity in a Member State (the United Kingdom) although the principal was established in a non-member country (the United States) and a clause of the contract stipulated that the contract was to be governed by the law of that country (and more particularly the law of California). This interpretation was based upon that directive's objective to protect commercial agents, ensuring freedom of establishment and the operation of undistorted competition in the internal market.[30]

In its more recent judgment in *Agro Foreign Trade*, on the other hand, the Court logically arrived at the opposite conclusion with regard to the applicability of the same directive to a commercial agent carrying out activities outside the EU (i.e., in Turkey) while the principal was established in a Member State (i.e., Belgium). Where a commercial agent carries out his activities outside the EU, the fact that the principal is established in a Member State does not present a sufficiently close link with the EU for the purposes of the same Directive 86/653 in the light of its objectives as explained in earlier case-law such as *Ingmar*.[31]

Comparing the Court's approach in *Ingmar* and, in particular, *Agro Foreign Trade*, with its reasoning in *Google/CNIL*, is illuminating. Both in *Agro Foreign Trade* and *Google/CNIL*, the Court limited the reach of EU law. The difference between both cases is, however, that, while the Court in *Agro Foreign Trade* denied any interest in

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Member States would adopt "an approach of self-limitation" and limit the extraterritorial effects of their injunctions concerning harm to private life and personality rights (point 100 of his Opinion).

28 CURRIE, B. Notes on Methods and Objectives in the Conflict of Laws. In: CURRIE, B. *Selected Essays on the Conflict of Laws.* Durham, N.C.: Duke University Press, 1963, pp. 185–186.

29 Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ 1986, L 382, 17.

30 ECJ 9 November 2000, Ingmar GB Ltd v Eaton Leonard Technologies Inc., case C-381/98, ECLI: EU:C:2000:605, paragraphs 20–26.

31 ECJ 16 February 2017, Agro Foreign Trade & Agency Ltd/Petersime NV, case C-507/15, ECLI:EU:C: 2017:129, paragraphs 26–36.

the applicability of EU law – as measured by the concerns of the internal market – in the given fact situation, this was different in *Google/CNIL* where the Court refused to order global de-referencing in spite of having indicated that such action would meet the objectives of the pertinent EU legislation "in full". Very probably, the nature of the internet as a global network serves as the essential distinguishing factor between the situations covered by these respective judgments. The EU is confronted with the limits of its powers to enforce its rules on a worldwide scale, in contrast to its power over intra-EU situations, including the internal market, in which de-referencing can indeed be ordered or the freedom of establishment and undistorted competition protected.

This comparison also sheds more light on the identification of those cases and issues that raise interest from the perspective of globalization and its effects on the law. For the purpose of identifying the legal challenges created by globalization, one should indeed look further than the mere selection of extra-EU cases in the sense of those cases that are connected to both the EU and third countries. Technology, as evidenced in *Google/CNIL* by the Court's references to the internet as "a global network without borders" and the internet users' access "in a globalized world", clearly constitutes a distinguishing factor to define pertinent globalization cases. This is not meant as a confirmation that technology is the essential, necessary and sufficient factor to define pertinent globalized cases – other factors are pertinent as well – but the Court's recent case-law at least makes clear that the impact on the law, including EU law and conflict of laws, of technological evolution that has the effect of diminishing or even eliminating the pertinence of territorial borders as we have traditionally known them, must be watched closely and requires a particular legal analysis that follows the "logic of globalization".

If that is true, however, one cannot escape the thought that such "logic of globalization" also implies additional duties for the courts, in particular their responsibility to adopt a global perspective. In *Google/CNIL*, neither the Court nor the AG really do so, at least not explicitly. While their reasoning examines extraterritoriality and the actual (legal) power of the EU with respect to a global phenomenon such as the internet, they do so from a sole EU perspective, apart from the Court's unsubstantiated consideration that "numerous third States do not recognise the right to de-referencing or have a different approach to that right" (paragraph 59). Certainly, it is the Court's task to interpret EU law only. But wouldn't it be wise for the Court, in such cases with clear global anchor points, to adopt a more global and comparative perspective as well, albeit only for information and interpretation purposes? The "right to be forgotten" is obviously not a mere concept of EU law, but has a broader European reach through the case-law of the European Court of Human Rights and has also been recognized in various ways by the legal systems of many third States beyond the European borders.[32] Taking that into account when considering the extraterritorial effect of pertinent EU legislation or, as the AG does, contemplating the risk of countermeasures and a race to the bottom, would have given additional weight to their eventual interpretation of EU law.

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[32] For a more precise overview and references, see GSTREIN, O. J. The Judgment That Will Be Forgotten. In: *Verfassungsblog on Matters Constitutional*. [online]. 25. 9. 2019. Accessed [June 20, 2020] at: https://verfassungsblog.de/the-judgment-that-will-be-forgotten/.

4. CONCLUSION

Google/CNIL raises fascinating legal questions of a diverse nature. Very probably, it will be followed by many other cases that involve, in different ways, issues of "globalization". This concept is still in need of a sufficiently precise and comprehensive definition. But certainly, technological evolutions that diminish or even eliminate the concept of borders as we have traditionally known them and granted significance for legal analysis, are very pertinent in that regard.

For sure, the process of globalization is irreversible, and a true "logic of globalization" inevitable. For the CJEU, the latter implies that it must not only take into account (i.a.) the particular legal effects of "globalizing" technological evolutions, but also should broaden its own legal perspective when interpreting EU law from a solely European to a truly global and comparative one.

Last but not least, *Google/CNIL* testifies of the EU's weakness when faced with the full impact of globalization. Although its interests, and those of its citizens, are clearly affected, the EU's purely unilateral action is unable to sufficiently protect them.

Globalization creates enormous opportunities, but also new problems. International collaboration is a unique way to solve the latter.

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THE IMPACT OF EU LAW ON NORWEGIAN PRIVATE INTERNATIONAL LAW

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Abstract: Norway is not a EU member state, but is associated to the EU through the European Economic Area (EEA) Agreement. The EEA Agreement extends the single market to Norway, but does not cover the area of judicial cooperation. EU law nevertheless has a considerable significance for Norwegian private international law. On the one hand, Norway has ratified and implemented Lugano Convention, Norwegian courts give consideration to EU private international law, and there is a project of codification which is based on the Rome I and Rome II Regulations. On the other hand, substantive EU law on the single market may have an impact on the applicable law, and thus indirectly on the effectiveness of private international law. In particular, the principles of freedom of movement and of establishment, as well as the principle of legal clarity, proved to have significance for the formulation of choice of law rules for company and labour law.

Keywords: freedom of establishment; freedom of movement; legal certainty; choice of law for companies; choice of law for posted workers

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1. INTRODUCTION

Private international law, also known as conflict rules or choice of law rules,[1] is that branch of the law that deals with choice of the law applicable to an international legal relationship, choice of forum for international disputes, and the recognition and enforcement of foreign decisions. Private international law is traditionally a part of each state's own law. For EU member states, however, large parts of private international law are regulated by EU law.

Norway is not an EU member state. Since 1994, however, Norway has been connected to the EU by the European Economic Area Agreement (the "EEA Agreement"). Broadly speaking, the EEA Agreement extends to Norway (as well as to Iceland and Liechtenstein) the application of EU law provisions relevant to the implementation of the single market. Basically, this means that Norway is committed to apply principles correspond-

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1 Depending on the legal tradition, the terminology «choice of law» may be used to denote the general act of selecting the applicable law on the basis of conflict rules, or the specific conflict rule of party autonomy (i.e., the parties' power to select the applicable law). I use it in the former sense.

ing to the EU principles on freedom of movement. Some EU regulations, after they have been deemed to be EEA relevant, are directly applicable in Norway. Other EU instruments, particularly directives, need to be implemented through Norwegian legislation.

EU private international law instruments do not fall within the scope of the EEA Agreement. Therefore, as a general rule, private international law in Norway is a matter of national, Norwegian law.

This, however, does not mean that EU private international law is not applied or does not have influence in Norway. As we will see below, there are two ways in which EU law is relevant to Norwegian private international law.

First of all, parts of EU private international law have become applicable through the Lugano Convention,[2] as well as through isolated choice of law rules contained in instruments that are EEA relevant. The presence in the Norwegian legal system of isolated provisions of EU private international law exercises a significant force of attraction with respect to the remaining areas of Norwegian private international law. This will be discussed in section 2 below.

Secondly, EU substantive law, notably the principles of free movement and of free establishment, may turn out to have an impact on Norwegian choice of law rules. While EU substantive law does not intend to regulate choice of law, it may have an impact when the law designated as applicable by Norwegian choice of law rules contains a substantive regulation that can be deemed to create obstacles to the freedom of movement or to the freedom of establishment. To the extent that the EEA Agreement forbids hindrances to the freedom of movement or of establishment, the application of the applicable substantive law will be restricted. This has an impact on the effectiveness of the conflict rule that designated that law as applicable. This in turn makes it likely that conflict rules will rather be based on a connecting factor that does not create the risk of infringing the principles of the single market. Indirectly, therefore, EU substantive law has an impact on Norwegian choice of law rules. The same applies to the power of Norwegian courts to determine whether to exercise the exception of public policy. These two kinds of impact will be discussed in section 3 below.

2. THE ROLE OF EU PRIVATE INTERNATIONAL LAW IN NORWAY

In Norway, conflict rules have traditionally not been codified. Exceptions include the Act on the law applicable to contracts of sale, implementing the 1955 Hague Convention on the Law Applicable to International Sale of Goods, and certain provisions or special statutes implementing obligations under international law, such as the Product Liability Act, implementing the 1973 Hague Convention on the Law Applicable to Products Liability.

Since Norway's accession to the EEA Agreement in 1994, various conflict rules have been incorporated into Norwegian law as part of the implementation of legislative

[2] 2007 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

acts with EEA relevance. While the EEA Agreement does not cover issues of private international law, conflict rules are found in certain directives and regulations which govern different aspects of the single market and therefore have EEA relevance. These conflict rules have been implemented in Norway. Therefore, there are series of conflict rules in areas such as commercial agency and various parts of consumer law. What these EEA-based Norwegian conflict rules lack, however, is a more general private international law framework. In the EU, this is given by regulations such as the Regulation on the law applicable to contractual obligations (so-called Rome I)[3] and on the law applicable to non-contractual obligations (so-called Rome II).[4] These Regulations, however, are not covered by the EEA Agreement and therefore do not have direct effect in Norway.

Norway has ratified and incorporated into its law the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The Lugano Convention contains rules on choice of forum and on the enforcement of civil judgments and mirrors the Brussels I Regulation.[5] Brussels I applies to EU member states and is part of an integrated system of EU private international law. Other important elements of this EU system are, among others, the mentioned EU Regulations Rome I and Rome II. The Brussels I Regulation is interpreted in light of the Regulations Rome I and Rome II, and *vice versa*. Since the Lugano Convention has to be interpreted consistently with the Brussels I Regulation, it can be concluded that Rome I and Rome II indirectly have influence on the Lugano Convention and thus on Norwegian private international law.

The field of private international law is thus only partly regulated by statute in Norway, mostly as a result of the implementation in Norwegian law of EU law or of obligations under international law – particularly, the Lugano Convention.

However, choice of law is not regulated systematically in Norwegian law. Until recently, if a matter did not fall within the scope of the few statutory conflict rules, Norwegian courts would apply the so-called individualising method to determine the applicable law. The individualising method prevailing earlier entailed a discretionary assessment of each individual case on the basis of the circumstances as a whole. Legal doctrine has criticised this method for not being sufficiently objective, for not explaining the criteria according to which the applicable law is determined, and for leading to unpredictable results.[6]

In the last decade, the Norwegian Supreme Court has based a number of decisions on principles corresponding to the conflict rules laid down in Rome I and Rome II. This represents a significant departure from earlier case-law. Basically, according to recent Supreme Court practice, unless there is a Norwegian conflict rule with a different content, the applicable law shall be determined using connecting factors corresponding to those contained in EU private international law.

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3 Regulation (EC) 593/2008.
4 Regulation (EC) 846/2007.
5 The Lugano Convention reflects the Brussels I Regulation in its version of 2001: Regulation (EG) 44/2001.
6 For references, see CORDERO-MOSS, G. *Internasjonal privatrett på formuerettens område*. Universitetsforlaget, 2013, pp. 77 et seq.

The sources of Norwegian private international law are, thus, fragmented and difficult to ascertain. Where no conflict rules exist pursuant to statute or customary law, newer case-law gives considerable weight to the provisions in Rome I and Rome II. This reduces the legal uncertainty, but only to a certain degree. If the detailed content of Norwegian conflict rules – or even their existence – is difficult to establish, uncertainty arises as to when and to what extent the courts should give weight to the EU regulations. Moreover, giving weight to the EU regulations on choice of law is also associated with some uncertainty, as the regulations are not binding in Norway. Their application is entirely at the court's discretion.

The fact that choice of law is associated with such significant uncertainty is unfortunate in today's society, in which an ever-increasing number of issues have an international dimension and thus necessitate a choice of law. In this context, it may be sufficient to mention increased population mobility – both private and professional – by way of illustration. Increased mobility is creating an ever-larger number of cross-border legal relations, for example in connection with the purchase of goods, purchase of services, transportation of goods and persons, insurance, financing, employment, residential leases, and tort liability. Moreover, the number of commercial cross-border transactions is rising steadily in both the consumer and commercial segments. When the need to assess parties' rights and obligations arises in such situations, it becomes necessary to determine which state's legal system is applicable.

The need to make a choice of law is thus increasingly important in today's society. It would be unfortunate if conflict rules were to be inaccessible, and their application unpredictable. If party rights and obligations are uncertain, this may have a deterrent effect and, at worst, restrict both international activity by Norwegian actors and interest among international parties in investing in Norway or in trading with Norwegian parties.

Further, unpredictability is a cost driver, as it necessitates extensive investigations and may give rise to avoidable disputes. This hinders efficiency and unnecessarily increases transaction costs. As unpredictability makes it necessary to clarify the choice of law on an *ad hoc* basis, it also imposes an unnecessary burden on the Norwegian court system.

For all the reasons mentioned above, in 2017 the Norwegian Ministry of Justice launched a process that will hopefully lead to a codification of Norwegian choice of law rules for contractual and non-contractual obligations. The Ministry gave me the mandate to prepare a proposal for a statute and the relevant report. One of the questions the Ministry asked me to evaluate was which sources should be used as an inspiration for the Norwegian codification. In particular, the Ministry wished that I examine the advisability of using EU private international law as a model for the Norwegian codification. The proposal and the report were submitted in 2018, and soon thereafter were sent to public consultation.[7] It is expected that the Ministry will follow up and continue the legislative process.

In the report to the proposal for a statute on choice of law, I examined the relationship between Norwegian and EU private international law. As mentioned above, a series

[7] The proposal, report, and result of the public consultation may be found here: https://www.regjeringen.no/no/dokumenter/horing---enpersonsutredning-om-formuerettslige-lovvalgsregler/id2611666/.

of reasons suggests that the work on a proposal for a Norwegian statute on conflict rules be based on Rome I and Rome II.

As a consequence, the proposal for a Norwegian statute on choice of law for contractual and non-contractual obligations is modelled on the EU Regulations Rome I and Rome II. Should Norwegian choice of rules be codified along the lines of the proposed statute, Norway will have a set of private international law rules coherent with its rules on jurisdiction and with the isolated choice of law rules incorporated in EU instruments on the single market.

However, quite irrespective of the completion of this legislative process, the EU law-inspired conflict rules that are already codified exercise a considerable force of attraction and thus have an impact on other areas. An important example is the impact that the Lugano Convention had on the Norwegian Civil Procedure Act. When this statute was reformed in 2005, the rules on jurisdiction were modelled on the Lugano Convention. The statute is meant to be applied to cases that do not fall within the scope of application of the Lugano Convention, and the legislator was therefore free to independently develop its own rules. However, for the sake of internal harmonization, the rules largely replicated the Lugano Convention rules.

The foregoing shows that EU private international law has a considerable influence on certain areas of Norwegian private international law – either because provisions of EU law are implemented in Norway, or because they are used as a model for Norwegian choice of law rules.

3. THE ROLE OF EU SUBSTANTIVE LAW

There is another way in which EU law may have significance for Norwegian private international law. This is a hidden influence that is exercised not by EU conflict rules, but by EU substantive law. If the application of a Norwegian private international law rule leads to the choice of Norwegian law, and Norwegian law creates more burdens for one party than those that that party is subject to under the law of its home country, under certain circumstances the application of Norwegian law may constitute a hindrance to the free movement within the single market. This is particularly true for the provisions stating the freedom of establishment and the freedom of movement within the common market.

Substantive EU law can have an impact on the efficacy of Norwegian private international law rules, and thus induce the application of a connecting factor that leads to results that are coherent with EU substantive law. Below we will see how EU substantive law may influence the formulation of a conflict rule for company law, as well as the exercise of the public policy exception within labour law.

3.1 COMPANY LAW

Norwegian company law may have more burdensome requirements than those set forth under, for example, Irish company law. For example, the required capital

may be higher in Norway. If a company registered in Ireland moves its main seat to Norway, the freedom of establishment imposes that the Irish company be recognized in Norway as a company duly registered in Ireland, and that Norwegian authorities refrain from requesting that this company comply with the higher capital requirements of Norwegian law.

Seen from a private international law point of view, a company is to meet the company law requirements imposed on it by the applicable law, the so-called *lex societatis*. How to choose the applicable law depends on the connecting factor used in the conflict rule for company law. There is no uniform approach and legal systems are, broadly speaking, divided between the connecting factor of the main seat (also known as the real seat), and the connecting factor of the registration. The former leads to applying the law of the place where the company has its central administration, the latter to the law of the place where the company is registered.

In Norway, there is no codified conflict rule for company law. There is little case-law on the matter, and legal doctrine was traditionally divided between the main seat and the place of registration as possible connecting factors.

These two connecting factors, the place of registration (or, more precisely, the country under the law of which a company is registered) or the place where the main seat is located, are also the two prevailing connecting factors internationally. More recently, some countries have abandoned the main seat theory and have embraced the registration theory. Also in Norway, legal doctrine has gradually turned to prefer the registration theory.[8]

One of the reasons for preferring the registration theory is that it is easier to apply. It is quite easy to ascertain where a company is registered; to the contrary, it may be very difficult to ascertain where a company has its main seat for international companies with, for example, top management functions spread over different countries, or board meetings taking place in different venues or by electronic means.

Furthermore, the very definition of what constitutes the main seat of a company is not necessarily clear. When, a couple of decades ago, a company registered in Norway was evaluating moving the seat of its board of directors to a different country, it found it difficult to ascertain whether it would continue to be subject to Norwegian law or whether Norwegian law would no longer be applicable to it, with the consequence that the company would have been subject to liquidation and related tax liabilities. If the connecting factor for company law had been the place of registration, moving the seat of the board of directors would not have entailed losing nationality, and therefore no liquidation would have been required. If the connecting factor for company law had been the main seat, moving the board would have entailed losing the Norwegian nationality and therefore being subject to liquidation. The company asked the Ministry of Justice to clarify the legal status – the Ministry of Justice does from time to time render opinions on the status of Norwegian law. Although not binding on the courts, these opinions have a considerable persuasive authority.

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[8] For references, see CORDERO-MOSS, *Internasjonal privatrett på formuerettens område*, pp. 268 et seq.

The Ministry of Justice rendered an opinion that analysed all the available sources, and concluded that it was not possible to set out objective, general criteria for when a company which moves the seat of its board out of Norway may be deemed to no longer be subject to Norwegian law.[9] Among the issues that according to the Ministry were difficult to ascertain was the definition of main seat.

As was mentioned earlier, Norwegian courts have in the recent decades systematically given great significance to the conflict rules set out in EU private international law. The abovementioned unclear situation with respect to the connecting factor for company law is a perfect basis for looking at EU conflict rules. However, EU law does not have a conflict rule for company law. Article 54 of the TFEU, and the corresponding Article 34 of the EEA Agreement, accept all connecting factors, as long as they do not lead to results that restrict the freedom of establishment set out in Article 49 of the TFEU and Article 31 of the EEA Agreement. There is a long series of decisions by the Court of Justice of the European Union (the CJEU), confirming that EU law does not prefer one connecting factor to another, as long as the law designated as applicable does not restrict the freedom of movement.

While EU private international law does not have a preference for one of the connecting factors for company law, EU substantive law forbids the effects of one of the connecting factors, to the extent that the chosen law would restrict the freedom of establishment. As will be seen below, this dichotomy could be misunderstood.

It could be tempting to criticise the CJEU for not being consistent and for preferring sometimes the registration theory and sometimes the main seat theory. In particular, in a series of decisions the CJEU has affirmed the principle that companies are creatures of national law, and that it is up to national law to determine the conditions for the creation, continued existence, and dissolution of a company.[10] This could be interpreted as an endorsement of the main seat theory, if the country in which a company is registered has the main seat theory. In a series of other decisions, the CJEU has affirmed the principle that a company that is duly registered in a member state may not be imposed more burdensome company law criteria set out in the company law of another member state to which the company moved its main seat.[11] This could be interpreted as an endorsement of the registration theory.

This interpretation of CJEU case-law, however, would miss the point of this case-law. In this jurisprudence, the CJEU was not concerned with confirming a specific connecting factor for company law. The CJEU was concerned with safeguarding freedom of establishment. If the registration theory led to the application of a law that did not restrict the freedom, then the choice of the company law designated by the place of registration was approved of. If, in another setting, the main seat theory led to the application of a law that did not restrict the freedom, then the choice of the company law designated by the place of the main seat was approved of. That the CJEU first endorsed the registration theory and then the main seat theory is not a sign if inconsistency. It

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9 Norwegian Ministry of Justice, Selskapsrettslige konsekvenser av å flytte et aksjeselskaps ledelse på styrenivå til utlandet, No 1997/11163 E TO/ØØ, dated 06. 01. 1998.

10 C-81/87 (Daily Mail) (para. 19), C-210/06 (Cartesio), C-371/10 (National Grid), E-15/11 (Arcade).

11 C-208/00 (Überseering), C-167-01 (Inspire Art), C-212/07 (Centros).

simply means that, by circumstances, both theories are compatible with freedom of establishment. In particular, the main seat theory is compatible with freedom of establishment when it is applied in the country of origin of the company, but not necessarily when it is applied in the country of destination.

If the country in which the company is registered intends to move its main seat to another country, and the country of origin has the main seat theory, moving the main seat will mean that the company will no longer be considered as a company subject to the law of the country of origin. This may trigger consequences, such as dissolution and the payment of taxes.[12] These consequences are not deemed to represent an unacceptable restriction on the freedom of establishment, because the company chose to register in the country of origin and is deemed to have accepted the conditions for its creation, its continued existence, and its dissolution. Among the conditions for continued existence is that the company maintains its main seat in the country of origin. Hence, applying the main seat theory in the country of origin does not lead to effects that are forbidden by EU substantive law.

If the country to which a company intends to move its main seat has the main seat theory, moving the main seat will mean that the country of destination will consider the company as a company subject to the country of destination's law – notwithstanding that the company is registered in another member state. If the company law of the country of destination has a company law with more burdensome requirements than the country of origin, for example it requires a higher capital, the company's freedom to establish itself in the country of destination will be restricted by the requirement to pay a higher capital. This is an unacceptable restriction on the freedom of establishment. Hence, applying the main seat theory in the country of destination may lead to effects that are forbidden by EU substantive law.

A party choosing to create a company under a certain law must accept that law's requirements. Once a company exists under that law, it must be free to establish itself in other member states, with the only limitations that are provided for in the law under which it was registered.

Applying the connecting factor of the main seat in the country of destination, therefore, may lead to effects that are incompatible with the freedom of establishment. Applying the connecting factor of registration, in contrast, complies with the principle, set out by the CJEU, that companies are creatures of national law – irrespective of whether the connecting factor is applied in the country of origin or in the country of destination.

The foregoing shows that EU substantive law, even when it is not meant to regulate private international law matters, has an impact on the effects of conflict rules. EU substantive law does not require member states to embrace the registration theory; however, under certain circumstances, it forbids the effects of the main seat theory when it is exercised in the country of destination. To ensure internal harmony in its private

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[12] The consequences of losing the nationality of country of origin must, however, comply with other principles of EU substantive law, such as the principles of proportionality and of non-discrimination. This applies also in the eventuality of a company intending to convert into a company subject to another member state's law, see C-378/10 (Vale), E-15/11 (Arcade), C-106/16 (Polbud).

international law, therefore, it is preferable for a country to adopt the registration theory, whose effects will not be incompatible with EU substantive law. Norwegian legal doctrine seems nowadays to have embraced the place of registration.[13] However, although it is clearly preferable from a normative point of view, it is not clear whether this reflects the prevailing law.[14]

A further, interesting impact of EU substantive law on Norwegian private international law (and on Norwegian law in general), is connected with the principle of legal certainty. This can be illustrated by a decision rendered by the EFTA Court in a case relating, among other things, to the choice of law for companies.[15]

A Norwegian company had moved its main seat out of the country, but was still registered as a Norwegian company. The question was whether, having moved its main seat, the company could be deemed to have lost its Norwegian nationality, which in turn would have led to consequences in terms of dissolution and taxation. Following the abovementioned case-law by the CJEU, the EFTA Court recalled that companies are creatures of national law. Norway was, therefore, free to apply the main seat theory and to require that the company be dissolved.

However, the EFTA Court invoked the principle of legal certainty, and specified that the criteria according to which the nationality of a company is determined, need to be clear and objective. This criterion is likely to have a significant impact on Norwegian private international law – as was seen above, not only is it not completely clear from the applicable sources whether the applicable connecting factor is registration or the main seat; even more important is that there are no objective and clear criteria to define what is the main seat, as the abovementioned opinion by the Ministry of Justice concluded.

3.2 LABOUR LAW

Another area in which EU substantive law may limit the effects of the application of Norwegian private international law is the area of labour law – in particular, in connection with posted workers. The way in which Norwegian law was applied by the Norwegian Supreme Court[16] was deemed by the EFTA Surveillance Authority, the ESA, to infringe Article 36 of the EEA Agreement on freedom to provide services.[17] In particular, it was the Supreme Court's evaluation of what represents Norwegian public policy, that was put into question. The ESA issued a formal notice initiating a case against Norway for breach of the EEA Agreement. The case was later closed,[18] in part

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13 See, for references, CORDERO-MOSS, *Internasjonal privatrett på formuerettens område*, p. 281.

14 In one of the many decisions involving the moving out of Norway of the company Arcade, the Oslo District Court found that the registration theory is clearly preferable. However, it concluded that the prevailing law was still as described by the Ministry of Justice in its opinion of 1998, see TOSLO-2010-147861 – UTV-2013-1050.

15 E-15/11 (Arcade). The EFTA Court is a court established to interpret the EEA Agreement. It is, broadly speaking, the EEA parallel to the CJEU.

16 Rt. 2013 s. 238 (STX).

17 ESA Letter of formal notice to Norway concerning the posting of workers dated 25 October 2016, Decision No 191/16/COL.

18 ESA Decision dated 19 December 2018, Decision No 109/18/COL.

as a consequence of a political compromise that led to some changes in the disputed rules of the EU Directive on posted workers,[19] and in part due to the amendment of the relevant Norwegian regulation.

The Supreme Court decision was rendered in a dispute between the Confederation of Norwegian Enterprises and the Norwegian state. The Confederation claimed that the Norwegian state infringed the principle of freedom to provide services when it applied a regulation requiring enterprises providing construction services in Norway and using workers posted from abroad to pay to the posted workers a compensation for their board and lodging expenses.

The regulation in question was based on the Statute on General Application of Collective Agreements.[20] This statute permits an autonomous governmental body, the Tariff Board,[21] to decide that, in certain sectors, collective labour agreements be applicable to all workers employed in that sector, irrespective of whether the workers or the employers are bound by the collective agreement.

The purpose of the statute is to ensure that foreign workers who work temporarily in Norway have employment conditions that are comparable to Norwegian workers' employment conditions. While this measure may combat dumping practice and the exploitation of foreign workers, it also has the effect of protecting Norwegian employment conditions from foreign competition. Furthermore, it has the effect of restricting the possibility of foreign companies to compete in the Norwegian market if they use posted workers. The use of workers coming from abroad becomes much more expensive than the use of local workers when a collective agreement contains provisions requiring the employer to cover necessary travel expenses upon the commencement and completion of the assignment of a worker and for a reasonable number of journeys home, as well as to pay for board and lodging when performing the work in Norway. This is an obstacle to the free provision of services.

The field of temporary work is subject to the Directive on posted workers, which is EEA relevant and has been implemented in Norway. Under this Directive, employment conditions for workers from a member state who are temporarily employed in another member state shall be subject to the law of the country where the workers normally work (which for brevity I will hereafter define as "home country").

This rule is the result of a political compromise between the work-exporting member states and the work-importing member states. It is assumed that employment conditions in work-exporting states are more favourable to the employer, and that therefore posted workers will be able to be more competitive on the labour market than local workers. This facilitates the export of workforce. Work-exporting countries, therefore, benefit from the rule designating their law as the law applicable to the conditions of employment of their workers who are temporarily employed in another country. Host countries, however, have mixed interests. On the one hand, employers in the host country may

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19 Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

20 Act of 4 June 1993 No 58 relating to general application of collective agreements.

21 For the sake of transparency, I inform that I am a member of the Tariff Board. The Tariff Board's resolutions which were the object of the dispute and of the ESA notice mentioned here were, however, taken before I became a member.

be interested in benefitting from a cheaper workforce. Therefore, they welcome posted workers who can offer more competitive employment conditions from their home countries. Local employees, in contrast, are interested in maintaining the level of work protection and of benefits that was reached thanks to long-lasting economic development and trade unions activity. Competition from posted workers who accept more restrictive employment conditions may threaten the standard of worker protection prevailing in the host country. Employees in host countries, therefore, would prefer that foreign workers who are temporarily employed in the host country benefit from the same employment conditions as local workers.

The compromise between these opposed interests was found in Article 3 of the Directive. This provision contains an exhaustive list of employment conditions that may be subject to the law of the host country. Among these conditions is the minimum rate of pay.

Among the questions that were decided by the Norwegian Supreme Court, was whether the Collective Agreement's provision on compensation for board and lodging expenses could, pursuant to the General Application Act, also be applied to posted workers. According to the Directive, the issue of compensation for board and lodging expenses has to be governed by the posted worker's home country, unless it can be deemed to fall within the scope of Article 3, for example as being part of the minimum rate of pay.

According to the ESA,[22] a systematic interpretation of the Directive as it was at the time of the dispute suggested that compensation for board and lodging expenses did not fall within the scope of Article 3 and must thus be subject to the law of the posted workers' home country. The Supreme Court, in contrast, opted for the opposite interpretation, that would have permitted applying the Norwegian regulation extending the Collective Agreement. The Supreme Court, however, did not conclude on this issue,[23] because it found that in any case compensation for board and lodging expenses fell within the scope of Article 3 No 10 of the Directive – containing a reservation for public policy.

The Norwegian Supreme Court considered the importance that collective negotiations have in Norwegian society. The cooperation of social parties has traditionally been an important characteristic of the Norwegian labour market, based on the acknowledgement that the salary level has had great significance for the development of Norwegian society.[24] In addition, it has traditionally been considered to be of crucial importance that collective negotiations be carried out first in sectors where competition is free, and that the result of the negotiations in these sectors be applied in protected sectors. The Supreme Court found that this method has traditionally ensured social stability in

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22 ESA Formal notice dated 25 October 2016, paras. 38–61.

23 The list of Article 3 was later amended to also include compensation for board and lodging expenses – however, only relating to travels within the host member state. The new regulations by the Tariff Board were, in turn, amended to extend only compensation for board and lodging expenses relating to travels within the host member state. Therefore, there was no discrepancy any more between the Directive and the Tariff Board regulation, and the ESA closed the case against Norway.

24 Rt. 2013 s. 258, para. 159.

Norway. In fact, this system is so fundamental for the functioning of Norwegian society that it must be considered to represent public policy.

The exception of public policy is a known mechanism in private international law. It permits, in exceptional situations, to disregard specific rules of otherwise applicable law. A condition for the exercise of the public policy exception is that the result of applying the foreign rule would seriously infringe fundamental principles in the court's country. The threshold for applying the public policy exception is very high.

Within EU private international law, the criteria for defining the scope of the public policy exception are a matter of EU law – for example, Article 21 of the Rome I Regulation requires the breach to be manifest, and the preamble explains that the exception may be used in exceptional situations.[25]

The definition of the public policy exception and its effects, therefore, are a matter of EU law. However, the definition of what is the content of public policy is left to the member states. What constitutes a fundamental principle in a certain country is a matter for that country to define.

The same mechanism that is laid down in the Rome I Regulation for contract obligations is applicable in the field of individual employment contracts under the Directive. Thus, the ESA affirmed that: "While the EEA States are still, in principle, free to determine the requirements of public policy in the light of national needs, the notion of public policy may be relied upon only if there is a genuine and sufficiently serious threat to a fundamental interest of society."[26]

When the Supreme Court argued that the system of collective labour negotiations is a fundamental characteristic of the Norwegian labour market, and that not being able to apply the Collective Agreement rule on compensation for board and lodging expenses would have seriously undermined the stability of Norwegian society, it exercised the prerogative of national courts to determine what is a fundamental principle in their country.

Admittedly, the Supreme Court seems to have interpreted the public policy exception in a much broader way than what is usual in the field of private international law and, according to the ESA, in the specific context of Article 3 No 10 of the Directive. One of the problematic issues arising out of the exception of public policy is precisely the risk that courts may interpret it too extensively, thus disregarding the foreign applicable law to a larger extent than what the narrow scope of public policy is supposed to permit.

However, the fact remains that it falls within the power of national courts to determine which principles are fundamental in the court's own legal system. The ESA, in contrast, initiated a case for breach of the EEA Agreement on the basis of the Norwegian Supreme Court's application of the public policy exception. The basis for doing so was that the Supreme Court's exercise of the public policy exception would restrict the freedom of movement.

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[25] Rome I, preamble, para. 37.

[26] ESA Formal notice dated 25 October 2016, para. 68.

4. CONCLUSION

The foregoing shows that Norwegian private international law is exposed to multiple influences from EU law – notwithstanding that Norway is not a member state of the EU, and that private international law does not fall within the scope of the EEA Agreement.

On the one hand, there is the influence exercised by EU conflict rules. Some of them are implemented in Norway and are therefore directly applicable. This is the case of conflict rules contained in EU instruments on the single market. The instruments on the single market are relevant to the EEA Agreement and are therefore implemented in Norway, and the conflict rules that may have been included in these instruments find their way into the Norwegian legal system. Another source of the import of EU private international law is the Lugano Convention. Other EU private international law rules are considered to have significance because they give the systematic framework for the EU conflict rules that are implemented in Norway. This is the case of the Rome I and Rome II Regulations, which are significant for the interpretation of the Brussels I Regulation and thus for the Lugano Convention. For the sake of harmonisation of the Norwegian legal system internally, as well as with its neighbouring countries and Europe, EU private international law is therefore deemed to have great significance for Norwegian private international law. A proposal for a statute on choice of law for contractual and non-contractual obligations is largely based on the Rome I and Rome II Regulations.

On the other hand, there is the influence of substantive EU law. This is an indirect influence: EU substantive law is not aimed at imposing connecting factors for designating the applicable law. EU substantive law is concerned with safeguarding and promoting the single market. As the examples of company law and of labour law showed, the application of Norwegian law may, under certain circumstances, represent a restriction on the freedom of establishment or of movement. In these cases, EFTA authorities have reacted to the restrictive effect of applying Norwegian law. This has various indirect effects on Norwegian private international law: choice of law rules for company law need to be formulated in a more objective and predictable way; the connecting factor for company law may not, under certain circumstances, be the company's main seat; and the Norwegian provisions on the general application of collective agreements' regulation of the compensation for board and lodging expenses may not be deemed to represent public policy.

Private international law is, therefore, highly intertwined – not only the different branches of private international law with each other, but also with substantive law.

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LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME ET LES CONFLITS DE LOIS : SYNTHÈSE DE DIX ANS DE JURISPRUDENCE EUROPÉENNE

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Abstract: **The European Convention on Human Rights and the conflict of laws: summary of ten years of European case-law**

The European Court of Human Rights, whose jurisprudence is presented here, is not a court specialising in private international law. However it applies the norms deriving from the European Convention on Human Rights to applications by litigants complaining of any type of national legal rules, including the rules of private international law. There are cases decided by the European Court in all fields of private international law, out of which the cases relating to the field of choice of law are presented here. The cases decided during the last ten years can be classified in cases on the human rights control of (1) equality before the national rules of choice of law, (2) the public policy exception, (3) *fraus legis*, and (4) the methodological choice between the application, to a status acquired abroad, of the forum's own rules of choice of law, or, alternatively, the method of recognition of the result of the application of the foreign rules of choice of law. The case-law of the European Court has had, on the whole, a moderate – and moderating – effect on national choice of law rules.

Keywords: European human rights law; principle of equality; public policy; *fraus legis*; method of recognition

Mots clés : convention européenne des droits de l'homme ; principe d'égalité ; ordre public ; fraude à la loi ; méthode de la reconnaissance

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I. INTRODUCTION : DES ARRÊTS ET DÉCISIONS « AYANT TRAIT » AUX CONFLITS DE LOIS

1. Les décisions de la Cour européenne des droits de l'homme « ayant trait » au droit international privé que l'on présentera ici ne sont pas des décisions *de* droit international privé. La Cour n'est (contrairement aux juridictions nationales, ou à la Cour de justice de l'Union européenne) pas une juridiction qui aurait directement compétence pour trancher des questions de droit international privé, ni d'ailleurs, plus généralement, des questions de droit allant au-delà de l'application d'un seul ensemble

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normatif, la Convention européenne des droits de l'homme et ses protocoles additionnels. Mais la Cour européenne a potentiellement vocation à intervenir – en le faisant, comme le rappelle à présent le Protocole additionnel nº 15 à la Convention européenne, dans le respect du principe de subsidiarité et en respectant la marge d'appréciation dont bénéficient les Etats cocontractants[1] – dans le contrôle, par rapport à la Convention, du résultat de l'application des règles nationales (ou européennes au sens de : règles de l'Union européenne[2]) de droit international privé.

C'est que les décisions et arrêts de la Cour européenne des droits de l'homme peuvent intervenir à propos de n'importe quel domaine de la réalité ou presque.[3] Comme la formulation et l'administration des règles du droit international privé font partie de l'activité des pouvoirs publics des Etats contractants, et comme elles sont susceptibles de porter des atteintes réelles (ou du moins alléguées par les requérants) aux droits de l'homme des personnes qui se relèvent de la juridiction des Etats contractants, elles sont concernées elles aussi par le contrôle de la Cour.

2. Le contrôle par rapport aux droits de l'homme ne peut pas réellement nuire aux méthodes générales du droit international privé. Ces méthodes survivront à leur confrontation aux droits de l'homme et au contrôle de leurs résultats par une juridiction internationale qui n'est pas spécialisée en droit international privé.[4] Il peut en aller différemment de l'une ou de l'autre application de ces méthodes, et il faut s'en féliciter, car des solutions non seulement très discutables au regard des buts réels du droit international privé, mais encore attentatoires aux droits de l'homme existent parfois dans les systèmes nationaux de droit international privé.

Les décisions et arrêts issus de ce contrôle – par essence aléatoire, puisque réalisé par une juridiction qui ne peut pas s'autosaisir – sont intéressants à connaître et à systématiser, y compris dans une perspective de codification progressive du droit international privé de l'Union européenne. Il ne convient en effet évidemment pas de favoriser les

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1 Le 15e Protocole a ajouté un nouveau considérant au préambule de la Convention, ainsi rédigé : « Affirmant qu'il incombe au premier chef aux Hautes Parties contractantes, conformément au principe de subsidiarité, de garantir le respect des droits et libertés définis dans la présente Convention et ses protocoles, et que, ce faisant, elles jouissent d'une marge d'appréciation, sous le contrôle de la Cour européenne des Droits de l'Homme instituée par la présente Convention ». Le Protocole n'est pas encore entré en vigueur ; sa ratification par la Bosnie-Herzégovine et l'Italie n'est pas encore intervenue. Mais de toute manière, le texte en question correspond à la jurisprudence existante de la Cour.

2 Cf. en particulier l'arrêt *Avotiņš c. Lettonie* du 23 mai 2016 [GC], nº 17502/07.

3 Dans un article publié en 2011, j'en avais proposé une preuve empirique, en proposant aux lecteurs de voir ce qui serait le résultat d'une recherche sur le système « Hudoc » mis à disposition du public sur www.echr.coe.int, qui utiliserait comme terme de recherche le mot « druide » (ou plutôt son équivalent anglais, « druid »). Le résultat en était qu'il y avait deux décisions et un arrêt faisant apparaître le terme « druid » ; les deux décisions avaient trait à des requêtes de druides dirigées contre le Royaume-Uni, à propos des règlements de police s'appliquant au site de Stonehenge qui portaient indûment atteinte, selon les requérants, au libre exercice de la religion druidique : cf. Private International Law Topics Before the European Court of Human Rights – Selected Judgments and Decisions (2010–2011). *Yearbook of Private International Law*, 2011, 13, pp. 37 et seq., spécialement note 2.

4 La même observation est exacte en ce qui concerne le contrôle par une juridiction constitutionnelle nationale. Cf. d'une manière générale « Droits de l'homme, droits fondamentaux et droit international privé ». *Recueil des cours*, 2005, vol. 318, p. 22, note 9 (où il est observé que ce contrôle a même un avantage notable : l'absence de spécialisation en droit international privé de la juridiction chargée de contrôler le respect des droits de l'homme lui permet d'avoir un regard pour ainsi dire naïf, et qui peut être plus perspicace que le regard de ceux qui sont plus routiniers de la matière).

conflits de normes ; la codification doit s'efforcer de respecter le droit international des droits de l'homme liant l'ensemble des Etats membres, et qui inspire au demeurant la Charte des droits fondamentaux de l'Union européenne.[5]

3. L'activité de la Cour au cours des années activité dépend des requêtes dont la Cour est saisie. Parmi les sous-matières du droit international privé général, c'est le domaine de la coopération en matière de lutte contre l'enlèvement international d'enfants – par application de la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants, et à l'intérieur de l'Union européenne par application des règlements Bruxelles-II, Bruxelles II*bis* et (à l'avenir) de la refonte de ce dernier, opérée par le règlement (UE) 2019/1111 – qui est celui dans lequel l'activité jurisprudentielle est la plus intense, simplement parce que le nombre de saisines est le plus élevé ; la jurisprudence est assez casuistique mais s'oriente autour des principes arrêtés dans deux arrêts de Grande Chambre, les arrêts *Neulinger et Shuruk c. Suisse*[6] et *X. c. Lettonie*.[7]

S'agissant de la compétence judiciaire internationale, il n'y a en revanche pas de grands thèmes prédominants, mais plutôt des solutions individuelles qui ont été adoptées dans des arrêts de la Cour européenne. Ces arrêts se sont jusqu'à présent concentrés (du fait, à nouveau, de la nature des requêtes dont la Cour avait été saisie) sur l'aspect de garantie de l'effectivité de l'accès aux tribunaux pour les demandeurs[8] plutôt que sur la protection des défendeurs contre les affirmations de compétence exorbitantes pouvant émaner des tribunaux des Etats contractants.

Dans le domaine de la reconnaissance et de l'exécution des jugements étrangers, un Etat contractant peut méconnaître la Convention en refusant d'exécuter un jugement étranger pour des motifs non reconnus comme suffisants au regard du droit à l'exécution effective d'une décision obtenue,[9] ou alors en l'exécutant malgré le fait que les droits garantis par la Convention ont été méconnus lors de la procédure devant le juge d'origine. Les deux hypothèses apparaissent périodiquement dans la jurisprudence de la Cour ; la deuxième de ces hypothèses est une cause de tension entre le droit européen des droits de l'homme et le droit de l'Union européenne qui met en œuvre, au moins partiellement, une politique fondée sur la confiance mutuelle entre Etats membres et comportant l'exécution des jugements émanant des tribunaux d'autres Etats contractants, sans contrôle dans l'Etat membre de l'exécution de ces jugements.[10]

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[5] Cf. l'article 52, paragraphe 3 de la Charte : « Dans la mesure où la présente Charte contient des droits correspondant à des droits garantis par la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales, leur sens et leur portée sont les mêmes que ceux que leur confère ladite convention. Cette disposition ne fait pas obstacle à ce que le droit de l'Union accorde une protection plus étendue ».

[6] Arrêt du 6 juillet 2010, nº 41615/07.

[7] Arrêt du 26 novembre 2013, nº 27853/09.

[8] *Arlewin c. Suède*, arrêt du 1er mars 2016, nº 22302/10. Par ailleurs, un arrêt de la Grande Chambre de la Cour, l'arrêt *Naït-Liman c. Suisse*, arrêt du 15 mars 2018, nº 51357/07, a considéré comme justifié le refus de la Suisse d'accepter la compétence de ses tribunaux pour connaître de faits de torture dont avait été victime un Tunisien réfugié en Suisse, et ceci malgré l'impossibilité d'obtenir la compétence des juridictions tunisiennes. Comme on le sait, l'arrêt *Naït-Liman* a été très critiqué.

[9] Cf. « Enforcement as a Fundamental Right ». *Nederlands Internationaal Privaatrecht*, 2014, pp. 540 et seq.

[10] Sur ce point, cf. « Le rôle du politique en droit international privé ». *Recueil des cours*, 2019, t. 402, pp. 295–310.

4. Ce que je me propose de présenter ici est la jurisprudence de la Cour européenne des droits de l'homme au cours de la dernière décennie dans un autre domaine que ceux qui viennent d'être mentionnés, celui des conflits de lois. Le conflit de lois est l'une des matières centrales du droit international privé, et reste (du moins à mon avis) la matière la plus caractéristique du mode très particulier de raisonner qui caractérise le droit international privé.

Là encore, ce n'est pas à la Cour européenne des droits de l'homme qu'il appartiendrait de définir des règles de conflits ou de se prononcer sur telle ou telle technique du droit international privé. Je montrerai au contraire, à l'aide de sa jurisprudence des dix dernières années, qu'elle est respectueuse de la compétence des Etats contractants à cet égard. Mais elle se réserve un contrôle, qu'elle a exercé jusqu'à présent dans quatre domaines : la non-discrimination par la règle de conflit (II), le jeu de l'ordre public d'éviction (III), celui de l'exception de fraude à la loi (IV) et, enfin – mais c'est un *last not least* – celui du choix méthodologique ou plutôt du résultat de ce choix,[11] entre la méthode de la reconnaissance et la méthode de l'application de la règle de conflit du for à des situations constituées en dehors du for (V).

II. LE CONTRÔLE EUROPÉEN DE LA NON-DISCRIMINATION PAR LA RÈGLE DE CONFLIT

5. La règle de conflit de lois est essentiellement un mécanisme de restriction de l'applicabilité des normes de droit matériel du for à certaines situations : celles que le facteur de rattachement de la règle de conflit localise dans l'Etat du for. Pour toutes les autres situations, non localisées dans le for, ce sera une loi étrangère, désignée conformément au système de conflit du for, qui sera appelée à les régir. Lorsque ce système de conflit est conforme à la tradition européenne dominante, la règle de conflit sera multilatérale et procédera elle-même à la désignation de la loi étrangère qui s'appliquera devant les autorités du for à ces situations, au lieu du droit matériel du for. Cette description, élémentaire, du fonctionnement des règles de conflit a parfois donné lieu à un soupçon qui a été (trop ?) rapidement écarté par les spécialistes du droit international privé : le traitement matériel différencié des deux types de situation, dès lors que la solution qui résulte de la loi du for n'est pas identique à la solution du droit étranger, alors que les deux situations sont similaires *sauf par leur localisation*, n'est-il pas discriminatoire ?[12]

La discrimination potentielle par la règle de conflit, à laquelle la Cour européenne a consacré la décision et l'arrêt que l'on présentera ici, relève de la violation du principe général de l'égalité devant la loi. Elle se distingue en cela de l'incidence de principes

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[11] Puisque, là encore, la Cour européenne des droits de l'homme s'est toujours gardée d'imposer un choix méthodologique aux Etats contractants. Il lui arrivera, en revanche, de censurer certains résultats de l'application de la méthode classique de la règle multilatérale de conflit de lois.

[12] Cf. « Sur la question de la discrimination inhérente aux règles de conflit de lois. Développements récents et interrogations permanentes ». Dans : CORTESE, B. (ed.). *Studi in onore di Laura Picchio Forlati*. Torino : G. Giappichelli Editore, 2014, pp. 195 et seq., dont est également reprise la description des affaires *Ammdjadi c. Allemagne* et *Harroudj c. France* ci-dessous.

spécifiques de non-discrimination ayant une nature particulière et un poids politique particulier, spécialement l'égalité entre hommes et femmes.[13]

La question peut sembler appeler une réponse extrêmement simple : il n'y a pas de discrimination dans pareil cas. Du moins en va-t-il ainsi selon un argument logique, *a priori* convaincant, dans le sens de la non-pertinence d'une vérification des règles de conflit par rapport au principe général d'égalité devant la loi : c'est qu'il *n'y a pas* de traitement inégal du fait de l'application d'une règle de conflit unique à toutes les situations. Prenons l'exemple le plus important, celui du rattachement du statut personnel à la nationalité des personnes. La règle de conflit – élément de l'ordre juridique du for et par conséquent susceptible d'être confrontée au principe d'égalité qui s'impose à l'intérieur de ce même ordre juridique – a pour seul contenu d'indiquer la loi applicable au fond ; et si le droit matériel du for, qui s'applique au statut personnel des nationaux du for, prévoit à leur profit un avantage, la règle de conflit n'empêche en rien les nationaux étrangers de bénéficier du même avantage, à condition qu'il soit prévu par leur propre loi nationale. La règle de conflit, quant à elle, est la même pour tous : tous seront jugés seront leur loi nationale. Il n'y a donc pas de traitement différencié et *a fortiori* pas de discrimination, celle-ci étant le traitement différencié non justifié.[14] Seules des règles de conflit qui différencient selon des critères non seulement irrationnels, mais absolument inacceptables peuvent, selon cette conception, être utilement confrontées au principe d'égalité. Il peut en aller autrement, bien entendu, lors de l'application des règles du droit interpersonnel, règles de conflit internes à un ordre juridique plurilégislatif – la Grèce en est un exemple avec l'application, par les juridictions grecques, de la charia aux membres de la minorité musulmane de Thrace, comme devait le montrer l'arrêt *Molla Sali c. Grèce* de la Cour européenne.[15] L'explication de cette exception sera que tant le droit commun grec que le droit musulman font partie de l'ordre juridique de la Grèce : le critère de répartition des normes est susceptible de contrôle au regard du principe général d'égalité, contrairement aux règles du droit international privé déclarant applicables tantôt les normes issues de l'ordre juridique du for, tantôt celles issues d'un ordre juridique étranger.

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[13] Une affaire complexe, faisant intervenir le droit international privé suisse et la réglementation suisse de droit matériel en matière d'attribution du nom après mariage, a été tranchée par l'arrêt de la Cour du 9 novembre 2010, *Losonci Rose et Rose c. Suisse*, nº 664/06. Cet arrêt décide que le fait de priver M. Losonci de la possibilité de choisir la loi applicable était discriminatoire en raison de son sexe (si une *femme* mariée avait demandé à changer de nom, le droit suisse l'y aurait admis dans une situation symétrique), en rappelant que « seules des considérations très fortes peuvent amener à estimer incompatible avec la Convention une différence de traitement fondée exclusivement sur le sexe » (par. 41). L'affaire *Losonci-Rose* est trop particulière pour que l'on puisse en tirer des conclusions à portée générale.

[14] Cf. le raisonnement conduit, avec une implacable logique, par SONNENBERGER, H.-J. *Münchener Kommentar zum Bürgerlichen Gesetzbuch.* 5e éd. München: C. H. Beck, 2010, Einleitung IPR, nº 341, note 1073 : le principe de non-discrimination ne peut viser que l'auteur de la règle de conflit ; dès lors, une critique ne serait pertinente que si la règle de conflit prévoyait un *rattachement différent* pour des mêmes situations de fait – ce qui n'est précisément pas le cas en cas d'un rattachement uniforme, tel le rattachement à la nationalité.

[15] Arrêt du 19 décembre 2018 [GC], requête nº 20452/14. La Cour y juge (par. 157) que « [r]efuser aux membres d'une minorité religieuse le droit d'opter volontairement pour le droit commun et d'en jouir non seulement aboutit à un traitement discriminatoire, mais constitue également une atteinte à un droit d'importance capitale dans le domaine de la protection des minorités, à savoir le droit de libre identification. »

6. Mais est-il vrai que, comme le soutient cette opinion doctrinale, une règle de conflit en matière de conflits de lois d'ordres juridiques différents est soustraite à tout contrôle ? Deux affaires portées devant la Cour européenne des droits de l'homme permettent d'en douter.

La première de ces affaires, l'affaire *Ammdjadi c. Allemagne*,[16] concernait les conséquences du divorce d'un couple d'Iraniens, domiciliés en Allemagne. Lorsque l'épouse demanda le *Versorgungsausgleich* (péréquation des droits à pension), conséquence du divorce qui existe en droit allemand, mais qui n'existe pas en droit iranien, elle se heurta à une disposition du traité d'établissement entre l'Allemagne et l'Empire de Perse du 17 février 1929, en vertu de laquelle en matière personnelle, familiale et successorale, la loi de la nationalité commune des parties est applicable. Cette solution adoptée par le traité était moins favorable à la requérante que celle du droit international privé commun allemand (art. 17, par. 3 EGBGB), lequel permet, en fonction des circonstances, de procéder à la péréquation des droits à pension entre conjoints étrangers si ces droits ont été acquis en Allemagne. Pour la requérante, l'application du droit iranien – qui lui déniait le droit à la péréquation, solution qui avait été jugée non contraire à l'ordre public allemand par les juridictions nationales – heurtait son droit à la vie familiale (art. 8 de la Convention), mais aussi son droit à ne pas être l'objet d'une discrimination en raison de sa nationalité iranienne (art. 14 en combinaison avec l'art. 8).

La Cour rejette d'abord le grief tiré de l'art. 8, estimant que la Convention n'oblige pas les tribunaux allemands à laisser sans application le traité germano-perse en qualifiant la péréquation des droits à pension comme faisant partie de l'ordre public allemand. Elle note dans ce contexte que le droit iranien prévoit lui aussi pour une « certaine protection sociale du conjoint », prenant la forme d'aliments après divorce.

Vient ensuite l'examen du grief tiré du principe d'égalité. La Cour retient que la requérante a effectivement été traitée différemment d'autres demandeurs en péréquation, auxquels s'applique le droit matériel allemand, et que cette différence de traitement est due à la nationalité iranienne de la requérante et de son conjoint. Si elle n'a pas pour autant conclu à l'existence d'une discrimination, c'est que la règle de conflit en question – tout en apparaissant quelque peu inopportune à la Cour qui lui préférerait en l'occurrence apparemment un rattachement à la résidence habituelle des parties – n'est pas pour autant sans justification « objective et raisonnable », si bien que rien ne s'oppose à son maintien. La Cour note par ailleurs que le rattachement à la nationalité a, en général, pour utilité de « protéger les liens étroits d'une personne avec son Etat national » :

> « The Court finds that, especially in conflict of laws cases, the differentiation for all family issues according to nationality and not to habitual residence is a well-known principle which aims at protecting a person's close connection with his or her home country. Therefore, even though the decisiveness of the habitual residence might arguably be considered preferable with regard to pension rights, the decisiveness of a person's nationality cannot be considered to be without "objective and reasonable justification" ».[17]

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[16] Décision du 9 mars 2010, nº 51625/08.

[17] La décision poursuit comme suit : « In this respect, it must also be noted that the applicant had been free to choose the application of German law, together with her husband, by notarial certification ». Il semblerait que cette réflexion confonde les règles ordinaires du droit international privé allemand (article 14, para-

Ammdjadi c. Allemagne est une décision d'irrecevabilité par laquelle la Cour motive brièvement la conclusion selon laquelle les griefs de la requérante étaient « manifestement malfondés ». Ces motifs n'en sont pas moins remarquables. La raison pour laquelle il a été conclu à l'absence de discrimination ne consistait *pas* dans le fait que le traité germano-perse formulait une règle de conflit uniformément applicable à toutes les personnes qui entraient dans son champ d'application (à savoir la règle de l'applicabilité de leur loi nationale, qu'elle soit allemande ou iranienne). Au contraire, la décision s'intéresse au facteur de rattachement choisi par le traité germano-perse et estime que ce facteur de rattachement est objectivement et raisonnablement justifié – ce qui, compte tenu de la marge d'appréciation que la Cour concède au législateur national, revient à le valider pour les besoins du principe d'égalité au sens de la Convention européenne des droits de l'homme.

C'est uniquement parce que la nationalité apparaît comme un facteur de distinction pertinent et raisonnable dans l'octroi entre époux allemands d'un droit à péréquation, et dans son refus entre époux iraniens, que la requête a été rejetée. Cette approche diffère de celle selon laquelle une règle de conflit unique traite par nature, quel que soit le facteur de rattachement choisi, toutes les personnes de manière identique. L'approche ainsi adoptée est une approche moins formelle et plus substantielle de la question de la discrimination par la règle de conflit de lois.

7. L'affaire *Harroudj c. France* a donné lieu à une motivation plus ample de la solution adoptée.[18] La requérante, une ressortissante française, s'était vu confier en Algérie, par un acte de recueil légal (*kafala*), un enfant algérien abandonné, Hind. L'acte de recueil légal autorisait l'enfant à sortir du territoire algérien et à s'établir en France avec la requérante. Deux ans après, M^me^ Harroudj demanda en France l'adoption plénière de l'enfant, au motif que ceci était la solution la plus conforme à « l'intérêt supérieur de l'enfant ». Mais le droit algérien, d'inspiration islamique, prohibe l'adoption,[19] et une règle de conflit du droit français, l'article 370-3 du code civil, dispose que « l'adoption d'un mineur étranger ne peut être prononcée si sa loi personnelle prohibe cette institution, sauf si ce mineur est né et réside habituellement en France ».[20] La requérante échoua par conséquent à obtenir en France l'adoption de l'enfant. Elle introduisit un recours devant la Cour européenne des droits de l'homme, fondé d'une part sur l'atteinte à sa vie familiale avec l'enfant qu'aurait constitué le refus de prononcer l'adoption et, d'autre part, sur la discrimination dont elle serait victime, par comparaison à une mère adoptant un enfant de statut personnel non prohibitif de l'adoption.

La Cour répond au grief tiré de la discrimination,[21] qu'elle examine après le grief tiré de l'atteinte à la vie familiale (garantie par l'article 8 de la Convention), « qu'au

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graphe 4, EGBGB, qui permet aux époux de choisir la loi applicable aux effets généraux de leur mariage) et les règles du traité germano-perse de 1929 qui s'appliquait en l'occurrence comme *lex specialis*. Mais ceci est sans importance réelle.

18 Arrêt du 4 octobre 2012, n° 43631/09.

19 Aux termes de l'article 46 du Code de la famille algérien, « l'adoption est interdite par la chari'a et la loi ».

20 L'article 370-3 du Code civil est issu de la loi n° 2001-111 du 6 février 2001 et est inséré au chapitre III (Du conflit des lois relatives à la filiation adoptive et de l'effet en France des adoptions prononcées à l'étranger) du titre VIII relatif à la filiation adoptive.

21 Article 14 de la Convention, en combinaison avec l'article 8.

cœur du grief énoncé par la requérante sur le terrain de l'article 14 de la Convention se trouve l'impossibilité d'adopter l'enfant Hind en raison de sa loi personnelle. Cette question a été examinée sous l'angle de l'article 8 […]. Dans ces conditions, la Cour estime qu'aucune question distincte ne se pose au regard de l'article 14 de la Convention et ne formule aucune conclusion séparée sur ce grief ».[22] Il faut donc se rapporter à la réponse de la Cour au grief tiré de l'atteinte au droit à la vie familiale pour connaître la motivation jugée également applicable à la discrimination alléguée. La Cour y retient que « le refus opposé à la requérante tient en grande partie au souci du respect de l'esprit et de l'objectif des conventions internationales » – ce qui est visé étant d'une part la Convention des Nations Unies relative aux droits de l'enfant du 20 novembre 1989, dont l'article 20 met sur un même plan (et considère comme également conformes à l'intérêt supérieur de l'enfant) la *kafala* de droit islamique et l'adoption, ainsi que les Conventions de La Haye du 29 mai 1993 sur la protection des enfants et la coopération en matière d'adoption internationale et du 19 octobre 1996 concernant la compétence, la loi applicable, la reconnaissance, l'exécution et la coopération en matière de responsabilité parentale et de mesures de protection des enfants, qui reposent sur la même logique. Selon la Cour, « la reconnaissance de la kafala par le droit international est un élément déterminant pour apprécier la manière dont les Etats la réceptionnent dans leurs droits nationaux et envisagent les conflits de loi qui se présentent ».[23]

Ensuite, la Cour relève que si certaines différences entre la *kafala* et l'adoption sont insurmontables (en particulier absence d'effets successoraux de la *kafala*), il peut être remédié dans une certaine mesure aux restrictions qu'engendre l'impossibilité d'adopter l'enfant.[24] Ces préalables étant exposés, la conclusion est la suivante :

> « L'ensemble des éléments examinés ci-dessus fait apparaître que l'Etat défendeur, appliquant les conventions internationales régissant la matière, a institué une articulation flexible entre le droit de l'Etat d'origine de l'enfant et le droit national. La Cour relève à ce titre que le statut prohibitif de l'adoption résulte de la règle de conflit de lois de l'article 370-3 du code civil mais que le droit français ouvre des voies d'assouplissement de cette interdiction à la mesure des signes objectifs d'intégration de l'enfant dans la société française. C'est ainsi, d'une part, que la règle de conflit est écartée explicitement par ce même article 370-3 lorsque « le mineur est né et réside habituellement en France ». D'autre part, cette règle de conflit est volontairement contournée par la possibilité ouverte à l'enfant d'obtenir, dans un délai réduit, la nationalité française, et ainsi la faculté d'être adopté, lorsqu'il a été recueilli en France par une personne de nationalité française. La Cour observe à ce titre que l'Etat défendeur soutient sans être démenti que la jeune Hind pourrait déjà bénéficier de cette possibilité.
> La Cour estime qu'en effaçant ainsi progressivement la prohibition de l'adoption, l'Etat défendeur, qui entend favoriser l'intégration d'enfants d'origine étrangère sans les couper immédiatement des règles de leur pays d'origine, respecte le pluralisme culturel et ménage un juste équilibre entre l'intérêt public et celui de la requérante ».[25]

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22 Par. 55.
23 Par. 50.
24 Par. 51 : « Outre la requête en concordance de nom ici acquise du fait de la filiation inconnue de l'enfant en Algérie, il est possible d'établir un testament, qui a pour effet de faire entrer l'enfant dans la succession de la requérante et de nommer un tuteur légal en cas de décès du recueillant ».
25 Par. 51.

L'arrêt *Harroudj* est remarquable par l'attention qu'accorde la Cour européenne des droits de l'homme aux buts poursuivis par le droit international privé en général et au rattachement du statut personnel à la nationalité en particulier. Mais il est également évident que la Cour n'entend pas accepter telles quelles, sans examen, les solutions du droit international privé national qui soumettent la question de l'adoptabilité de l'enfant au droit algérien. Elle estime que les solutions du droit international privé français sont conciliables avec le droit à la vie familiale *et donc également avec le droit à la non-discrimination*, mais uniquement parce qu'elles admettent qu'à terme, « à la mesure des signes objectifs d'intégration de l'enfant dans la société française », la solution substantielle de la loi française (l'adoptabilité) remplace la solution substantielle restrictive du droit algérien, et que le rattachement à la nationalité algérienne n'est pas immuable en cas d'acquisition ultérieure de la nationalité française.

Le grief de discrimination n'est en conséquence pas rejeté au motif que l'inadoptabilité de l'enfant n'est pas une solution du droit matériel français et qu'il est impossible de la comparer, aux fins de vérification du respect de l'égalité des personnes devant la loi, à la solution favorable à l'adoptabilité qui est celle du droit civil français. Il n'est pas non plus écarté parce que la règle de conflit, qui désignait dans le cas de Mme Harroudj le droit algérien, opère sans discrimination puisqu'elle se borne à renvoyer, sans distinction, au statut personnel de l'enfant. Ceci n'est pas le raisonnement de la Cour, qui accepte au contraire expressément de comparer la solution restrictive du droit algérien avec la solution du droit français. Ce faisant, elle semble montrer qu'elle accepte de prendre en considération, aux fins de confrontation au principe de non-discrimination, les deux solutions matérielles que les autorités françaises peuvent avoir à appliquer, selon la nationalité de l'enfant : adoptabilité ou inadoptabilité.

C'est dire aussi que la Convention aurait pu être méconnue si le système français de conflit de lois s'était montré excessivement, déraisonnablement, rigide et n'avait admis aucun assouplissement au rattachement de la question de l'adoptabilité au droit de l'Etat d'origine de l'enfant. En somme, derrière la solution adoptée par la Cour il y a l'idée qu'il existe, non pas en droit civil français mais en France quand même, deux solutions de droit matériel : la solution de l'adoptabilité, pour les enfants de statut personnel non prohibitif, et la solution de l'inadoptabilité pour les enfants de statut personnel prohibitif. Le champ d'application de ces deux solutions est déterminé par la règle de conflit française. Et donc la règle de conflit est susceptible d'un contrôle au regard de la règle de non-discrimination, de même que l'application du droit algérien désigné par la règle de conflit française est susceptible d'un contrôle au regard du droit à la vie familiale.

8. La décision *Ammdjadi c. Allemagne* et l'arrêt *Harroudj c. France* reposent ainsi sur une analyse fondamentalement différente de celle qui écarte, comme logiquement inconcevable, toute violation du principe général d'égalité par une règle de conflit multilatérale. Certes, ils ne concluent pas à la discrimination et montrent au contraire une grande tolérance à l'égard du contenu des règles de conflit, et notamment à l'égard de la question du rattachement du statut personnel à la nationalité ou à la résidence.[26] Mais ils reposent implicitement sur une approche théorique particulière. Pour l'expliciter,

[26] Cette tolérance apparaît tout particulièrement dans la décision *Ammdjadi c. Allemagne*, dans laquelle la Cour semble estimer qu'un rattachement à la résidence habituelle aurait été préférable, mais dans laquelle

on dira que c'est la coexistence de deux solutions matérielles différentes – présence ou absence d'un droit à la péréquation des droits à pension, adoptabilité ou inadoptabilité des enfants – qui justifie que la question de l'éventuelle discrimination soit posée en principe : coexistence à l'intérieur de l'ordre juridique des Etats contractants concernés et avec détermination du champ d'application des deux solutions matérielles par les règles de conflit de ces Etats contractants. C'est parce qu'elles apparaissent, du fait de leur désignation par les règles de conflit allemande ou française, comme faisant partie des solutions qui sont acceptées dans les ordres juridiques allemand et français, que les solutions iraniennes ou algériennes deviennent susceptibles de contrôle au regard de la Convention européenne des droits de l'homme, et que la répartition des solutions de droit matériel entre leurs destinataires, opérée par la règle de conflit, peut être confrontée au principe d'égalité devant la loi.[27]

III. LE CONTRÔLE EUROPÉEN DU JEU DE L'ORDRE PUBLIC D'ÉVICTION

9. Certes censé être un mécanisme d'exception, d'emploi rare, dans la méthodologie classique du droit des conflits de lois, le recours à l'ordre public d'éviction n'en est pas moins un mécanisme fondamental auquel aucun Etat ne peut renoncer complètement. La Cour européenne l'a expressément reconnu, spécialement dans les arrêts *Labassee c. France* et *Mennesson c. France*, à propos de la non-reconnaissance en France de gestations pour autrui effectuées aux Etats-Unis d'Amérique. Dans ces arrêts, elle fait le lien entre le contenu de l'ordre public et les choix démocratiques des différents législateurs nationaux ; ce faisant, elle reconnaît le principe de la possibilité pour la jurisprudence des tribunaux des Etats contractants de voir dans certains des principes du droit national des principes par lesquels s'exprime l'ordre public international au sens du droit international privé dans les Etats en question – tout en retenant que la Convention européenne ne donne pas carte blanche au législateur national :

> « La Cour constate que [l'approche restrictive de la jurisprudence française] se traduit par le recours à l'exception d'ordre public international, propre au droit international privé. Elle n'entend pas la mettre en cause en tant que telle. Il lui faut néanmoins vérifier si en appliquant ce mécanisme en l'espèce, le juge interne a dûment pris en compte la nécessité de ménager un juste équilibre entre l'intérêt de la collectivité à faire en sorte que ses membres se plient au choix effectué démocratiquement en son sein et l'intérêt des requérants – dont l'intérêt supérieur des enfants – à jouir pleinement de leurs droits au respect de leur vie privée et familiale ».[28]

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elle n'en juge pas moins que le rattachement à la nationalité n'est pas sans justification objective et raisonnable.

27 Voir la partie III de l'article précité, aux *Studi in onore di Laura Picchio Forlati*, pour une discussion des raisons de droit public de cette possibilité de confronter des règles de conflit ordinaires de droit international privé à ce principe structurant de l'ordre juridique qu'est le principe d'égalité.

28 Arrêts du 26 avril 2014, n^{os} 65041/11 et 65192/11, par. 63 du premier arrêt et par. 84 du second.

10. Dans certains cas, le résultat de ce contrôle européen sera un *satisfecit* délivré aux Etats contractants :

L'arrêt *Z.H. et R.H. c. Suisse*[29] rejette ainsi une requête introduite par des ressortissants afghans qui ont été mariés religieusement en Iran à un moment où l'homme était âgé de dix-huit ans et son épouse (qui est aussi sa cousine) était âgée de quatorze ans. Les deux ont demandé l'asile en Suisse. La décision des autorités compétentes était de permettre à l'épouse de rester en Suisse, mais d'expulser le mari vers l'Italie, l'Italie étant l'Etat compétent par application du règlement de Dublin qui s'applique à la Suisse en vertu de l'accord d'association helvético-européen de 2004.[30] Pour refuser de reconnaître le droit du mari à la vie familiale, le tribunal administratif fédéral décida que le prétendu mariage religieux des deux requérants ne pouvait pas être reconnu en Suisse, étant donné 1° son illégalité au regard du code civil afghan (âge minimum du mariage : quinze ans en ce qui concerne les femmes) et 2° qu'en tout état de cause, indépendamment même du droit afghan applicable, le mariage des requérants était manifestement incompatible avec l'ordre public suisse : les relations sexuelles avec un enfant en dessous de l'âge de seize ans constituent une infraction au regard du code pénal suisse. Comme le mariage n'est pas reconnu en Suisse, le requérant masculin ne peut pas être reconnu comme membre de la famille de son « épouse » et ne bénéficie dès lors pas des droits reconnus par le règlement de Dublin au profit des membres de la famille.

La requête, fondée sur la violation de l'article 8 de la Convention (droit à la vie familiale), est rejetée par la Cour, qui confirme la conformité avec la Convention des motifs de l'arrêt du tribunal administratif fédéral :

> « The Court does not see any reason to depart from the findings of the [Federal Administrative Court] in this respect. Article 8 of the Convention cannot be interpreted as imposing on any State party to the Convention an obligation to recognise a marriage, religious or otherwise, contracted by a 14 year old child ».[31]

L'intervention de l'ordre public suisse contre le mariage d'une jeune fille de quatorze ans est par conséquent conforme aux valeurs véhiculées par la Convention européenne des droits de l'homme, ce qui justifie cette exception à l'obligation de reconnaître le mariage célébré en Iran.

11. Dans d'autres cas, la Cour juge que l'invocation de l'ordre public national ne peut justifier l'ingérence dans un droit garanti par la Convention. La raison peut être de deux ordres. Soit c'est le type d'ordre public qui est considéré en lui-même comme insuffisamment fort pour légitimer réellement l'ingérence ; l'exemple-type en est un ordre public excentrique comme celui qui était en cause dans l'affaire *Negrepontis-Giannisis c. Grèce* que nous examinerons en premier lieu. Soit le recours à l'ordre public n'apparaît comme illégitime au regard des garanties de la Convention que parce que le fait

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29 Arrêt du 8 décembre 2015, nº 60119/12.

30 Ultérieurement, la requête d'asile des deux requérants a été acceptée, mais les requérants ont maintenu leur requête dans l'espoir de voir sanctionner la violation passée de leurs droits par la Suisse.

31 Par. 44.

d'avoir recours à lui est disproportionné ; ceci est illustré par la saga de la non-reconnaissance des gestations pour autrui à l'étranger, deuxième cas que nous examinerons.

12. L'affaire *Negrepontis-Giannisis c. Grèce*[32] met en scène un moine grec, évêque de l'Eglise orthodoxe à Detroit aux Etats-Unis d'Amérique, qui y adopte son neveu majeur, lui-même résident aux Etats-Unis depuis trois ans pour ses études universitaires. Le fils adoptif ajoute le nom de son père adoptif à son propre nom patronymique ; il rentre, au terme de ses études, en Grèce et entretient, pendant 14 ans, des liens qui correspondent à une filiation adoptive avec son oncle, lequel revient lui-même en Grèce deux ans avant son décès. Le moine – autre aspect par lequel il se singularise – laisse une fortune personnelle suffisamment considérable pour que le fils adoptif et les frères et sœurs du défunt se lancent dans une bataille judiciaire sur son partage : le fils adoptif se prétend seul héritier, mais l'une de ses tantes saisit le tribunal d'Athènes pour qu'il soit déclaré que le défunt, en tant que moine, n'avait pas la capacité pour adopter un enfant et qu'en conséquence, le jugement d'adoption américain ne peut être reconnu en Grèce.

La Cour de cassation grecque, formation plénière, est saisie du cas. Elle consulte les décisions des conciles du premier millénaire et les traditions sacrées, auxquelles se réfère l'article 3 de la Constitution grecque[33] et auxquelles la Cour de cassation reconnaît des effets civils dans l'ordre juridique grec. Elle en déduit qu'en droit civil, un moine ne peut pas adopter et juge que la reconnaissance d'un jugement étranger prononçant une adoption par un moine orthodoxe « se heurte à l'ordre public international de l'article 33 du code civil et n'est pas autorisée ». Les textes ainsi appliqués sont très anciens, ils remontent aux VII et IX^{es} siècles. Dans une opinion dissidente, des membres de la Cour de cassation font valoir que les règles canoniques sur les effets civils de l'incapacité des moines à adopter ne pourraient plus être reconnus en droit grec, la preuve en étant que lors de l'institution du mariage civil (en 1982), l'article 1364 du Code civil (lequel interdisait le mariage des moines) a été abrogé, ce qui montrerait que le législateur estime ne plus devoir tenir compte des incapacités résultant des règles canoniques. Mais l'opinion de la majorité des juges est différente, et la reconnaissance de l'adoption du requérant a été refusée comme étant contraire à l'ordre public.

Cette invocation d'un ordre public « d'après les conceptions religieuses et morales de l'Eglise Orthodoxe Orientale du Christ » ne résiste pas au contrôle opéré par la Cour européenne des droits de l'homme, qui décide que du fait du refus de reconnaître les effets en Grèce du jugement d'adoption américain, la Grèce a méconnu les droits du requérant – droits substantiels (droit au respect de la vie familiale, droit au respect des biens, droit à la non-discrimination) et droits procéduraux (droit au procès équitable, dont découle un droit à l'exécution internationale des jugements, même obtenus dans un Etat non contractant). Les textes dont s'inspire, en l'espèce, l'ordre public grec sont

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[32] Arrêt du 3 mai 2011, n^{o} 56759/08.

[33] « La religion dominante en Grèce est celle de l'Eglise Orthodoxe Orientale du Christ. L'Eglise Orthodoxe de Grèce, reconnaissant pour Chef Notre Seigneur Jésus-Christ, est indissolublement unie, quant au dogme, à la Grande Eglise de Constantinople et à toute Eglise chrétienne du même dogme, observant immuablement, comme celles-ci, les saints canons apostoliques et synodiques ainsi que les saintes traditions. […]» (trad. fr. dans : DELPÉRÉE, F. – VERDUSSEN, M. – BIVER, K. (dir.). *Recueil des constitutions européennes*. Bruxelles: Bruylant, 1994, p. 344).

en effet trop anciens et trop peu en phase avec l'évolution de la société pour pouvoir sérieusement être opposés à la reconnaissance d'une adoption qui a produit ses effets pendant plus de dix ans. L'abrogation de l'article 1364 du Code civil en est la preuve. Par conséquent, « la Cour considère que les motifs avancés par la Cour de cassation pour refuser de reconnaître l'adoption du requérant ne répondent pas à un besoin social impérieux. Ils ne sont donc pas proportionnés au but légitime poursuivi en ce qu'ils ont eu pour effet la négation du statut de fils adoptif du requérant ».[34] Bien que la Cour fasse référence au caractère disproportionné de l'invocation de l'ordre public dans l'arrêt de la Cour de cassation, elle ne prend visiblement pas au sérieux les motifs mêmes d'ordre public de l'arrêt de la Cour de cassation grecque : elle va jusqu'à affirmer « que les textes sur lesquels la Cour de cassation s'était fondée étaient de nature ecclésiastique, dataient du 7ème et 9ème siècle et étaient interprétés par la Cour de cassation d'une manière *qui ne correspondait pas au droit positif* existant au moment des faits et reflété par l'article 3 de la loi 1250/1982. Cette disposition abrogeait un article du code civil qui interdisait aux moines de se marier ».[35]

13. Le cas des gestations pour autrui est différent. Les principes d'ordre public international qui peuvent s'opposer dans certains Etats contractants à la reconnaissance du lien de filiation des parents d'intention à l'égard des enfants[36] ne sont pas, comme les principes qui intervenaient dans l'affaire *Negrepontis-Giannisis*, des principes religieux trop particularistes et trop anciens pour pouvoir être pris au sérieux dans une société pluraliste moderne. Ce sont, au contraire, des principes démocratiquement adoptés par les législateurs au vu du nouveau mode d'établir une parentalité qui résute du développement des formes de gestation pour autrui. C'est ce qui explique que la condamnation de la non-reconnaissance de la gestation pour autrui, là où cette condamnation est intervenue,[37] a été bien plus mesurée et plus respectueuse de la marge d'appréciation nationale.

Dans la double affaire *Mennesson c. France*[38] et *Labassee c. France*,[39] il s'agissait du refus de la transcription des actes de naissance établis au moyen de jugements cali-

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34 Par. 76.

35 Par. 102. Cette appréciation est en réalité étonnante et, pour le dire clairement, excessive, puisqu'on peut raisonnablement estimer que la formation plénière de la Cour de cassation grecque sait, (encore) mieux que la Cour européenne des droits de l'homme, quel est le contenu du droit civil grec. Ce type de motif ne devrait être utilisé qu'en cas de motivation manifestement arbitraire d'une décision judiciaire.

36 Y compris, comme dans la solution originairement adoptée par la Cour de cassation française dans un but de « prévention générale », par la non-reconnaissance du lien de filiation entre les enfants et leur père d'intention qui était également leur père biologique, et dont les gamètes avaient été utilisés lors de la conception des enfants.

37 Il y a des exceptions : voir *infra*, nº 15, l'arrêt de la Grande Chambre de la Cour dans l'affaire *Paradiso et Campanelli c. Italie* ; voir aussi la décision *D. et autres c. Belgique* (nº 29176/13, du 8 juillet 2014) qui a validé le système belge de délivrance de documents de voyage aux enfants nés d'une GPA en Ukraine : étant donné qu'en définitive, après l'intervention de la justice belge, le document de voyage avait été délivré aux enfants, la Cour a estimé que les difficultés administratives antérieures ne valaient pas violation de l'article 8 de la Convention. L'ingérence initiale des autorités belges était justifiée (par. 52) : « La Cour constate que le refus initial des autorités belges d'autoriser la venue de A. sur le territoire national était motivé par la nécessité de vérifier si les législations belge et ukrainienne étaient respectées. L'ingérence était donc justifiée par des objectifs de prévention des infractions pénales, en particulier de lutte contre la traite des êtres humains. Or la Cour a déjà reconnu l'importance et la nécessité de lutter contre ce phénomène (*Rantsev c. Chypre et Russie*, no 25965/04, § 278, CEDH 2010 (extraits)) ».

38 Arrêt du 26 avril 2014, nº 65192/11.

39 Arrêt du 26 avril 2014, nº 65041/11.

forniens (affaire *Mennesson*) ou du Minnesota (affaire *Labassee*) pour des enfants nés par gestation pour autrui aux Etats-Unis, les « parents d'intention » étant français et résidant en France. Dans les deux cas, les enfants étaient les enfants biologiques de leur père français, mais n'avaient aucun lieu de filiation biologique avec leur mère d'intention française (GPA avec don d'ovocyte).

La Cour de cassation française, appliquant avec rigueur l'exception d'ordre public, avait jugé qu'étant donné que le droit français prohibe le recours à la gestation pour autrui, la reconnaissance des jugements américains, y compris en tant qu'ils ne faisaient que refléter la réalité biologique de la filiation paternelle, ne pouvait être obtenue en France. Sur recours des couples concernés et de leurs enfants, la Cour européenne adopte une solution nuancée. Celle-ci revient à affirmer, au nom de la marge nationale d'appréciation, le droit de la France de ne pas reconnaître le lien de filiation entre les enfants et leurs mères d'intention, qui ne correspond pas à la réalité biologique ; en revanche, la non-reconnaissance de la filiation paternelle constitue une violation non pas du droit des parents et des enfants à la vie familiale, mais du droit des enfants à leur identité, dont fait partie leur filiation paternelle. Les motifs les plus significatifs sont les suivants. D'abord l'affirmation de l'existence d'une marge d'appréciation ample :

> « Cette absence de consensus [entre les différents Etats membres du Conseil de l'Europe sur le traitement juridique de la GPA] reflète le fait que le recours à la gestation pour autrui suscite de délicates interrogations d'ordre éthique. Elle confirme en outre que les États doivent en principe se voir accorder une ample marge d'appréciation, s'agissant de la décision non seulement d'autoriser ou non ce mode de procréation mais également de reconnaître ou non un lien de filiation entre les enfants légalement conçus par gestation pour autrui à l'étranger et les parents d'intention ».[40]

Le juste équilibre est respecté, selon la Cour, en ce qui concerne l'ingérence dans le droit au respect de la vie familiale des parents et des enfants.[41] En revanche, le droit des enfants au respect de leur identité est méconnu (droit à la constatation de leur filiation ; droit à la nationalité ; droit à la succession[42]), du moins à l'égard du père qui est leur père biologique :

> « 99. […] les effets de la non reconnaissance en droit français du lien de filiation entre les enfants ainsi conçus et les parents d'intention ne se limitent pas à la situation de ces derniers, qui seuls ont fait le choix des modalités de procréation que leur reprochent les autorités françaises : ils portent aussi sur celle des enfants eux-mêmes, dont le droit au respect de la vie privée, qui implique que chacun puisse établir la substance de son identité, y compris sa filiation, se trouve significativement affecté. […]
> 100. Cette analyse prend un relief particulier lorsque, comme en l'espèce, l'un des parents d'intention est également géniteur de l'enfant. Au regard de l'importance de la filiation biologique en tant qu'élément de l'identité de chacun […], on ne saurait prétendre qu'il est conforme à l'intérêt d'un enfant de le priver d'un lien juridique de cette nature alors que la

40 Par. 79 de l'arrêt *Mennesson*.
41 Par. 93–94.
42 Par. 96–98.

réalité biologique de ce lien est établie et que l'enfant et le parent concerné revendiquent sa pleine reconnaissance. […]
101. Étant donné aussi le poids qu'il y a lieu d'accorder à l'intérêt de l'enfant lorsqu'on procède à la balance des intérêts en présence, la Cour conclut que le droit des troisième et quatrième requérantes au respect de leur vie privée a été méconnu ».

14. Comme la formule « cette analyse prend un relief particulier »[43] ne brille pas par sa précision juridique, restait posée la question de l'éventuelle obligation de la France de reconnaître également le lien de filiation, établi aux Etats-Unis, entre les enfants et leur mère d'intention, avec laquelle le lien biologique de filiation faisait défaut. La Cour de cassation française saisit (dans le cadre du réexamen de l'affaire *Mennesson*) la Cour européenne des droits de l'homme d'une demande d'avis sur la question de savoir si la France « excède la marge d'appréciation dont [elle] dispose au regard de l'article 8 de la Convention » en refusant de transcrire, dans ces circonstances, une filiation maternelle à l'égard de la mère d'intention sur ses registres de l'état civil, et, dans l'affirmative, si « la possibilité pour la mère d'intention d'adopter l'enfant n'est pas suffisante au regard des exigences de la Convention ».[44] En réponse, la Grande Chambre de la Cour européenne des droits de l'homme a confirmé, dans son avis consultatif du 10 avril 2019, « relatif à la reconnaissance en droit interne d'un lien de filiation entre un enfant né d'une gestation pour autrui pratiquée à l'étranger et la mère d'intention, demandé par la Cour de cassation française »,[45] qu'eu égard à la marge d'appréciation dont disposait la France au regard de la Convention, il était effectivement suffisant d'admettre l'adoption de l'enfant par sa mère d'intention, « dès lors que ses conditions sont adaptées et que ses modalités permettent une décision rapide, de manière à éviter que l'enfant soit maintenu longtemps dans l'incertitude juridique quant à ce lien. Il va de soi que ces conditions doivent inclure une appréciation par le juge de l'intérêt supérieur de l'enfant à la lumière des circonstances de la cause ».[46]

La solution adoptée par l'avis de la Grande Chambre dans l'affaire *Mennesson* a par la suite été confirmée par la décision de la Cour dans l'affaire *C. et E. c. France*[47] qui a rejeté, comme irrecevable pour défaut manifeste de fondement, une requête contre la France d'un couple de parents d'intention qui faisait grief à la France d'avoir accepté de transcrire la filiation paternelle des enfants (conforme à la réalité biologique), mais non leur filiation à l'égard de leur mère d'intention ; il a été jugé dans ce contexte que

« ce n'est pas imposer aux enfants concernés un fardeau excessif que d'attendre des requérants qu'ils engagent maintenant une procédure d'adoption à cette fin. […] il résulte des éléments produits par le Gouvernement que la durée moyenne d'obtention d'une décision n'est que de 4,1 mois en cas d'adoption plénière et de 4,7 mois en cas d'adoption simple »,[48]

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43 Cf. le paragraphe 100 de l'arrêt.
44 Ass. plén., 5 octobre 2018, nº 10-19053.
45 Demande nº P16-2018-001.
46 Par. 54.
47 Décision du 19 novembre 2019, nºs 1462/18 et 17348/18.
48 Par. 43.

si bien que le refus des autorités françaises de transcrire les actes de naissance étrangers des enfants requérants sur les registres de l'état civil français pour autant qu'ils désignent la mère d'intention comme étant leur mère n'était pas disproportionné. La même solution a été adoptée par l'arrêt *D. c. France*[49] à propos d'une situation où la mère d'intention était également la mère génétique (mais avait eu recours à une père porteuse pour donner naissance à l'enfant) ; il a été jugé par la Cour qu'elle pouvait également être renvoyée à une procédure d'adoption.

La Cour de cassation française, qui avait pendant très longtemps adopté une position « bioconservatrice » en matière de gestation pour autrui, semble avoir en définitive abandonné celle-ci (ou ce qui en restait) au moment même où la Cour européenne des droits de l'homme a paru reconnaître qu'elle ne violait (plus) la Convention européenne. Au vu de l'avis consultatif de la Cour européenne des droits de l'homme, l'Assemblée plénière de la Cour de cassation a fini par juger, dans l'affaire *Mennesson*, qu'« en l'espèce, s'agissant d'un contentieux qui perdure depuis plus de quinze ans, en l'absence d'autre voie permettant de reconnaître la filiation dans des conditions qui ne porteraient pas une atteinte disproportionnée au droit au respect de la vie privée [des enfants] consacré par l'article 8 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, et alors qu'il y a lieu de mettre fin à cette atteinte, la transcription sur les registres de l'état civil de Nantes des actes de naissance établis à l'étranger […] ne saurait être annulée ».[50] Des arrêts ultérieurs ont laissé entendre que la nouvelle solution, de transcription d'une filiation établie par GPA et sans lien biologique, pouvaient être préférée à la voie de l'adoption dans d'autres cas que l'affaire *Menesson*.[51] Lassitude de l'ordre public international ?

15. L'arrêt de la Grande Chambre de la Cour européenne dans l'affaire *Paradiso et Campanelli c. Italie*, intervenu dans une situation où (contrairement aux affaires françaises) un lien de filiation génétique n'existait avec aucun des parents d'intention – ceux-ci se disaient victimes d'une erreur de la clinique russe où la conception de l'enfant avait eu lieu – , a estimé justifiée la séparation de l'enfant de ses parents d'intention sur ordre d'un tribunal italien, en jugeant notamment qu'« accepter de laisser l'enfant avec les requérants, peut-être dans l'optique que ceux-ci deviennent ses parents adoptifs, serait revenu à légaliser la situation créée par eux en violation de règles importantes du droit italien ».[52]

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49 Arrêt du 16 juillet 2020, n° 11288/18.

50 Ass. plén. 4 octobre 2019, nº 10-19.053.

51 Civ. 1re, 18 décembre 2019, nº 18-11.815 et nº 18-12.327, deux arrêts qui admettent la transcription de la filiation à l'égard de couples masculins résultant d'un acte de l'état civil de la Californie dans le premier cas et du Nevada dans le second, et écartent l'obligation de passer par une adoption : « Au regard des mêmes impératifs [que ceux retenus dans l'affaire *Menesson* dans l'arrêt de l'assemblée plénière du 4 octobre 2019] et afin d'unifier le traitement des situations, il convient de faire évoluer la jurisprudence en retenant qu'en présence d'une action aux fins de transcription de l'acte de naissance étranger de l'enfant, qui n'est pas une action en reconnaissance ou en établissement de la filiation, ni la circonstance que l'enfant soit né à l'issue d'une convention de gestation pour autrui ni celle que cet acte désigne le père biologique de l'enfant et un deuxième homme comme père ne constituent des obstacles à la transcription de l'acte sur les registres de l'état civil, lorsque celui-ci est probant au sens de l'article 47 du code civil ».

52 Arrêt du 24 janvier 2017, nº 25358/12, § 215.

16. La logique adoptée par la Cour dans les affaires *Mennesson* et *Labassee* se retrouve, *mutatis mutandis*, dans les affaires *Orlandi et autres c. Italie*,[53] dans lesquelles était en cause la non-reconnaissance par les tribunaux italiens de mariages homosexuels célébrés à l'étranger (Pays-Bas, Canada) par des citoyens italiens, qui parfois étaient résidents permanents de l'Etat étranger où le mariage avait été célébré et parfois étaient des résidents italiens qui avaient profité d'un voyage à l'étranger pour y faire célébrer un mariage dont ils ne pouvaient vraisemblablement pas ignorer le caractère fragile au regard de l'ordre juridique italien. La Cour a condamné l'Italie, mais pour la même raison qu'elle avait retenue dans une autre affaire de mariage entre personnes du même sexe, purement interne à l'ordre juridique italien[54] : c'est en refusant toute forme de reconnaissance juridique aux couples du même sexe que l'Italie avait violé le droit au respect de la vie privée et familiale au sens de la Convention. L'arrêt dans les affaires *Orlandi et autres* n'oblige pas l'Italie à reconnaître les mariages homosexuels en tant que tels, même s'ils ont été célébrés dans l'Etat de la résidence permanente de certains des requérants. Là encore, la Cour rappelle que

> « there is also a State's legitimate interest in ensuring that its legislative prerogatives are respected and therefore that the choices of democratically elected governments do not go circumvented ».[55]

L'arrêt *Orlandi* (ou d'ailleurs l'arrêt, d'inspiration similaire, de la Cour de justice de l'Union européenne dans l'affaire *Coman*[56]) n'est assurément pas l'équivalent de l'arrêt *Obergefell v. Hodges*,[57] un arrêt retentissant de la Cour suprême des Etats-Unis qui imposa à tous les Etats fédérés américains la reconnaissance du mariage entre personnes du même sexe. Encore faut-il observer que malgré les précautions, réelles, prises par la Cour européenne des droits de l'homme, une opinion dissidente des juges Aleš Pejchal (tchèque) et Krzysztof Wojtyczek (polonais) soulève des problèmes de principe à l'égard de la solution adoptée par la majorité, du point de vue de l'« effective political democracy » :

> « To sum up : in our view the majority have departed from the applicable rules of Convention interpretation and have imposed positive obligations which do not stem from this treaty. Such an adaptation of the Convention comes within the exclusive powers of the High Contracting Parties. We can only agree with the principle : "no social transformation without representation" ».[58]

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53 Arrêt du 14 décembre 2017, nos 26431/12, 26742/12, 44057/12 et 60088/12.
54 Arrêt du 21 juillet 2017, *Oliari et autres c. Italie*, nos 18766/11 et 36030/11.
55 Par. 207.
56 Arrêt du 5 juin 2018, *Coman*, C-673/16, ECLI:EU:C:2018:385. Pour un rapprochement des deux arrêts, cf. « European Courts and the Obligation (Partially) to Recognise Foreign Same-Sex Marriages – On *Orlandi* and *Coman* », *Yb PIL*, 2018/2019, 20, pp. 47 et seq.
57 576 U.S. 644 (2015).
58 Par. 14 de l'opinion dissidente.

IV. LE CONTRÔLE EUROPÉEN DE L'EMPLOI DE LA TECHNIQUE DE LA FRAUDE À LA LOI

17. Aussi longtemps qu'elle persistait dans sa politique de refus de toute reconnaissance à la filiation entre des parents d'intention français et leurs enfants nés suite à une gestation pour autrui à l'étranger, la Cour de cassation française chercha, peut-être un peu désespérément, à rendre sa jurisprudence, attaquée par des parents d'intention déboutés, acceptable pour la Cour européenne des droits de l'homme. A un certain moment elle crut vraisemblablement avoir trouvé une manière plus pédagogique que le recours à l'ordre public international, en motivant le refus par le recours à la notion de fraude à la loi : « la naissance est l'aboutissement, en fraude à la loi française, d'un processus d'ensemble comportant une convention de gestation pour le compte d'autrui, convention qui, fût-elle licite à l'étranger, est nulle d'une nullité d'ordre public ».[59]

Mais ces efforts de renouvellement de la motivation du refus devaient s'avérer vains : dans l'affaire *Foulon et Bouvet c. France*,[60] la Cour reprend les conclusions de ses arrêts *Mennesson* et *Labassee* (existence d'une violation de l'article 8 dans le chef des enfants pour méconnaissance de leur droit à l'identité, mais inexistence d'une violation de l'article 8 dans le chef des parents d'intention), et ceci de manière extrêmement brève : « Considérant les circonstances de l'espèce, la Cour ne voit aucune raison de conclure autrement que dans les affaires *Mennesson* et *Labassee* ».[61]

Exit par conséquent la fraude à la loi comme justification d'une restriction au droit des enfants (qui n'auront certainement pas été parties ou complices à une opération frauduleuse aboutissant à leur propre naissance) à la reconnaissance de leur véritable filiation paternelle. Ceci ne signifie pas que jamais un motif de non-reconnaissance tiré d'une (véritable) fraude à la loi ne sera admis par la Cour européenne. Il n'y a aucune raison de le penser ; au contraire, si c'est par artifice qu'un futur requérant a acquis un statut à l'étranger qu'il n'aurait pas pu acquérir dans l'ordre juridique dans lequel il cherche pourtant à l'importer, le refus de cet ordre juridique de reconnaître le statut acquis en fraude à la loi est évidemment susceptible d'être admis comme cause légitime d'ingérence dans la vie privée et familiale. Le fait que le requérant ait eu recours à des manœuvres frauduleuses lui interdit de faire état de la légitimité de sa confiance dans l'acquisition du statut à l'étranger, ce qui apparaît comme une précondition de la protection européenne du droit au respect de la vie familiale ou privée.[62]

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[59] Civ.1re, 13 septembre 2013, deux arrêts, no 12-18315 et no 12-30138. Cette jurisprudence a été abandonnée, par la suite, par Ass. plén., 3 juillet 2015, no 14-21323.

[60] Arrêt du 21 juillet 2016, nos 9063/14 et 10410/14.

[61] Par. 57.

[62] Voir *infra*, no 20.

V. LE CONTRÔLE EUROPÉEN DU CHOIX MÉTHODOLOGIQUE ENTRE MÉTHODE DE LA RECONNAISSANCE ET MÉTHODE DE L'APPLICATION DE LA RÈGLE DE CONFLIT DU FOR À DES SITUATIONS CONSTITUÉES EN DEHORS DU FOR

18. Comme le savent les spécialistes du droit international privé, une méthode générale de traitement des situations potentiellement boiteuses en droit international privé contemporain est la « méthode de la reconnaissance » qui propose de distinguer entre la création des situations dans un Etat, pour laquelle les règles de conflit de lois continueraient à s'appliquer, et le traitement des situations valablement acquises au regard d'un ordre juridique étranger, qu'il est proposé de reconnaître sans contrôle de la loi appliquée à l'étranger par rapport aux règles de conflit du for.[63]

Le droit international privé peut, en adoptant une variante ou une autre de la méthode de la reconnaissance, résoudre de manière autonome le problème des situations boiteuses résultant de la divergence des règles de conflit de lois ; un exemple en est l'article 9 de la Convention de La Haye du 14 mars 1978 sur la célébration et la reconnaissance de la validité des mariages qui impose, pour les (trois) Etats l'ayant ratifiée, la reconnaissance des mariages conclus à l'étranger, y compris par des ressortissants des Etats en cause, sans contrôle de la loi appliquée et sous réserve, pour l'essentiel, du seul ordre public. Il se peut aussi que si l'Etat du for (de la reconnaissance d'une situation constituée à l'étranger) reprend à son compte des solutions qui relèvent de la méthode de la reconnaissance, il le fasse uniquement parce qu'il est lié par l'un des textes ayant une portée quasi-constitutionnelle que sont le traité sur le fonctionnement de l'Union européenne d'une part, la Convention européenne des droits de l'homme d'autre part.

Même en matière de droit de la famille, la jurisprudence de la Cour de justice de l'Union européenne semble adhérer à une espèce de projet néolibéral dans le domaine des droits de la personne ou de la famille, très favorable à l'importation en cette matière de solutions se rattachant à la méthode de la reconnaissance[64] : c'est que pour elle, les liens de ce projet avec l'idée de libre circulation des personnes – centrale dans le droit de l'Union – sont évidents. C'est beaucoup plus discutable en revanche en ce qui concerne la Cour européenne des droits de l'homme.

19. Certes, la Cour européenne des droits de l'homme a eu l'occasion d'étendre et, en fait, d'universaliser la solution de deux arrêts de la Cour de justice auxquelles elle se réfère expressément, la jurisprudence *Garcia Avello* et *Grunkin et Paul*.[65] Dans l'affaire *Henry Kismoun c. France*[66] elle a imposé la possibilité pour un ressortissant de double nationalité algérienne et française de pouvoir faire valoir son intérêt à porter le même

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63 LAGARDE, P. « La méthode de la reconnaissance est-elle l'avenir du droit international privé ? », conférence publiée au *Recueil des cours*. 2014, tome 371, pp. 9 et seq. (avec une référence, p. 27, à la jurisprudence de la Cour européenne des droits de l'homme).

64 Les décisions de principe sont connues : arrêts *Garcia Avello* du 2 octobre 2003, C-148/02, ECLI:EU:C:2003:539 ; *Grunkin et Paul* du 14 octobre 2008, C-353/06, ECLI:EU:C:2008:559 ; et des arrêts plus récents qui admettent cependant la justification de l'ingérence étatique à travers l'ordre public : *Sayn-Wittgenstein* du 22 décembre 2010, C-208/09, ECLI:EU:C:2010:806 ; *Bogendorff von Wolffersdorff* du 2 juin 2016, C-438/14, ECLI:EU:C:2016:401.

65 Les références de ces arrêts sont données *supra*, note précédente.

66 Arrêt du 5 décembre 2013, nº 32265/10.

nom dans les deux Etats dont il était ressortissant et dès lors de pouvoir choisir un nom conforme au droit algérien, y compris pour le porter en France. Mais c'est par référence au droit du requérant à la vie privée et familiale (article 8 de la Convention), qui inclut un droit à l'identité dont un droit au nom, que la Cour européenne a décidé ainsi. Avec le changement de base juridique, cette jurisprudence change largement de sens par rapport à la jurisprudence de la Cour de justice de l'Union européenne.[67]

20. Dans la jurisprudence de la Cour européenne des droits de l'homme, l'obligation de reconnaître le statut juridique obtenu à l'étranger se fonde sur la protection de la confiance légitime des requérants.[68] La jurisprudence de la Cour est une jurisprudence inspirée d'un esprit d'équilibre et de compromis : elle ne reconnaît pas aux Etats la possibilité d'opposer, dans tous les cas, les conditions restrictives prévues par leur droit international privé à l'égard des situations constituées à l'étranger, mais elle ne proclame pas non plus la possibilité, sans restriction, pour les particuliers d'obtenir à l'étranger un statut juridique qui leur est refusé par le droit de l'Etat de leur nationalité ou de leur résidence, et de le faire reconnaître ensuite dans ce dernier Etat. Même si par ailleurs les relations entre les requérants peuvent se voir reconnaître le statut d'une « vie familiale » *de facto*, la reconnaissance spécifique du statut juridique obtenu à l'étranger présuppose que ce statut ait été acquis de bonne foi et dans une situation de confidence légitime dans sa pérennité.

L'arrêt *Wagner et J.M.W.L. c. Luxembourg*[69] – intervenu dès 2007 – a ainsi constaté l'existence d'une obligation pour le Luxembourg de reconnaître l'adoption plénière de la requérante J.M.W.L. par M^me^ Wagner au regard des circonstances de fait qui avaient entouré la procédure d'adoption au Pérou : M^me^ Wagner s'était fiée à la pratique, alors existante, des officiers d'état civil luxembourgeois d'accepter la transcription automatique des jugements d'adoption étrangers, sans contrôle par rapport aux conditions formulées par le droit international privé luxembourgeois. Ayant adopté J.M.W.L., puis l'ayant emmenée au Luxembourg, elle s'était heurtée à une modification soudaine de la pratique administrative. Pourtant, comme le constate la Cour : « Une fois au Luxembourg, les requérantes pouvaient légitimement s'attendre à ce que l'officier d'état civil procédât à la transcription du jugement péruvien ».[70]

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67 Non seulement la solution de l'arrêt *Henry Kismoun* intervient-elle à partir de bases conceptuelles très différentes (droit individuel au respect de l'identité personnelle plutôt que droit à la libre circulation des personnes dans l'Union européenne), mais encore la solution se trouve-t-elle ici universalisée, puisqu'elle s'applique dans les relations entre la France et l'Algérie et non pas dans le seul cadre, régional ou « fédéral », de l'Union. L'arrêt *Henry Kismoun* de la Cour européenne paraît également moins artificiel que certains aspects de la jurisprudence de la Cour de justice en matière de droit au nom : étant donné les limitations matérielles du champ d'application du droit de l'Union européenne, la Cour de justice est tenue, si elle veut intervenir dans ce domaine, de rattacher cette question à la libre circulation – ce qui est plausible dans l'affaire *Sayn Wittgenstein* (*supra*, note 63), mais beaucoup plus artificiel lorsqu'il s'agit de noms d'enfants, voire de bébés comme dans l'affaire *Grunkin et Paul* (*ibid*.).

68 Cf. « L'apport de la jurisprudence de la Cour européenne des droits de l'homme ». Dans LAGARDE, P. (dir.). *La reconnaissance des situations en droit international privé*. Paris : Pedone, 2013, pp. 43 et seq. ; « L'article 8 de la Convention et l'obligation de reconnaître les situations familiales constituées à l'étranger : à la recherche du fondement d'une solution jurisprudentielle ». Dans : *Mélanges en l'honneur de Dean Spielmann*. Oisterwijk : Wolf Legal Publishers, 2015, pp. 273 et seq.

69 Arrêt du 28 juin 2007, n^o^ 76240/01.

70 Par. 130 de l'arrêt.

De même, dans l'affaire *Negrepontis-Giannisis c. Grèce*,[71] la non-reconnaissance en Grèce de l'adoption du requérant prononcée par un tribunal américain était de nature à porter atteinte à la confiance légitime du requérant, le fils adoptif, dans la validité de l'adoption. Le requérant avait été adopté par son oncle, un moine grec et évêque de l'Eglise orthodoxe à Detroit, dans des circonstances qui faisaient ressortir le caractère réel et substantiel des liens entre cette adoption et les Etats-Unis d'Amérique : le père adoptif était de nationalité grecque mais résident permanent aux Etats-Unis – de même que son neveu majeur résidait aux Etats-Unis depuis trois ans pour ses études universitaires. Ce ne fut qu'à la fin de ses études que le neveu et fils adoptif rentra en Grèce ; la relation de filiation adoptive fut maintenue pendant 14 ans, jusqu'au décès de l'oncle. On peut certes admettre que l'oncle devait être conscient du fait que l'adoption lui était interdite par le droit de l'Eglise orthodoxe grecque, mais il n'y a pas de raison de penser que son neveu aurait dû savoir qu'une vingtaine d'années plus tard, la Cour de cassation grecque allait décider, dans un litige sur la succession de l'oncle, que cette interdiction du droit ecclésiastique valait également pour le droit civil et faisait partie de l'ordre public au sens du droit international privé grec.[72]

Dans la décision, brièvement motivée, *Green et Farhat c. Malte*,[73] la Cour était saisie d'une situation dans laquelle une citoyenne maltaise, qui avait épousé son premier mari à Malte conformément au rite catholique, s'expatria en Libye, s'y convertit à l'Islam (ce qui entraînait automatiquement, au regard de la loi libyenne, la dissolution de son mariage, une convertie ne pouvant rester liée à un non-musulman) et épousa, avec l'autorisation d'une juridiction locale, son deuxième mari, avec lequel elle resta pendant près de vingt ans en Libye où les époux étaient considérés comme valablement mariés. Vingt ans après, lors de son retour à Malte accompagné de son deuxième mari, elle échoua à obtenir l'enregistrement de son mariage libyen à Malte : les juridictions maltaises décidèrent qu'il n'était pas prouvé que le premier mariage de M^me^ Green était réellement dissous et qu'en conséquence, le deuxième mariage semblait polygamique. La décision de la Cour rejette la requête comme manifestement malfondée : la prise en considération, par les juridictions maltaises, des intérêts de la communauté nationale au maintien du principe de la monogamie et de ceux du premier mari de la requérante restait à l'intérieur de la marge d'appréciation des autorités nationales. Les circonstances de fait de l'affaire *Green et Farhat c. Malte* intriguent, mais la décision est trop sommairement motivée pour permettre de dire si M^me^ Green et son mari libyen étaient conscients, au moment de la conclusion de leur mariage, de ce que celui-ci ne serait pas reconnu à Malte, ni permet-elle de juger si la cour aurait été disposée à admettre que la très longue durée de la vie familiale en Libye était de nature à engendrer, à elle seule, une confiance légitime dans le chef de la requérante et de son second mari. En tout cas, il a été jugé qu'à supposer même qu'il y a ait eu ingérence dans la vie privée et familiale

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71 Arrêt du 3 mai 2011, n° 56759/08 (*supra*, n° 12).

72 Par. 75 de l'arrêt : « la Cour relève que l'adoption litigieuse a eu lieu en 1984, alors que le requérant avait atteint l'âge adulte et qu'elle a duré vingt-quatre ans avant que la Cour de cassation n'y mette un terme par ses arrêts. Les parties n'ont par ailleurs fourni aucun élément tendant à démontrer que la réalité des liens entre le requérant et son père adoptif ait été mise en cause avant que la question de la succession ne se pose ».

73 Décision du 6 juillet 2010, n° 38797/07.

des requérants, les raisons d'ordre public invoquées par les autorités maltaises étaient suffisamment graves pour relever de la marge nationale d'appréciation.

21. Contrairement à l'apparence, peuvent également citées dans le présent contexte les affaires de non-reconnaissance en France de filiations issues de gestations pour autrui.[74] La Cour y était confrontée à une situation où, selon ses constatations, les parents d'intention ne pouvaient ignorer « qu'il y avait au moins un risque sérieux » de non-reconnaissance en France de la filiation qui résulterait de la mise en œuvre de la convention de gestation pour autrui aux Etats-Unis.[75] Ce fait est de nature à montrer que la confiance légitime dans la reconnaissance de la filiation en France n'existait pas en ce qui concernait les parents d'intention.[76] Toutefois, dans les arrêts de la Cour, une violation de la Convention ne fut constatée qu'*à l'égard des enfants* dont la filiation paternelle, conforme à la réalité biologique, n'était pas reconnue, violant ainsi leur droit à leur identité (article 8 de la Convention, au titre de la « vie privée ») : or les enfants nouveaux-nés n'avaient évidemment pas contribué aux circonstances de leur gestation, et la stabilité de leur situation familiale est pour eux une nécessité primaire, pouvant remplacer la « confiance légitime » qui ne peut pas exister dans leur chef.

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22. Pour terminer, voici une affaire portée devant la Cour européenne qui montre qu'occasionnellement, les buts poursuivis par la Convention européenne ne sont pas seulement compatibles avec les buts poursuivis par le droit international privé, mais y sont même identiques.[77] Il s'agit de l'affaire *Chbihi Loudoudi et autres c. Belgique*.[78]

Il s'agissait du rejet, par les tribunaux belges, d'une demande en adoption d'un enfant dont le statut personnel est celui d'un pays musulman (ici, le Maroc) qui prohibe l'adoption, enfant recueilli par *kafala*. C'est au moyen de règles matérielles de droit international privé que le droit international privé belge approche la question de l'adoption éventuelle d'un enfant confié en *kafala*. Ces règles ne se trouvant pas respectées en l'espèce, la demande en adoption de l'enfant, âgée de 14 ans et qui avait déclaré qu'elle souhaitait que l'adoption fût prononcée,[79] a été rejetée.

Les requérants (les époux ayant recueilli l'enfant, ainsi que l'enfant lui-même) reprochent à la Belgique, devant la Cour européenne, d'avoir méconnu l'article 8 de la Convention (droit au respect de la vie familiale) en refusant, face à une vie familiale qui existe depuis la décision marocaine de *kafala*, d'« accorder une protection juridique

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74 Voir *supra*, nº 13.

75 Arrêt *Mennesson c. France*, par. 58, dans le contexte de la vérification du caractère « prévu par la loi » de l'ingérence.

76 Cf. en ce sens J. Guillaumé, note sous l'arrêt *Mennesson* au *JDI* 2014, p. 1273.

77 La même observation pouvait également être faite à propos d'un *obiter dictum* de l'arrêt *Harroudj c. France* (par. 51, cité *supra*, nº 7) consacré à une règle de conflit française : « en effaçant ainsi progressivement la prohibition de l'adoption, l'Etat défendeur, qui entend favoriser l'intégration d'enfants d'origine étrangère sans les couper immédiatement des règles de leur pays d'origine, respecte le pluralisme culturel et ménage un juste équilibre entre l'intérêt public et celui de la requérante ».

78 Arrêt du 16 décembre 2014, nº 52265/10.

79 Par. 39.

rendant possible l'intégration de l'enfant dans sa famille, ce qui ne serait le cas selon les requérants qu'au moyen d'une adoption ».

La Cour rejette leur requête. Elle retient d'abord que contrairement à la situation dans l'affaire *Wagner et J.M.W.L.*[80] dont se prévalaient les requérants, ce n'est pas une adoption qui avait été prononcée à l'étranger, mais une *kafala* qui a certes créé un lien juridique entre les requérants « mais cette institution n'existant pas en Belgique, l'adoption qu'ils sollicitaient constituait, comme l'ont justement souligné les juridictions internes […], une situation juridique nouvelle ».[81]

La Belgique n'a pas non plus méconnu son obligation positive de tout mettre en œuvre, dans l'intérêt supérieur de l'enfant, afin de protéger juridiquement la vie familiale entre les requérants. En effet, l'adoption n'est pas la seule procédure de protection des enfants abandonnés qui existe dans le monde, et la loi belge était destinée à mettre en œuvre l'objectif d'assurer que les adoptions internationales aient lieu dans l'intérêt (« supérieur ») de l'enfant à être protégé contre tout usage abusif de l'institution d'adoption et ainsi dans le respect de sa vie privée et familiale. Les tribunaux belges ne se sont pas abstenus d'une appréciation *in concreto*, mais ont jugé au contraire qu'il était conforme à l'intérêt bien compris de l'enfant de ne pas voir substituer en Belgique un autre statut (celui de l'adoption) au statut de la *kafala* seule reconnue au Maroc. Il convenait d'éviter que l'enfant ait en Belgique et au Maroc deux statuts personnels différents, celui d'un enfant adopté en Belgique et d'un enfant sous *kafala* au Maroc. La Cour juge que

> « [l]es autorités belges pouvaient estimer … que l'intérêt de l'enfant exigeait qu'elle n'ait qu'une et même filiation, aussi bien en Belgique qu'au Maroc (comparer, au sujet de l'importance pour une personne d'avoir un nom unique, *Henry Kismoun c. France*, no 32265/10, § 36, 5 décembre 2013) ».[82]

Par conséquent, l'harmonie internationale des solutions apparaît ici comme une valeur importante, partagée par le droit international privé et la Convention européenne des droits de l'homme. La Cour européenne n'est pas l'ennemie du droit international privé ; à l'occasion, elle en est même l'alliée.

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[80] *Supra*, nº 20.
[81] Par. 91.
[82] Par. 101.

STRATEGIC CLIMATE LITIGATION IN THE DUTCH COURTS: A SOURCE OF INSPIRATION FOR NGOS ELSEWHERE?

HANS VAN LOON

Abstract: In its landmark *Urgenda* judgment of 20 December 2019 the Dutch Supreme Court confirmed the lower courts' order compelling the State of the Netherlands to limit the joint volume of Dutch annual greenhouse gas emissions by at least 25% at the end of 2020 compared to 1990. This case, launched by the Dutch NGO *Urgenda*, may encourage further strategic climate change litigation against both governments and (multinational) companies. Already, building on *Urgenda,* the NGO *Milieudefensie* has launched a lawsuit against RDShell in the Dutch courts. To what extent may these cases serve as models in other jurisdictions? Two aspects deserve special attention: the procedural standing of NGOs, and the different legal grounds – duty of care derived from civil tort law (including choice of law), or from human rights law – upon which the courts in *Urgenda* based their decisions, and *Milieudefensie* bases its claim.

Keywords: climate change litigation; collective and public interest lawsuits; duty of care; impact of climate science (policy) and inter-State obligations; European Convention on Human Rights (Arts. 2, 8, 34)

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"Without increased and urgent mitigation ambition in the coming years, leading to a sharp decline in greenhouse gas emissions by 2030, global warming will surpass 1.5°C in the following decades, leading to irreversible loss of the most fragile ecosystems, and crisis after crisis for the most vulnerable people and societies."[1]

1. INTRODUCTION

Around the world, a growing volume of lawsuits deal with climate change.[2] The majority of cases are brought by citizens, NGOs and corporations against

[1] IPCC (International Panel on Climate Change) Special Report 2019, p. vi. Available at: https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_High_Res.pdf.

[2] See, e.g., SETZER, J. – BYRNES, R. *Global trends in climate change litigation: 2019 snapshot* (July 2019). Available at: http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf. The *Climate Change Law of the World* database available at: www.lse.ac.uk/GranthamInstitute/climate-change-laws-of-the-world/ includes some 370 cases from some 30 countries and four international jurisdictions, excluding the United States of America for which alone over 1200 cases have been identified, see http://climatecasechart.com/us-climate-change-litigation.

governments, with a trend showing that the number of plaintiff NGOs using litigation as a strategic tool to mitigate, adapt to, or compensate for losses from climate change is increasing. Such lawsuits are also on the rise against private corporations and the plaintiffs are, again, NGOs, but also cities, investors and shareholders.

Whether they include parties outside the court's jurisdiction or not, these cases have an inherently transnational dimension due to the global interests involved. They frequently build on each other. Often, where cases purport to influence government policies and corporations' accountability, strategic alliances are formed across borders.

This article is about recent developments regarding civil litigation on climate change in the Dutch courts. It discusses two cases initiated by Dutch NGOs. One against the Dutch government – *Urgenda v. the State of the Netherlands* ("*Urgenda*") – and one against a multinational corporation based in the Netherlands – *Milieudefensie v. Royal Dutch Shell* ("*MD/RDS*"). Both lawsuits are examples of strategic collective actions pursuing a public interest, supported by a number of persons defending their individual private interests. The remedy sought in both cases is injunctive relief to mitigate greenhouse gas (GHG) emissions.

The *Urgenda* judgment of the Dutch Supreme Court[3] has been called "the most important climate change court decision in the world so far" by the UN special rapporteur on human rights and the environment, David R. Boyd.[4] The case against Shell is in an early stage and has not yet led to a judgment, but the plaintiffs' strategy builds on that of *Urgenda,* and is also attracting wide interest.

To what extent may these cases, upon closer analysis, offer examples to follow in strategic climate litigation in other jurisdictions? One aspect to consider in this regard is the special Dutch rule on the standing in civil proceedings of NGOs representing collective interests or the public interest, which enabled these two lawsuits. Another, not unrelated to the first, is the variety of legal grounds – duty of care derived from civil tort law or from human rights law – upon which the courts in *Urgenda* based their decisions, and *Milieudefensie* bases its claim.

2. CIVIL PUBLIC INTEREST LITIGATION IN THE NETHERLANDS

A) ADMINISTRATIVE AND CIVIL LITIGATION

Although administrative litigation may be used in the Netherlands to advance general interests, it is available only against orders and permits issued by administrative authorities. As a result, collective actions against policies and (lack of) action of the government have resorted to litigation before the civil courts. Similarly, the civil courts have been used for collective actions against private companies. In contrast to administrative proceedings, which in principle are limited to claims relating to

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3 Supreme Court (Hoge Raad), 20 December 2019, ECLI:NL:HR:2019:2006, unofficial English translation available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007.

4 *The Independent*, 21 December 2019.

activities and interests *within* Dutch territory, civil actions may extend to activities and interests, including in environmental matters, *outside* the Netherlands.

B) STANDING: THE INTERESTS REPRESENTED BY THE NGO

Urgenda based its standing before the civil courts on a specific provision for collective actions, Article 3:305a of the Dutch Civil Code (DCC). So does Milieudefensie in its case against RDS. This provision, in its version applicable in our cases, grants a right of action to foundations or associations promoting the "similar interests" of other persons through civil law claims. Although it contains elements of a class action (the "similar interests" must be suitable to be "bundled" through the collective action), it does not create a class action in the proper sense. It is the NGO that has standing, not the persons whose interests it bundles. Nor do those persons have to be consulted or give their consent. If the ensuing judicial decision makes it impossible to exclude a person not wishing to be affected thereby, the judgment nevertheless binds that person. Injunctions as imposed in *Urgenda* and requested in *MD/RDS* are examples of such a decision.

The provision is thus open-ended as to the interests the NGO promotes.[5] Those interests may indeed be "diffuse". Although private international law (PIL) aspects were discussed in the legislative process,[6] no special PIL rules were included to limit the article's scope. The provision covers both collective actions promoting private interests (which can indeed be "bundled") and actions in the general interest. Its hybrid nature explains why in *Urgenda*, the courts could differ in their views on whose interests to consider, and why in *MD/RDS*, the parties disagree on whether the interests the plaintiffs represent are sufficiently similar.

3. URGENDA V. THE STATE OF THE NETHERLANDS

A) A NARROW DISPUTE

Urgenda brought its lawsuit in 2013, asking the court to order the State of the Netherlands to limit the volume of Dutch GHG emissions such that by the end of 2020 this volume would be reduced by 40%, or at least 25%, in comparison to 1990. The Government's and Urgenda's opinions regarding the reduction targets for 2100, 2050, and 2030 did not differ: the sole issue was the target for 2020, the *pace* required to reduce the emissions so as to stay below the 2°C global temperature rise target on which the parties agreed.[7] So the case exclusively concerned *the narrow question of whether Dutch emissions must be reduced by at least 25% in 2020 compared to 1990*, rather

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5 According to the history of this statutory provision, ideological interests can also be represented in a class action. The admissibility of "a claim brought by an environmental organisation to protect the environment, without an identifiable group of persons requiring protection" is specifically mentioned.

6 See VAN LITH, H. *The Dutch Collective Settlements Act and Private International Law.* Available at: https://repository.tudelft.nl/view/wodc/uuid:24d19976-35dc-46c9-9988-78531e6a7e69.

7 Note that the judgment was rendered in the run-up to, and thus before, the Paris Agreement which set the target of "holding the increase in the global average temperature to well below 2°C above pre-industrial

than 14–17% which the Government claimed was sufficient to ultimately reach the 2°C target. Moreover, the parties largely agreed on the facts, including the serious effects of climate change originating in human activity, and the authority of climate science based global policy recommendations.

B) THE PROCEEDINGS BEFORE THE HAGUE DISTRICT COURT[8]

1. STANDING: CLAIM HELD ADMISSIBLE REGARDING THE INTERESTS OF HUMANITY AND OF FUTURE GENERATIONS

Urgenda brought the case both on its own behalf and on behalf of 886 individual persons. In so far as the foundation was acting on its own behalf, based on Article 3:305a DCC, the District Court held that it could act in the interest not only of the current population of the Netherlands, but also of persons outside the Netherlands, and of future generations, since "all of them hav[e] an interest in a sustainable society which [Urgenda] seeks to protect".

Regarding the 886 individual plaintiffs, the Court ruled that they lacked any additional personal interest, and denied the claims brought on their behalf.[9]

2. LEGAL BASIS OF THE JUDGMENT: DUTY OF CARE DERIVED FROM CIVIL TORT LAW

Urgenda based its claim primarily on the core provision of the Dutch civil law on torts, Article 6:162 DCC, and alternatively on Articles 2 and 8 of the European Convention on Human Rights (ECHR). The District Court followed the plaintiff in its primary claim.

Given the world-wide interests represented by Urgenda, the Government might have argued that the laws of each State concerned, and not just Dutch law, should determine whether the conduct of the Netherlands was (un)lawful (Article 4 (1) Rome II Regulation). As it happened, in contrast to *MD/RDS*, Dutch tort law was applied without further ado.[10]

The District Court based its finding that the State was acting unlawfully towards Urgenda on the duty of care – more specifically hazardous negligence – on "a rule of unwritten law pertaining to proper social conduct" contained in Article 6:162 DCC.[11] This duty of care being an "open norm", the court set itself the task of determining its

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levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels…" (Art. 2 (1) a).

8 See judgment Rechtbank Den Haag, 24 June 2015, ECLI:NL:RBDHA:2015:7145; unofficial English translation, ECLI:NL:RBDHA:2015:7196, available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196.

9 One would have expected the Court to declare these claims inadmissible instead of denying them. The decision was not questioned in appeal, so that these individual claimants were no longer involved in the case.

10 Arguably, the Court should have raised the applicable law issue of its own motion, cf. Art. 10:2 DCC.

11 "1. A person who commits an unlawful act toward another which can be imputed to him, must repair the damage which the other person suffers as a consequence thereof.
2. Except where there is a ground of justification, the following acts are deemed to be unlawful: the violation of a right, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct.

content in the case at hand, "being mindful of the State's power of discretion in the way of fulfilling its duty".

a) Reflex effect of global and European norms; role of global science based climate policies

Climate change being a global hazard, in respect of which the Dutch government had a "shared risk management duty", both the State's duty of care to avoid dangerous impairment of the living climate, including in the Netherlands, and its margin of discretion were informed by the global and European normative framework concerning climate change binding upon the Netherlands, as well as its constitutional duties.

The Court referred in particular to the *United Nations Framework Convention on Climate Change* (UNFCCC, also often referred to as the "Rio Climate Change Treaty"),[12] the TFEU, Articles 191–193,[13] and Articles 2 and 8 of the ECHR.[14] Although these instruments, binding upon the State, "did not create rights Urgenda could directly invoke", they did have a "reflex effect" upon the State's duty of care. Therefore, this duty should be interpreted so as to avoid a conflict with the State's international obligations.

These obligations, moreover, had to be considered in the light of the latest scientific knowledge, foremost the reports of the Intergovernmental Panel on Climate Change (IPCC). The IPCC had determined that, in order to limit the rise in global temperature to 2°C, developed countries listed in Annex I to the Kyoto Protocol such as the Netherlands, should reduce their emissions by 25–40% by 2020 in comparison to 1990 levels.

b) Causality

Whilst proving the causal link between GHG emissions, global climate change, and its localized effects is a challenge in lawsuits for damages suffered, for the purpose of prospective injunctive relief the burden of proof is less severe. The Court found that the causal link between emissions from Dutch territory and climate change, including its effects on the Dutch living climate, was sufficiently established. That the current Dutch GHG emissions are limited on a global scale does not alter the fact that they contribute to climate change. Therefore the State has an obligation to take precautionary measures.

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3. An unlawful act can be imputed to its author if it results from his fault or from a cause for which he is answerable according to law or common opinion" (translations from HAANAPPEL, P. – MACKAAY, E. (eds.). *Netherlands Civil Code, Book 6.* 1990).

12 *United Nations Framework Convention on Climate Change*. The court also took into consideration its 1997 Kyoto Protocol, and the various decisions of its Conference of the Parties, including the 2007 Bali Action Plan, the 2010 Cancún agreements, and the 2011 Durban Platform for Enhanced Action, all binding upon the Netherlands.

13 The court also took into consideration the various implementing EU directives, in particular, the ETS (Emission Trading System) Directive 2003/87/EC, as amended, and decisions, in particular, EU Council Decision EUCO 169/14, establishing a 2030 Climate and Energy Framework.

14 The rights and freedoms of the ECHR extend to everyone within the jurisdiction of the Contracting States (Art. 1). In relation to the similar provision of the Interamerican Convention on Human Rights, the Interamerican Court of Human Rights opined that in environmental cases the jurisdiction of the State where the harm originates may extend to persons in *third* States where the harmful effect materializes, IACtHR, Advisory Opinion OC – 23/17 (2017), para. 81, available at: http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf. This issue did not come up before the District Court.

And, "in view of a fair distribution, the Netherlands, like the other Annex I countries, has taken the lead in taking mitigation measures and has therefore committed to a more than proportionate contribution to reduction. Moreover, it is beyond dispute that the Dutch per capita emissions are one of the highest in the world."

c) Trias politica, other defences; order given

Finally, the Court rejected the State's objection that by granting the requested order it would interfere with the distribution of powers (trias politica) in the Dutch democratic system. We will see how the Supreme Court disposed of this objection.

After considering several other defences, the Court concluded that the State's duty of care required immediate additional mitigation action to ensure that by 2020 the Dutch GHG emission level was reduced by 25–40%. Given the State's margin of discretion, the reduction order was limited to 25% only.

C) THE PROCEEDINGS BEFORE THE HAGUE COURT OF APPEAL

1. STANDING: CLAIM ADMISSIBLE REGARDING THE INTERESTS OF CURRENT DUTCH POPULATION

On appeal by the Government and cross-appeal by Urgenda, the Court of Appeal confirmed the District Court's judgment,[15] but took a different course both regarding the standing of Urgenda and the legal basis for the reduction order.

For its decision on Urgenda's standing, the Court of Appeal considered Article 3:305a DCC together with Article 34 ECHR. The District Court had found that Urgenda was barred by the latter provision to rely on the ECHR in view of the ECtHR's case-law according to which it could not claim to be itself a victim of a violation of Articles 2 and 8, and "public interest actions" are excluded. In contrast, the Court of Appeal took the view that regarding access to the Dutch courts, not Article 34 ECHR but Dutch procedural law was conclusive. Under Article 3:305a DCC Urgenda's claim was already admissible insofar as Urgenda acted in the interests of the current, in particular the younger, generation of Dutch nationals.

2. LEGAL BASIS OF THE JUDGMENT: ARTICLES 2 AND 8 ECHR

This shift of focus regarding the *standing* of Urgenda paved the way for a shift in the *legal basis* for the GHG emission reduction order. Referring to global climate change policy and climate science, and to international and European law along the lines of the District Court's judgment, the Court concluded that the State by resisting a reduction by at least 25% by the end of 2020 was failing to fulfil its duty of care pursuant to the positive obligations flowing from Articles 2 and 8 ECHR. The Court came to this conclusion although, in the appeal stage, due to a new calculation method more in line with IPCC methodology, the aimed percentage for the State's GHG reduction

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[15] See judgment Gerechtshof Den Haag, 9 October 2018, ECLI:NL:GHDHA:2018:2591, available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2591; unofficial English translation ECLI:NL:GHDHA:2018:2610, available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610.

for 2020 was adjusted to 23%. "That is not far from 25%, but a margin of uncertainty of 19–27% applies… Such a margin of uncertainty is unacceptable."

D) THE SUPREME COURT: THE COURT OF APPEAL'S JUDGMENT CONFIRMED

1. STANDING: CLAIM ADMISSIBLE REGARDING THE INTERESTS OF CURRENT DUTCH RESIDENTS

The Supreme Court[16] agreed with the Court of Appeal that the fact that Urgenda could not lodge a complaint with the ECtHR on the basis of Article 34 ECHR because it is not itself a potential victim of a violation of Articles 2 and 8 ECHR, did not detract from its right to institute proceedings before the Dutch courts in accordance with Article 3:305a DCC "on behalf of residents who are in fact such victims".

2. DUE DILIGENCE DERIVED FROM ARTICLES 2 AND 8 ECHR

The Supreme Court also followed the Court of Appeal regarding the legal grounds for its reasoning. The Supreme Court noted that the interpretation of Articles 2 and 8 by the Court of Appeal went beyond the case-law of the ECtHR, "which has not yet issued any judgments regarding climate change or decided any cases that bear the hallmarks that are particular to issues of climate change [such as] the dangers presented by a globally occurring activity – the emission of greenhouse gases all over the world, and not just from Dutch territory – whose consequences will have a worldwide impact, including in the Netherlands". It therefore took care to explain its interpretation method, paraphrasing the ECtHR's own interpretation standards. Referring to the "common ground" interpretation of the Strasbourg Court, the Supreme Court hooked international and European law, both legally binding and not binding, and global science policy and the findings of climate science onto positive ECHR obligations.

The Court stressed the serious risks of climate change that may take a wide variety of forms (sea level rise, heat stress, deteriorated air quality, increasing spread of infectious diseases, excessive rainfall, and disruption of food production and drinking water supply). The fact that these risks would only become apparent in a few decades did not mean that Articles 2 and 8 ECHR would not offer protection against this threat. Therefore, the risks caused by climate change are sufficiently "real and immediate", as required by the ECtHR's case-law to bring them within the scope of Articles 2 and 8.

Moreover, this protection is not limited to specific persons, but to society or the population as a whole. The Court referred here to judgments of the ECtHR, according to which with regard to environmental hazards that may endanger an entire region, Articles 2 and 8 ECHR offer protection to the residents of that region.

3. JOINT RESPONSIBILITY OF THE STATES AND PARTIAL RESPONSIBILITY OF INDIVIDUAL STATES

Whereas the "I only have to do my part, if the others do as well", "my emissions are too small to count" and the "waterbed" ("if I reduce my emissions, other

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[16] See *supra* n. 3.

States will produce more") arguments were dealt with the District Court in the context of causality required under civil tort law, the Supreme Court, relying on Articles 2 and 8 ECHR, followed a public international law approach. Under Articles 2 and 8 ECHR the Netherlands is obliged to do "its part" in order to prevent dangerous climate change, even if it is a worldwide problem. The objection that a State can decline its partial responsibility because other States do not comply with theirs, or that its reduction does not help because other States will continue their emissions, is unacceptable. And so is the assertion that a country's own share in global GHG emissions is very small and makes little difference on a global scale. "Indeed, acceptance of these defences would mean that a country could easily evade its partial responsibility by pointing to other countries or its own small share."

4. THE 25–40% TARGET

The Supreme Court concluded that although the 25–40% target was not a binding rule or agreement "in and of itself, there is a high degree of international consensus on the urgent need for the Annex I countries to reduce greenhouse emissions by at least 25–40% by 2020 compared to 1990 levels, in order to achieve at least the 2°C target, which is the maximum target to be deemed responsible. This high degree of consensus can be regarded as 'common ground' within the meaning of the ECtHR case law". This target applies to each Annex I country individually, irrespective of EU arrangements. The State has not "provided any insight into which measures it intends to take in the coming years". Nor has it substantiated that the reduction of at least 25% by 2020 is impossible or disproportionate: the State initially pursued a policy aimed at a 30% reduction by 2020, and other EU countries are pursuing much stricter climate policies than the Netherlands.

5. TRIAS POLITICA; POLITICAL DOMAIN

The Government had argued that the reduction order amounted to an order to create legislation, which according to Supreme Court's own case-law was not permissible. Moreover, it was not for the courts to engage in the political considerations necessary for a decision on the reduction of GHG emissions.

In response to the first complaint, the Supreme Court pointed out that if the Government is obliged to do something, it may be ordered to do so by the courts, as anyone may be, at the request of the entitled party. This is a fundamental rule of constitutional democracy. The order is not for the State to take specific legislative measures, but leaves it free to choose the measures to be taken to achieve a 25% GHG emission reduction by 2020.

In response to the second complaint, the Supreme Court recognised the large degree of discretion under the Dutch constitutional system of the decision-making power of the government and parliament regarding the reduction of GHG emissions. But it is up to the courts to decide whether they have remained within the limits of the law by which they are bound, including those for the State arising from the ECHR. "This case involves an exceptional situation", in which "the Court of Appeal was allowed to rule that the State is in any case obliged to achieve the aforementioned reduction of at least 25% by 2020".

E) DISCUSSION

1. WERE THE COURTS RIGHT TO STEP IN? TO PROTECT WHOM?

In our 2015 Hague Academy lecture, delivered one month after the District Court's *Urgenda* judgment, we welcomed it "as a remarkable decision, based on an acute awareness of the nature and magnitude of an inherently global problem, and providing extensive and detailed grounds based on a review of the relevant global, European, and domestic law as well as available scientific evidence."[17] The judgment also met with broad criticism, however. Many expected that it would not stand in appeal. But it did. Yet, the confirmation of the order by the Court of Appeal and Supreme Court, once again, met with criticism.

We believe that part of the criticism (how can a NGO, acting without any check on whether it represents the interests it purports to promote, obtain an order from the courts requiring the State to reduce GHG emissions?) actually concerns the provision on collective actions, Article 3:305a DCC, which, as we have seen (*supra II.B.*) is an unusually open-ended and hybrid procedural norm. In fact, since 1 January 2020 a more limited version of this article applies. But it will still, it would seem, allow actions such as those discussed here.

Whilst this provision is not beyond criticism, given that it exists we do not share the view that the courts overstepped the boundaries of their judicial task. As the Supreme Court points out, "in this exceptional case" the courts had a special responsibility, and, as organs of the domestic legal order, they provided legal protection by ensuring compliance by the executive of its duty of care.

Moreover, it may be said that as a substitute for the missing international organs of collective enforcement, they stepped in to enforce the State's share in maintaining the global legal order regarding climate change: an example of George Scelle's notion of "*dédoublement fonctionnel*".[18]

This appears most clearly and consistently in the District Court's judgment. By recognizing Urgenda's standing as representing the interests of humanity, present and future, the decision acknowledges that climate change affects people around the globe, and, by implication, that it affects them very *unevenly regarding time, space, severity of, and capability to cope with, its impacts*. Hence the distinction made in the UNFCCC between Annex I (industrialised) countries and non-Annex I (developing) countries and the Paris Agreement (concluded after the judgement) where it specifically takes into account "the urgent and immediate needs of those developing country Parties that are particularly vulnerable to the adverse effects of climate change".[19]

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17 VAN LOON, H. The Global Horizon of Private International Law. Inaugural Lecture, Private international Law Session. *Recueil des cours*, 2015, Vol. 380, pp. 1–108 (at p. 103).

18 *Ibid.*, pp. 102–103. See also CASSESE, A. Remarks on Scelle's Theory of 'Role Splitting' (*dédoublement fonctionnel*) in international Law. *European Journal of International Law*, 1996, Vol. 1, p. 210 et seq. (at p. 228).

19 Article 7 (2.): Parties recognize that adaptation is a global challenge faced by all with local, subnational, national, regional and international dimensions, and that it is a key component of and makes a contribution to the long-term global response to climate change to protect people, livelihoods and ecosystems, *taking into account the urgent and immediate needs of those developing country Parties that are particularly vulnerable to the adverse effects of climate change* (emphasis added).

By narrowing Urgenda's standing to the interests of the *current Dutch* population (Court of Appeal) or residents (Supreme Court), instead of those of *humanity* and *future generations*, these Courts lost some of the global perspective, and focused on the vertical relation between the State of the Netherlands and those within its jurisdiction. This view leads not only to a huge reduction in the numbers of people concerned,[20] but also of the distributional justice aspect[21] that forms part of the background of the District Court's ruling.

2. DUTY OF CARE DERIVED FROM CIVIL TORT LAW OR FROM HUMAN RIGHTS LAW?

There is no doubt that, especially in vulnerable developing countries with limited capabilities to mitigate or adapt to climate change, the human rights of individuals and communities, often highly dependent on agriculture or coastal livelihoods, are at this point in time already at stake.[22] But can this also be said, in the circumstances of this case, of the residents of the Netherlands, the population of one of the richest of the Annex I countries? Without any further differentiation, or assessment of the situation of groups or individuals?

According to the Supreme Court, Urgenda, representing the residents of the Netherlands, could invoke Articles 2 and 8 ECHR notwithstanding its Article 34 that bars *actio popularis* before the ECtHR. But Article 34 has a reason. Its aim is to bar complaints of an abstract nature: "an applicant must produce reasonable and convincing evidence of the likelihood that a violation affecting him or her personally will occur".[23]

Certainly, the State of the Netherlands fell short of its duty of care. The Government, knowing it should do more to pursue an effective climate policy, did not take the necessary action without a credible justification. Parliament let it happen. The State of the Netherlands, while pretending to lead, in fact stayed behind almost all other EU countries, thereby increasing the risk of irreversible harm to its own population and the rest of the world.

Yet, the ECtHR has consistently held that, when applying Articles 2 and 8 to environmental matters, "the crucial factor in determining whether, in the circumstances of a case, environmental damage has violated one of the rights guaranteed by Article 8 (1), is the existence of a harmful effect on the private or family sphere of a person, and not simply the general deterioration of the environment…".[24]

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[20] The current Dutch population (17,100,000) numbers 0,22% of the current world population (7,800,000,000).

[21] See HEY, E. – VIOLI, F. The hard work of regime interaction: climate change and human rights. *Mededelingen van de Koninklijke Nederlandse Vereniging voor Internationaal Recht – nr 145 – Climate Change: Options and Duties under International Law*, 2018, pp. 1–24.

[22] For details concerning the vulnerability of populations at disproportionately higher risk of adverse consequences with global warming of 1.5°C and beyond, see IPCC, *Global Warming of 1.5 ºC – Summary for Policymakers*, pp. 8–12. Available at: https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_SPM_version_report_HR.pdf.

[23] See ECtHR, Practical Guide on Admissibility Criteria (2019), 13–14. Available at: https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf.

[24] ECtHR *Cordella v. Italy*, no 54414/13 54264/15 § 101; see also *Kyrtatos c. Greece*, no 41666/98, § 52, *Fadeïeva c. Russia*, no 55723/00, § 68.

One can agree with the Supreme Court where, building on the existing case-law of the ECtHR, it interprets Articles 2 and 8 ECHR to the effect that they may also offer protection against harm caused by climate change, all the more because of its irreversible effects. These concrete effects may manifest themselves in (threat of) local droughts, heavy rainfalls, storms, etc, which present an *immediate* and *real* danger to certain individuals or even certain communities. But we do not think, in the light of the ECtHR's case-law, that it is, in the circumstances of this case, given the narrow issue at hand, a tenable position to say that *the Dutch population* is currently a (potential) victim of a violation of its human rights under Articles 2 and 8 ECHR. This is also hardly defensible if one compares this case with cases of vulnerable people elsewhere on our planet.[25] Such an overly broad interpretation of Articles 2 and 8 risks stripping these human right provisions of their effectiveness.

Furthermore, the way the Supreme Court uses the "common ground" method of interpretation of the ECtHR to hook international and European law and global science policy onto positive ECHR obligations, gives rise to doubt. Certainly, these international and European norms are broadly shared. But if, as the Supreme Court admits, its extensive interpretation of Articles 2 and 8 breaks new ground, then more is needed to argue that these shared norms also lend broad support to the position taken by the Supreme Court in this case.

The Supreme Court had the choice to base the State's duty of care on civil tort law (following the District Court) or human rights (following the Court of Appeal).[26] It chose to follow the Court of Appeal. While agreeing with the outcome of the Supreme Court's judgment, we believe that in this case the District's Court approach is more compelling than that of the Supreme Court.

4. MILIEUDEFENSIE V. ROYAL DUTCH SHELL PLC.

A) STANDING

This case was brought in 2019 by seven Dutch NGOs, led by Milieudefensie (MD). All seven organisations argue, based on their statutory mission and activities, that they have legal standing under art. 3:305a DCC. They claim to be acting not only

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[25] Contrast this case with, e.g., *Leghari v. Pakistan*, available at: http://climatecasechart.com/non-us-case/ashgar-leghari-v-federation-of-pakistan/, or *Torres Strait Islanders v. Australia*, available at: http://climatecasechart.com/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/, where the threat of climate change is undoubtedly real and immediate, and where the State had not developed any climate policy at all. Cf. also *Juliana v. United States*, available at: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/01/17/18-36082.pdf, (petition for rehearing *en banc* pending) where the courts agreed that the plaintiffs claim "concrete and particularized injuries" including a girl being forced to leave her home because of water scarcity, thereby being separated from her relatives on the Navajo Reservation, or a boy having to evacuate his coastal home multiple times because of flooding.

[26] Cf. the Procurator General's advisory opinion, par. 6.16, ECLI:NL:PHR:2019:887; unofficial English translation ECLI:NL:PHR:2019:1026, available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2019:1026.

on behalf of the present (Dutch) population but (referring to the District Court's ruling in *Urgenda*) also of future generations.

MD also acts on the basis of a power of attorney on behalf of 17.000 individual persons.

B) A LARGE DISPUTE

MD is asking the court to order RDS to limit the joint volume of all CO_2 emissions associated with its business activities and fossil fuel products such that the joint volume of those emissions be reduced by 45% by 2030, 72% by 2040, and 100% by 2050, all compared to 2010 levels; or, in any case, by 45% by 2030.[27]

In contrast to *Urgenda*, the positions of the parties in this case are far apart. Among other issues, they disagree on the extent of the control of RDS over its CO_2 emissions, and the legal regime(s) that apply to these emissions. RDS argues that it has control solely over the emissions of RDS plc, and not, as MD claims, over the emissions of its subsidiaries, which are subject to the laws of each State where they are active, nor over those of the end users of its products who have their own responsibility for the use they make of these products.

C) JURISDICTION

MD bases the jurisdiction of the Hague District Court primarily on Articles 1, 4, and 63 of the Brussels I recast regulation (BIR), since Royal Dutch Shell plc, although having its statutory seat in London, has its principal place of business in The Hague. Moreover, MD invokes Article 7(2) BIR, arguing that the main cause of the damage occurs in the Netherlands, since it is there that RDS adopts the group policy that results in the climate damage, and affects people and the environment in the Netherlands, among other countries.

In contrast to a series of other cases against RDS, now pending before the Hague Court of Appeal,[28] MD is not also suing subsidiaries of RDS in other countries, but only the parent company.

D) PRIMARY GROUND FOR THE CLAIM: CIVIL TORT LIABILITY

MD bases its claim primarily on a civil tort committed by RDS arguing that Dutch law applies, not on the basis of Article 4 (1) but Article 7 of the Rome II Regulation. As damage may be suffered everywhere on Earth, Article 4 (1) could lead to the

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[27] See the writ of summons, unofficial English translation available at: http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/?mc_cid=ff847ee323&mc_eid=c70ad85e80, and the response by RDS available at: https://milieudefensie.nl/actueel/2019-11-12-conclusie-van-antwoord-finale-versie-als-aangeboden-voor-indiening-bij-rechtbank.pdf (we did not find an English translation).

[28] See Court of Appeal The Hague, 18 December 2015, ECLI:NL:GHDHA:2015:3587, *Akpan et al. v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria LTD* (interlocutory appeal judgment, proceedings continue). Appeal from District Court The Hague 30 January 2013, ECLI:NL:RBDHA:2013:BY9854.

application of a large variety of applicable laws. To avoid that result MD has opted for the choice of Dutch law permitted under Article 7 (1), claiming that RDS determines the group policy that its subsidiaries follow. RDS's response is that the event causing damage is not the group policy decision by RDS, which is "a mere preparatory act", but the concrete implementation thereof by Shell companies at the local level, as well as the conduct of the end users across the world. So, not Article 7 (1) (nor 4 (2) or (3)), but 4 (1) Rome II is applicable. In any event, even if Dutch law is held to be applicable, Article 17 Rome II should be applied.

Based on the application of Dutch law, MD argues that RDS is acting contrary to the "rule of unwritten law pertaining to proper social conduct" referred to in Article 6:612 DCC. RDS was aware of the gravity of the danger to people and the environment caused by fossil fuels and of its share in creating the climate danger. Yet, since 2007 it has been reducing its investments in sustainable energy and has increased its investments in fossil activities. It is hampering the energy transition, e.g., by actively encouraging demand for fossil fuels, opposing government initiatives aiming to regulate Shell's activities, and misleading the general public about its real intentions and the real urgency of the climate issue. It thus violates its duty of care. For its part, RDS contests the causal link between its specific activities and dangerous climate change. Reducing its activities would make hardly any difference, and if RDS were ordered to do so, other companies active in the global market would immediately fill the gap. Therefore, RDS is not violating any duty of care.

E) SUBSIDIARY GROUND FOR THE CLAIM: (INDIRECT) VIOLATION OF HUMAN RIGHTS

MD, building on the judgment of the Court of Appeal in *Urgenda*, argues, by way of alternative claim, that RDS is violating Articles 2 and 8 ECHR, which have "horizontal effect" in its relations with MD, but also the UN Guiding Principles on Business and Human Rights (UNGP's), the UN Global Compact, and the OECD Guidelines for multinationals. According to RSD, the parallel is unfounded: RDS is not a State, moreover, the requested order, which would not take effect before 2030, 2040, or 2050, is solely addressed to RDS and not to the many actors who are contributing to climate change. Of the international regimes that MD is invoking, the UNGP's are addressed to States, not to companies, and the UN Global Compact and OECD Guidelines are not binding upon companies either.

The oral pleadings before the Hague District Court are scheduled for December 2020.

F) DISCUSSION

In *Urgenda*, the plaintiff's private interests confronted a government, a defendant in charge of the public interest with jurisdiction over the territory of the Netherlands. The courts managed – albeit through different routes – to link the conduct of the State of the Netherlands to the global climate policy target of a minimum re-

duction by Annex I States of 25% in comparison to 1990. That target applies to States, however, each State having to contribute "its share" within its jurisdiction, the idea being that if all States would comply with their duties under the Paris agreement, it should be possible to reach the 1.5° (preferably) or the 2°C target.[29]

MD v. RDS is a different game. In this case the defendant is a private party providing society with energy, whilst operating in a global market. As RDS argues, it is only one of multiple actors contributing to climate change. Although developments in quantifying fossil fuel companies' past and current contributions to climate change, and in attributing fractions of the accumulation of CO_2 in the atmosphere to individual companies are progressing,[30] establishing an objective standard for future emissions, addressed by injunctive relief, is not evident.

A creative attempt has been made by a group of climate change lawyers to define an objective yardstick under civil tort law for the reduction obligation of enterprises, based on the "carbon budget" of the State where they operate, which itself would be derived from an annually determined global "carbon budget", with corrections to be made if the emissions of companies' supply chains, subsidiaries and end-users are included. However, *MD* has not relied on these *Principles on Climate Obligations of Enterprises*.[31]

Nonetheless, RDS and other fossil fuel corporations have an increasing interest "to become part of the solution rather than passive (and profitable) bystander to continued climate disruption".[32] More broadly, one can see a trend away from a model of corporate responsibility narrowly focused on shareholders' interests, in which public health and safety risks are seen as external factors, towards a broader "stakeholder-oriented" model, requiring companies to act in a socially and environmentally acceptable manner, and assume these risks as an internalized corporate risk. Pressure from investors and shareholders, as well as ongoing public scrutiny, are helping to accelerate the transition of fossil fuel to non-fossil energy production.[33] Civil lawsuits such as the case *Milieudefensie* has launched also keep Shell and other fossil fuel corporations' eyes on the (green) ball, even though the legal basis for the claim may not be sufficiently strong to support the outcome the plaintiffs are hoping for.[34]

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[29] But see UNEP Emissions Gap Report 2019, available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/30797/EGR2019.pdf.

[30] Thus bringing private climate litigation into closer alignment with asbestos and tobacco litigation, see GANGULY, G. – SETZER, J. – HEYVAERT, V. If at First You Don't Succeed: Suing Corporations for Climate Change. *Oxford Journal of Legal Studies*, 2018, Vol. 38 (4), pp. 841–868.

[31] Principles on Climate Obligations of Enterprises, with Commentary by J. Spier (2018), available at: https://climateprinciplesforenterprises.files.wordpress.com/2017/12/enterprisesprincipleswebpdf.pdf.

[32] HEEDE, R. Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010. *Climatic Change*, 2014, Vol. 122, pp. 229–241.

[33] Recently all the large European oil and gas producers, including RDS, have set emissions reduction targets. For a recent assessment, see *TPI State of Transition Report 2020*, available at: https://www.transitionpathwayinitiative.org/tpi/publications/50.pdf?type=Publication.

[34] See GANGULY – SETZER – HEYVAERT (*supra* n. 30).

5. CONCLUSION

Urgenda breaks new ground. For the first time, the Supreme Court of a western State[35] has ordered a State to do more to reduce the risks of climate change. Building on *Urgenda*, plaintiffs in *MD/RDS* are now seeking an order to force a private multinational company to switch more rapidly to non-fossil energy production. To what extent can these lawsuits provide inspiration to NGOs in other countries? Here are a few points to consider:

1. All three *Urgenda* Courts recognised the extreme seriousness of climate change, and the need to limit global warming to 2°C at most, and provided legal protection in civil proceedings in order to drive governmental ambition regarding climate change action.
2. All three Courts agreed that judicial intervention, even where it orders the State to do more to reduce GHG emissions from its soil, does not encroach upon the political domain, as long as it leaves the State free to choose the measures to be taken.[36]
3. All three Courts grounded their decision in a duty of care of the State. They differed, however, with respect to both the interests to which this duty extends, and its legal ground (see 7. below).
4. All three Courts found ways, through this duty of care, to give effect to international and regional (European) law legally binding on States only, as well as non-binding law. They differed, however, in the method used to this end (see 7. below).
5. All three Courts embraced the IPCC assessment reports as authoritative evidence of climate change that individuals may invoke against their Governments.
6. As a result, according to all three Courts, individuals may hold their Governments, in particular those listed in Annex I to the Kyoto Protocol, accountable for taking their partial shares in reducing GHG emissions. States can neither claim that their contribution is too small to be taken into account, or too small to be accounted for, nor that, if they act to reduce their emissions, other States will produce more.[37]
7. The approach of the District Court, accepting that the interests of humanity, current and future, and very unevenly exposed to climate change risks, were represented in the proceedings, and grounding the State's duty of care in civil tort law interpreted in the light of international and European law and global climate policy, is more compelling than the approach of the Supreme Court, based on the positive obligations of the State towards the Dutch population, derived from its interpretation of the ECHR and of the ECtHR's case-law.

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35 The judgment in *Leghari v. Pakistan,* 2015 (*supra* n. 25), constitutes another recent milestone.

36 Contrast this with *Juliana v. United States* (*supra* n. 25), where the US Court of Appeals for the 9th Circuit, 2-1, "reluctantly concluded … that the plaintiffs' case must be made to the political branches or to the electorate at large … That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes."

37 In a similar vein, US Court of Appeals 2nd circuit, 21 September 2009, *Connecticut v. Am. Electric Power Co*., 582 F.3d 309, 69 ERC 1385 (2d Cir. 2009), likewise rejecting the defendants' claim that their emissions were too insignificant to cause future injuries, particularly since only the collective effect of worldwide emissions allegedly caused injury. This part of the court's ruling was not affected by the Supreme Court's reversal of the judgment (US S Crt, 20 June 2011, 564 US (2011)).

8. The remedy sought in both *Urgenda* and *MD/RDS*, is injunctive relief, not damages. *Urgenda* shows that this may be an effective strategy, not least because it requires a less severe standard of proof of causality between emissions and their effects through climate change.
9. A crucial difference with *MD/RDS* remains, however, that in *Urgenda* an objective minimum standard for the lawfulness of the State's duty of care regarding its future emissions by the end of 2020 was found in the 25–40% target, whereas such a standard is not evident for future emissions attributable to RDS in 2030 (let alone beyond that year).
10. The Dutch procedural provision, Article 3:305a DCC, even in its recent more limited version, is not beyond doubt. It is a hybrid rule that mixes the collective action of private interests and action in the public interest. While it has enabled the two lawsuits, it has also led, at least in part, to the different approaches of the courts in *Urgenda* referred to above. In *MD/RDS* it gives rise to a debate on the plaintiff's standing and the law to be applied to the lawsuit.

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THE RELEVANCE OF FAMILY STATUS CREATED ABROAD FOR THE FREEDOM OF MOVEMENT IN THE EU

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Abstract: Article 21 TFEU gives EU citizens the right, subject to very few exceptions, to move and reside freely within the territory of the Member States, which are not allowed to obstruct the exercise of this right by imposing direct and indirect obstacles. An EU citizen might hesitate to move to another Member State if he/she could not be accompanied by his/her closest family members who are not EU citizens. Certain family members, such as a spouse or direct descendants, enjoy therefore a derived right of free movement pursuant to Directive 2004/38. This may give rise to complications when the family relationship in question is not recognized in the Member State to which the family wishes to move. This paper discusses two recent judgments where the CJEU had to deal with this issue, in particular regarding a same-sex marriage (*Coman*, C-673/16) and the adoption-like Islamic *kafala* (*SM* v. *Entry Clearance Officer*, C-129/18).

Keywords: family members; freedom of movement; Islamic *kafala*; same-sex marriage; recognition of family status

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1. INTRODUCTION

Article 21(1) of the Treaty on the Functioning of the European Union (TFEU) gives every citizen of the EU the right, subject to very few exceptions, to move and reside freely within the territory of the Member States. This freedom of movement means not only that the Member States must not impose direct restrictions in the form of administrative requirements such as visas and residence permits, but also that they must not deter EU citizens from moving with indirect obstacles, including those following from differences of family law. For example, an EU citizen might hesitate to use his/her freedom of movement to another Member State if that State would not recognize his/her marriage or his/her parental relation to his/her adopted children. Similarly, an EU citizen would probably refrain from moving if he/she could not be accompanied by close family members who are not citizens of the EU. Family law is thus of great relevance for the free movement of persons. This applies in particular to cross-border family law issues, such as the recognition in the host Member State of family status created abroad.

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This paper deals with some aspects of the delimitation of those non-EU citizens who are entitled to move to and reside in an EU Member State in their capacity as family members of an EU citizen (the primary right holder).[1] The free movement of such persons is in principle regulated by EU Directive 2004/38 of 29 April 2004 "on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States".[2] Article 2(2) of the Directive defines "family members" as the spouse, the partner with whom the EU citizen contracted a registered partnership on the basis of the legislation of a Member State (provided the host Member State treats registered partnerships as equivalent to marriage), direct descendants who are under the age of 21 or are dependents, and dependent direct relatives in the ascending line (such as parents and grandparents). Article 3 declares the listed family members to be beneficiaries of free movement, but goes further than that by adding additional categories of persons whose entry and residence the Member States, in accordance with their national legislation and subject to an extensive examination of the personal circumstances of the persons concerned, are obliged to "facilitate"; these categories comprise certain persons with weaker family-law ties to the EU citizen concerned, such as "any other family members" who, in the country from which they have come, are dependents, members of household, persons requiring personal care by a family member, or partners having a duly attested durable relationship with the EU citizen (the last-mentioned group, comprising mainly *de facto* cohabitees, is in some Member States, such as Sweden,[3] regarded as a legitimate family form regulated by law). However, the right of entry and residence of these persons is much weaker than that of family members listed in Article 2(2).

As opposed to the criteria of being a dependent, member of household, or a person requiring personal care by the EU citizen, which are basically mere matters of fact, the status of belonging to one of the categories of family members mentioned specifically in Article 2(2) of the Directive (spouse, registered partner, direct descendant or direct ascendant) is a legal issue, to be answered in principle on the basis of the family law of the host Member State, including its rules of private international law.[4] Only exceptionally are there uniform rules of EU private international law regarding family-law status, such as the provisions on the recognition of divorces and marriage annulments in EU Regulation 2201/2003 (known as Regulation Brussels II).[5] There are no EU regulations or directives on the validity of marriages, validity and dissolution of registered partnerships, paternity and other parenthood, and adoptions. This gives rise to the question whether the Member States have full discretion to deal with these issues or must, in order to comply with Article 21(1) TFEU and the above-mentioned Directive 2004/38,

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1 This issue is closely related, but not identical, to the right of third-country nationals residing lawfully in the EU to be joined by their family members pursuant to EU Directive 2003/86 of 22 September 2003 "on the right to family reunification", OJ 2003 L 251 p. 12.

2 OJ 2004 L 158 p. 77.

3 See the Swedish Cohabitees Act (2003:376).

4 Persons having a duly attested durable relationship with the EU citizen constitute a borderline category, because different Member States may have different statutory definitions of legally relevant cohabitation that can be "duly attested".

5 OJ 2003 L 338 p. 1. On 1 August 2022, this Regulation will be replaced by a recast Regulation 2019/1111, OJ 2019 L 178 p. 1.

respect family relationships created abroad. This is of particular interest whenever the family status in question is in the Member State where it is relied on considered reprehensible or is totally unknown.

This question has arisen, and was to some extent answered, in two recent judgments of the EU Court of Justice (CJEU). The importance of the two decisions is underlined by the fact that both of them have been rendered by the Court's Grand Chamber. The purpose of this paper is to subject the two judgments to a critical analysis, regarding both the conclusions and the reasoning of the CJEU.

2. THE CASE OF SAME-SEX MARRIAGE

The first judgment, *Coman v. Inspectoratul General* was rendered on 5 June 2018.[6] It concerned two persons of the same sex who had married in Belgium in accordance with Belgian law. At that time, one of the couple lived in Belgium and was an EU citizen (he possessed both American and Romanian nationality), while the other held only American citizenship and continued to live in the United States. After some time, the couple wished to move together to Romania, but the Romanian authorities refused to grant the American spouse long-term residence right on grounds of family reunion, because pursuant to Article 227 of the Romanian Civil Code "marriages between persons of the same sex entered into or contracted abroad by Romanian citizens or by foreigners shall not be recognized in Romania". The applicants argued that this provision was contrary to the Romanian constitution, so the matter was referred to the Romanian Constitutional Court which, in turn, had doubts about the proper interpretation of EU Directive 2004/38 and turned to the CJEU for a preliminary ruling.

To start with, it must be noted that the case did not, in fact, fall directly within the scope of application of Directive 2004/38. The CJEU had on several previous occasions interpreted this Directive, in accordance with its wording,[7] as to mean that it governs only those situations where an EU citizen and his family members who are third-country nationals want to enter and reside in a Member State other than that of the EU citizen's nationality. Consequently, it does not confer a derived right of residence on third-country nationals who intend to accompany or join their EU relative in the latter's own Member State.[8] However, the full effect of the freedom of movement granted to EU citizens by Article 21(1) TFEU presupposes that an EU citizen can bring his close family with him also when he returns to his own Member State, since he would otherwise be discouraged from exercising that freedom by leaving his State. The third-country family members of an EU citizen who moves to his own Member State, even though not entitled to a derived right of residence pursuant to Directive 2004/38, can thus be granted such right directly on the basis of Article 21(1) TFEU. The condi-

6 Case C-673/16; ECLI:EU:C:2018:385.

7 Article 3(1) of the Directive provides that "[t]his Directive shall apply to all Union citizens who move to or reside in a Member State *other than that of which they are a national* and to their family members…" (italics added).

8 See, for example, the Grand Chamber of the CJEU on 14 March 2014 in the case of *S* v. *Minister voor Immigratie*, case C-457/12, ECLI:EU:C:2014:136.

tions for obtaining such right must not, according to the CJEU, be stricter than those stipulated in Directive 2004/38, which means that the Directive is to be applied by analogy even in the situation dealt with in the Coman judgment.

The CJEU went on to admit that a person's marital status is a matter that falls within the competence of the Member States, which are thus free to decide whether or not to allow marriage for persons of the same sex. However, the exercise of that competence must comply with EU law. To permit the Member States to accord or refuse residence rights to third-country nationals who lawfully married an EU citizen in another Member State where the EU citizen genuinely resided at that time, would make the freedom of movement of EU citizens vary from one Member State to another depending on the forum Member State's attitude towards same-sex marriages. Furthermore, a refusal of residence right could in its consequences amount to denying the EU citizen his right to return to his own Member State together with his spouse.

A restriction on the freedom of movement may, nevertheless, be justified if it is based on objective considerations of public interest, is proportionate to its legitimate objective and does not go beyond what is necessary to attain that objective. Some Member States have submitted observations to the CJEU referring to the fundamental nature of the institution of marriage as a bond between a man and a woman and claimed that even if a refusal to accept same-sex marriages might constitute a restriction of the rights under Article 21(1) TFEU, such a restriction is justified on grounds of public policy and national identity protected by Article 4(2) TFEU.

This reasoning was, however, not accepted by the CJEU, which stated that any restrictions imposed on a fundamental right such as the freedom of movement under Article 21 TFEU must be interpreted strictly and cannot be determined unilaterally by each Member State without control by the EU. The public policy exception may be relied upon only if there is a genuine and sufficiently serious threat to a fundamental interest of society. The obligation of a Member State to recognize a same-sex marriage, "for the sole purpose of granting a derived right of residence to a third-country national" does not, according to the CJEU, undermine the institution of marriage in that Member State. Neither does it undermine the national identity there or pose a threat to public policy. Furthermore, any national restrictions on the freedom of movement must be consistent with the fundamental rights protected by the Charter of Fundamental Rights of the EU,[9] including its Article 7 guaranteeing protection of private and family life. That Article must be understood in the same way as the corresponding Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is interpreted by the European Court of Human Rights to apply to both homosexual and heterosexual couples.[10]

The Court concluded, therefore, that Article 21(1) TFEU gives a third-country national of the same sex as his EU spouse, who married in accordance with the law of

[9] OJ 2007 C 303 p. 1.

[10] The attitude of the European Court of Human Rights towards same-sex couples is demonstrated, for example, by its judgment in the case of *Orlandi and others v. Italy*, applications nos 26431/12 *et al*., decided on 14 December 2017, where the Court held that States are still free to restrict access to marriage to different-sex couples, but acknowledged that same-sex couples are entitled to such legal recognition and protection that does not leave them in a legal vacuum.

the Member State where the EU spouse had genuine residence at that time, the right to move to and reside in the Member State of which the EU spouse is a national irrespective of the fact that the marriage is not recognized there. As mentioned above, this derived right of residence must not be subjected to conditions that are stricter than those stipulated in Directive 2004/38.

3. THE CASE OF ISLAMIC *KAFALA*

The second judgment, *SM v. Entry Clearance Officer*, was rendered on 26 March 2019.[11] It differs from the Coman case in two very important aspects, because the disputed family member status was created in a non-Member State and the status itself was of a kind unknown in the law of the Member State to which the third-country citizen intended to move.

The judgment involved a French married couple residing in the United Kingdom, who travelled to Algeria where an Algerian court assigned to them the parental responsibility for an abandoned child under the Algerian *kafala* system. This institution, based on Islamic law, gave them parental authority and responsibility similar, in some respects, to adoption. The couple undertook, *inter alia*, to give the child an Islamic education, keep her fit morally and physically, supply her needs, look after her teaching, treat her like natural parents, protect her, defend her before judicial instances and assume civil liability for her detrimental acts. They were also authorized to receive family allowance, subsidies and other benefits, to sign any administrative and travel documents, and to take the child out of Algeria. Furthermore, the child's surname was officially changed to that of the couple.[12]

If deemed to be an adopted child of the French couple, the Algerian child would be classified as their "direct descendant" and, as such, would enjoy the right of entry and residence in the UK as their "family member" pursuant to Article 2(2) of Directive 2004/38.[13] Nevertheless, the British authorities refused to clear the child for entry to the UK as an adopted child, on the ground that *kafala* was not recognized as adoption under UK law.

After the matter was referred to the CJEU, the Court pointed out that Article 2(2) does not designate the law determining the meaning and scope of the concept of "direct descendant" and that under such circumstances the need for a uniform application of EU law and the principle of equality require that the concept must normally be given an independent and uniform interpretation throughout the EU. According to the CJEU, the concept of a "direct descendant" commonly refers to the existence of a direct parent-child relationship between the two persons concerned. The concept must be construed broadly, so that it includes both the biological and adopted children, since

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[11] Case C-129/18; ECLI:EU:C:2019:248.

[12] See Recitals 27 and 28 of the judgment.

[13] In this case, as opposed to the Coman judgment, Directive 2004/38 was directly applicable, since the UK was not the Member State of the couple's nationality.

it is established that adoption creates a legal parent-child relationship. Where there is no parent-child relationship, the child cannot, according to the Court, be described as a "direct descendant" for the purposes of the Directive.

The Court examined the legal effects of *kafala* and noted, *inter alia*, that unlike adoption, which is forbidden by Algerian law, the placing of a child under a *kafala* guardianship does not mean that the child becomes the guardian's heir. Furthermore, a *kafala* relationship comes to an end when the child attains the age of maturity and may even be revoked at the request of the biological parents or of the guardian. The Court concluded that as opposed to adoption, *kafala* does not create such a parent-child relationship between the child and its guardian that would qualify the child as "direct descendant" in the sense of Article 2(2) of Directive 2004/38.

However, the Court did not stop there but went on to point out that the child, even though not a direct descendant under Article 2(2), could, depending on its personal circumstances in the individual case, be entitled to a privileged treatment pursuant to Article 3(2), i.e., to have its entry "facilitated". Recital 6 of Directive 2004/38 mentions that in order to maintain the unity of the family "in a broader sense", the situation of persons who do not enjoy an automatic right of entry and residence since they are not family members should be examined by the Member State concerned on the basis of its own national legislation, taking into consideration their relationship with the EU citizen and any other relevant circumstances, such as their financial or physical dependence on the same. The examination should be extensive and, in the event of a negative decision, provide justification by stating the reasons for the refusal. The CJEU confirmed that the Member States have wide discretion as regards the selection of the factors to be taken into account in this examination, but stressed that in accordance with Recital 31 of Directive 2004/38, their discretion must be exercised in the light of and in line with the provisions of the Charter of Fundamental Rights of the EU, whose Article 7, recognizing the right to respect for private and family life, has the same meaning and scope as Article 8 of the European Human Rights Convention.

The CJEU found it apparent that the actual relationship between a child placed under the *kafala* system and its guardians may, depending on all the current and relevant circumstances of the case, constitute a family tie falling within the definition of family life protected by these provisions. The assessment by the authorities of the Member State concerned must be balanced and reasonable and take into consideration, *inter alia*, the age at which the child was placed under the *kafala* system, whether the child has lived with its guardians since its placement, the closeness of the personal relationship between them, and the extent to which the child is legally and financially dependent on its guardians. The risk that the child will become the victim of abuse, exploitation or trafficking must also be taken into account, but if it is established that the child and its *kafala* guardians will lead a genuine family life, the best interests of the child demand, in principle, that it be granted the rights of entry and residence in order to live with its guardians in the Member State where they reside.

4. CONCLUDING REMARKS

While the outcome of the Coman case, protecting the right to family life of same-sex married couples, can hardly be objected to, some parts of the reasoning and terminology used by the CJEU seem to be controversial. It is noteworthy that the Court repeatedly affirms "the obligation for a Member State to recognize a marriage between persons of the same sex", even though merely "for the sole purpose of granting a derived right of residence to a third-country national".[14] This obligation to recognize the marriage is not mentioned in the holding itself and it is almost certainly not meant to imply the duty to consider the couple to be actually married. Considering the same couple to be married for some purposes only creates a situation where the simple question of whether they are married cannot be answered by a simple "yes" or "no". It is true that limping marriages are a well-known phenomenon in private international law, but they normally concern marriages that are recognized in some countries only, and not marriages that are recognized and unrecognized in the same country depending on the context. It is, therefore, preferable to disconnect, in this case, the issue of family status as such from the specific consequences of that status.

It is interesting that in the Coman judgment the CJEU, when applying Article 21(1) TFEU in the light of analogies borrowed from Directive 2004/38, relied on the Directive's Article 2(2) and discussed whether the same-sex marriage could be recognized with the effect that the third-country citizen involved would be considered a "spouse" for the purposes of a derived right of residence. The Court did not discuss the possibility of analogous application of Article 3(2) of the Directive, that might probably qualify the same-sex spouse as an "other family member" or at least as a partner with whom the EU citizen had "a durable relationship, duly attested". The probable reason of the Court's choice on this point is that whereas Article 2(2) grants the same-sex spouse an almost automatic right of entry and residence, Article 3(2) would place him in a much weaker position, merely obliging the Member State concerned to undertake an extensive examination of his personal circumstances in order to conclude whether his family life was of such a kind that would entitle him to family unification pursuant to the national legislation of that Member State. It is true that a decision refusing the right of entry or residence would even in such a case have to provide justification and comply with Article 7 of the Charter of Fundamental Rights of the EU and Article 8 of the European Human Rights Convention, but the compulsory extensive examination of personal circumstances could take time and the outcome would be much more uncertain, thus subjecting same-sex couples to discrimination.

One may also question the wisdom of limiting the holding of the Coman judgment explicitly to situations where the same-sex marriage has been concluded in an EU Member State pursuant to its law, an additional condition being that the EU citizen concerned must have been a genuine resident there at the time. The arguments used by the CJEU in support of its decision should reasonably carry the same weight even if the same-sex marriage in question had been concluded in the United States pursuant to American law

[14] See paras. 45 and 46 of the judgment.

during the EU citizen's short visit there. There are fortunately no reasons to interpret the Court's holding *a contrario* to mean that under such circumstances the outcome would be different. It is submitted that the CJEU simply chose to limit the holding of its judgment to the circumstances in the case at hand and refrained from expressing an opinion on other situations.

It follows clearly from the wording of the Coman judgment that the CJEU did not intend to oblige the Member States to give same-sex marriages concluded in another Member State full effects under private law, for example as to maintenance, marital property regime or inheritance. This remains an open question though, since even differences between Member States regarding such issues may conceivably discourage a couple from making use of the freedom of movement within the EU, especially in view of the increasing application of the law of the country of habitual residence. It is theoretically also possible that a refusal to recognize the married status as such might in some cases be deemed to constitute an unlawful restriction on free movement, for example if the refusal by a Member State to recognize same-sex couples as married carries such a social stigma that it deters such couples from moving there.

Turning to *kafala*, it might seem close at hand to understand the CJEU judgment to mean that the Court, while refusing to equate *kafala* to adoption,[15] has recognized it as a valid family-law status *sui generis*, with legal consequences of its own. Such interpretation would, however, be incorrect. It is true that the Court considered the child to belong to the category of "any other family members" under Article 3(2) of Directive 2004/38, but this is a very wide and vague category with no family-law effects at all. Belonging to this "extended family" gives no right of entry or residence, unless the third-state national in question fulfills additional conditions (e.g., be a dependent or household member etc.).

There is, of course, nothing preventing Member States from equating *kafala* to adoption in their domestic family law and/or in their private international law for purposes other than the interpretation of the EU Directive 2004/38. The recognition of *kafala*, as an institution intended to protect orphans and abandoned children, could as such hardly be considered to violate the public policy of the host Member State.[16] In this respect, *kafala* differs not only from a same-sex marriage but also from, for example, polygamous marriages.

A polygamous marriage appears, in fact, to be particularly problematic, since it questions the entire concept of spouse and family life that prevails in practically all EU Member States. It is very doubtful whether a Member State, even if recognizing, in principle, the validity of polygamous marriages concluded abroad,[17] must or can

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[15] It is worth mentioning that Article 4(b) of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, ratified or acceded to by all EU Member States, excludes adoption from the Convention's scope of application, whereas its Article 3(e) covers explicitly the "provision of care by *kafala* or an analogous institution".

[16] This does not necessarily apply to all of *kafala*'s purported legal effects, such as the obligation of the guardians to give the child an Islamic education.

[17] This is presently the case of Sweden, provided that at the time of the conclusion of the marriage none of the parties was a Swedish citizen or habitual resident. A legislative Bill proposing stricter rules is, however, expected to be submitted by the Swedish Government under 2020.

treat the parties to such marriages as spouses under Article 2(2) of Directive 2004/38 or as partners with a duly attested durable relationship under Article 3(2) of the same. In any case, Article 27 of the Directive allows Member States to restrict the freedom of movement and residence on grounds of public policy. Regarding the possibility of direct application of Article 21(1) TFEU, it is submitted that its interpretation should be based on an analogous application of Article 4(4) of Directive 2003/86 on the right to family reunification,[18] which provides that in the event of a polygamous marriage, where the third-country national residing in the EU already has a spouse living with him, the Member State concerned "shall not authorize the family reunification of a further spouse". There are no reasons to treat, in this respect, the right to reunification with an EU citizen more generously than reunification with a third-country national residing lawfully in the EU.

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[18] See footnote 1 *supra*.

CODIFIER LE DIVORCE INTERNATIONAL QUELQUES REMARQUES SUR LE PROJET GEDIP

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Abstract: **Codifying international divorce. Some remarks about the GEDIP project**
The EU legislator has modified once again the so-called Brussels 2 bis Regulation. The new regulation 2019/1111 adds new provisions on parental responsibility and child abduction, but leaves those on divorce largely untouched. To the contrary, the GEDIP, an expert group of academics in private international law from across Europe, has established an in-depth proposal for a new regulation on divorce. This paper analyzes the proposal which seeks to modernize and improve the current situation that has been widely criticized. The proposed regulation covers choice of law, jurisdiction and recognition. It allows limited party autonomy, both in jurisdiction and choice of law, and suggests significant improvements of the provisions on objective jurisdiction. It also recommends a recognition mechanism that would apply to judgements from third States and provides for a comprehensive set of rules concerning private divorces.

Keywords: divorce; choice of laws; jurisdiction; recognition; GEDIP

Mots clés : divorce ; conflits de lois ; compétence ; reconnaissance ; GEDIP

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Le droit international privé de la famille est en complet bouleversement en Europe. Deux facteurs, différents et indépendants, y contribuent.

Le premier est la jurisprudence de la Cour de justice en matière de liberté de circulation et de citoyenneté européenne. A partir de son interprétation extensive de la notion de citoyenneté et au fil d'une jurisprudence audacieuse, la Cour a progressivement posé des règles importantes et libérales, en matière, par exemple, de nom de famille,[1] de mariage[2] ou de *kafala*.[3] Toutes ces règles dévoilent peu à peu un schéma d'ensemble,

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1 En dernier lieu : CJUE, 8 juin 2017, aff. C-541/15, *Freitag.*
2 CJUE, Gde Chambre, 5 juin 2018, aff. C-673/16, *Coman.*
3 CJUE, Gde Chambre, 26 mars 2019, aff. C-129/18, *SM*.

méthodologiquement orienté autour de la théorie de la reconnaissance[4] et qui s'insère progressivement dans le droit international privé des États membres.

Le second facteur, beaucoup plus évident à identifier, est l'importance de l'œuvre législative européenne en matière de droit de la famille. A partir de la Convention dite de Bruxelles 2,[5] inspirée par un projet du Groupe européen de droit international privé[6] et jamais entrée en vigueur, ont été adoptés plusieurs règlements importants en matière de droit de la famille. La Convention initiale a ainsi été transformée en règlement européen,[7] lui-même modifié[8] puis encore modifié.[9] Ensuite, à ce texte relatif au divorce, à la responsabilité parentale et à l'enlèvement d'enfants ont été ajoutés d'autres règlements, sur la loi applicable au divorce[10] et sur les obligations alimentaires, les successions et les régimes matrimoniaux.[11]

Pour l'essentiel, ces règlements restent de facture relativement classique, en ce sens qu'ils posent des règles de conflit, de compétence internationale et de reconnaissance des décisions qui, pour être modernisées et nouvelles, n'en appartiennent pas moins à la tradition du droit international privé traditionnel.

Deux lignes d'évolution, donc, et, à cet égard, l'un des défis majeurs de la discipline sera de réunir ces deux fils pour permettre la naissance d'un véritable droit international privé européen de la famille, fondé sur des objectifs politiques et des bases juridiques propres à l'Union.[12]

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4 LAGARDE, P. La reconnaissance est-elle l'avenir du droit international privé? *Rec. Cours*, 2015, vol. 371, p. 9.

5 Convention *concernant la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale* du 28 mai 1998, *JOCE*, nº C 221 du 16 juillet 1998.

6 Groupe européen de droit international privé, « Proposition pour une convention concernant la compétence judiciaire et l'exécution des décisions en matière familiale et successorale », Réunion de Heidelberg de 1993, texte à la *Rev. Crit. DIP*, 1993, 841 ; sur de texte, v. GAUDEMET-TALLON, H. « La Convention dite "Bruxelles II" : convention concernant la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale ». *Trav. Com. fr. DIP*, 1998–2000, p. 83.

7 Règlement nº 1347/2000, *relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et de responsabilité parentale des enfants communs*, *JOCE* nº L 160 du 30 juin 2000, dit Règlement Bruxelles 2.

8 Règlement nº 2201/2003, *relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale*, *JOCE* nº L 338 du 23 décembre 2003, dit règlement Bruxelles 2 bis.

9 Règlement 2019/1111, *relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale, ainsi qu'à l'enlèvement international d'enfants, JOUE* nº L 178 du 2 juillet 2019, dit règlement Bruxelles 2 ter.

10 Règlement nº 1259/2010 du 20 décembre 2010 *mettant en œuvre une coopération renforcée dans le domaine de la loi applicable au divorce et à la séparation de corps*, *JOUE* nº L 343 du 29 décembre 2010, p. 10 (dit Règlement Rome 3).

11 Respectivement : Règlement 4/2009 du 18 décembre 2008 *relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions et la coopération en matière d'obligations alimentaires*, *JOUE*, nº L. 7 du 10 janvier 2009, p. 1 ; Règlement nº 650/2012 du 4 juillet 2012 *relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions, et l'acceptation et l'exécution des actes authentiques en matière de successions et à la création d'un certificat successoral européen, JOUE* nº L 201 du 27 juillet 2012, p. 107 ; Règlements 2016/1103 et 2016/1104 du 24 juin 2016 *mettant en œuvre une coopération renforcée dans le domaine de la compétence, de la loi applicable, de la reconnaissance et de l'exécution des décisions en matière de régimes matrimoniaux* (ou, pour le second, *d'effets patrimoniaux des partenariats enregistrés*), *JOUE* nº L 183 du 8 juillet 2016, p. 1.

12 RASS-MASSON, L. The Foundations of European Private International Family Law. *Yearbook of Private International Law*, 2018/2019, Vol. 20, pp. 217–231.

En attendant, chacun des grands domaines du droit de la famille évolue peu à peu, au fur et à mesure des textes et des arrêts.

A cet égard, le droit du divorce international est le grand oublié de la réforme du règlement Bruxelles 2 *bis*.[13] Le nouveau texte ne prévoit en effet guère de modification fondamentale, à l'exception d'une importante et discutable règle nouvelle sur les divorces sans juge, on y reviendra. Les critiques, pourtant, ne manquent pas. Les règles de compétence, surtout, sont vigoureusement discutées en raison de leur complexité et de leur nombre, véritable appel au *forum shopping*.[14] Mais tout autant, les critiques n'épargnent parfois pas non plus les règles de conflit de lois et la place qu'elles laissent à l'autonomie de la volonté, ou même, les règles de reconnaissance et d'exécution, notamment en raison de la politique substantielle qu'elles véhiculent.[15] Toutes ces règles, donc, vont rester inchangées jusqu'à un incertain règlement Bruxelles 2 *quater* ou Rome 3 *bis,* bien improbables à court terme.

Le choix est certes regrettable. Il ne doit pas pour autant empêcher la réflexion d'avancer en la matière. Si le droit du divorce paraît être parvenu à un certain équilibre, en effet, cet équilibre reste instable et critiqué et pourrait être amélioré. A cet égard, la proposition faite par le Groupe européen de droit international privé d'un nouveau règlement en matière de divorce est un jalon suffisamment important pour mériter une analyse plus approfondie.[16]

La proposition de texte offre en effet à la réflexion quelques règles plus ou moins nouvelles selon les cas, en matière de compétence (2), de loi applicable (3) et de reconnaissance (4). Il faudra toutefois dire un mot du champ d'application (1) et isoler la question, difficile entre toutes, du divorce sans juge (5).

1. CHAMP D'APPLICATION

A) QUESTIONS DE MÉTHODE

La première remarque à faire est méthodologique. Comme on le sait, deux modèles, en matière de droit international privé de l'Union, s'opposent. Le premier, celui des règlements dit « Rome » (1, 2 et 3) ou « Bruxelles » (1 et 2, dans leurs différentes mues) consiste à unifier les règles de conflit de lois, dans le premier cas, de droit

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13 FRANCQ, S. Réforme avortée et réforme surprise : compétence et reconnaissance en matière de dissolution du mariage après la refonte du règlement Bruxelles Iibis. Dans : FRANCQ, S. – SAROLEA, S. (dir.). *Actualités européennes en droit familial international*. Anthemis, 2019, p. 53.

14 Pour un panorama complet v. part. BONOMI, A. La compétence internationale en matière de divorce. Quelques suggestions pour une (improbable) révision du règlement Bruxelles 2 bis. *Revue Critique de Droit International Privé*, 2017, pp. 511–534, et KRUGER, T. – SAMYN, L. Brussel 2 bis : successes and suggested improvements. *Journal of Private International law*, 2016, 1.

15 McELEAVY, P. Integrating the Brussels II bis Regulation in the United Kingdom. Dans : BOELE-WOELKI, K. – BEILFUSS, C. G. (eds.). *Brussels II bis : its impact and application in the member states.* Intersentia, 2007, p. 309 ; ANCEL, B. – MUIR WATT, H. La désunion européenne : le règlement dit Bruxelles 2. *Revue Critique de Droit International Privé*, 2001, pp. 403–457.

16 GEDIP, *proposition de règlement relatif à la compétence, la loi applicable et la reconnaissance en matière de divorce*, adopté à la session de Katowice en 2019, disponible sur le site internet : https://www.gedip-egpil.eu/reunionstravail/2019_Katowice/divorce/Divorce-Txt-Final-FR.pdf.

judiciaire international, dans le second. La seconde méthode est méthodologiquement plus globale mais substantiellement plus étroite. Elle consiste à isoler une question particulière et à en traiter l'ensemble des conséquences internationales. C'est la voie suivie par les grands règlements récents de droit de la famille : successions, régimes matrimoniaux et obligations alimentaires.

C'est aussi la méthode suivie par le GEDIP, qui propose donc d'abandonner, en matière de droit de la famille, la séparation entre conflit de lois et droit judiciaire, pour l'aborder dans un seul texte. L'avantage visé est celui de la cohérence d'ensemble en matière de divorce. L'inconvénient corrélatif est de perdre les liaisons qui peuvent exister avec d'autres questions proches mais tout aussi essentielles.

A cet égard, il ne faut pas se dissimuler une faiblesse majeure du projet GEDIP : celle de ne traiter que du principe du divorce.

Le divorce est aujourd'hui admis, avec plus ou moins de restriction, dans tous les pays de l'Union européenne. Dès lors, en permettre le prononcé et en assurer la circulation est bien évidemment toujours utile, notamment si l'on souligne que le texte concernera aussi les États tiers, mais ce texte n'en reste pas moins peut-être d'une urgence moindre qu'à une époque où les extrêmes différences entre États, y compris européens, en la matière, rendaient d'une particulière importance l'adoption de règles claires et prévisibles.

Aujourd'hui, le contentieux du divorce et post-divorce est très largement un contentieux patrimonial ou portant sur la responsabilité parentale, soit sur des questions qui relèvent d'autres règlements de l'Union. Dès lors, prévoir des règles précises mais portant uniquement sur le principe du divorce s'expose à deux objections. D'une part, le caractère très étroit de son champ d'application en diminue l'intérêt ; d'autre part, et surtout, l'adoption de règles particulières à la question du principe du divorce va nécessairement poser une difficulté importante de cohérence d'ensemble. Des époux qui divorcent veulent certes rompre leur lien matrimonial, mais ils veulent aussi régler leurs intérêts pécuniaires et la responsabilité parentale. Éclater les règles en la matière dans différents règlements, c'est risquer l'incohérence, les difficultés d'articulation et les situations boiteuses, source d'importantes difficultés pratiques pour les premiers concernés : les époux et les enfants.[17] L'empilement de textes pose d'importantes difficultés d'articulation, qui ne seront pas résolues par l'adoption d'un règlement particulier sur le principe du divorce.

L'objection n'est certes pas nouvelle ; mais elle n'est non plus pas aggravée par le projet GEDIP, puisque les textes actuels sont déjà limités au principe du divorce. Une éventuelle solution, toutefois, dépasserait le cadre limité de cette contribution. Elle ne pourrait en effet passer que par une véritable codification d'ensemble du droit international privé européen (ou, au moins, du droit international privé européen de la famille) qui tiendrait compte, bien entendu, de l'acquis législatif, mais qui permettrait aussi d'intégrer les solutions désormais imposées par la Cour de justice. On en est loin.

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[17] Sur ce point, v. particulièrement BOICHE, A. Pratique judiciaire des règlements européens en droit de la famille. *Travaux du Comité français de droit international privé 2014–2016*. Pedone, 2016, p. 17.

Autre difficulté : celle du champ d'application matériel du texte. La difficulté n'est pas tellement celle de l'inclusion du divorce entre personnes de même sexe, qui semble inévitable en raison de l'expansion de cette forme de mariage. Bien entendu, nul n'ignore les difficultés politiques qu'engendre une telle inclusion. Il reste que ces difficultés relèvent de la sphère de la décision politique et non de celle du droit, le mariage homosexuel n'étant en rien différent d'un mariage hétérosexuel. Dès lors, la décision de l'inclure s'imposait d'elle-même.

Plus délicate, en revanche, était l'inclusion ou pas de l'annulation du mariage. A l'instar de la séparation de corps, qui entre progressivement dans l'ombre, le contentieux de la nullité du mariage semblait voué à une relative marginalisation en raison de la libéralisation du divorce en Europe. Quel intérêt, en effet, que l'annulation du mariage dans un monde où le divorce est si aisément accessible ?

Deux faits, pourtant, ont démenti ce pronostic hâtif. La lutte contre l'immigration, tout d'abord, a conduit à un renforcement de l'arsenal à la disposition des autorités publiques visant à remettre en cause les mariages de complaisance.[18] Les exemples en matière de nullité du mariage ont désormais quitté les rives rassurantes et anecdotiques des mariages morganatiques et des virginités douteuses pour aborder ceux, beaucoup plus sinistres, de l'intrusion de la puissance publique au sein même de la liberté du mariage.[19]

D'autre part, la crise causée par les guerres au Moyen Orient et, en particulier, en Syrie, a conduit à un certain renouveau de la question de la nullité des mariages, notamment dans le but de lutter contre les mariages contractés entre ou avec des enfants. L'Allemagne et la Suède, tout particulièrement, ont adopté des règles particulières en la matière, d'ailleurs pas exemptes de toute critique.[20] Les questions de droit international privé liées à la nullité du mariage ont donc évolué, mais nullement disparu.

Les règlements européens actuels ont sur ce point des positions différentes. Le droit judiciaire inclut le contentieux de la nullité du mariage[21] ; le conflit de lois l'exclut. C'est cette seconde solution qui a été préférée dans le projet GEDIP, sous réserve d'une éventuelle question préalable.[22]

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18 En France, v. CORNELOUP, S. « Maîtrise de l'immigration et célébration des mariages ». *Mélanges P. Lagarde*. Dalloz, 2005, p. 207.

19 En matière de nullité du mariage, « le principal demandeur est le procureur de la République qui assigne le couple dans près de six affaires sur dix (57 %). Le plus souvent, le mariage scelle l'union de conjoints de nationalités différentes (86,8 %), les couples d'étrangers de même nationalité et de Français étant peu nombreux (respectivement 8,0 % et 5,2 %) » : LAMARCHE, M – LEMOULAND, J.-J. Mariage : sanctions de l'inobservation des conditions de formation. *Répertoire Dalloz de droit civil*, 2014 et 2019, nº 7.

20 Pour l'Allemagne, v. KOHLER, C. La nouvelle législation allemande sur le mariage et le droit international privé. *Revue Critique de Droit International Privé*, 2018, pp. 51–58 ; Pour la Suède, v. part. BOGDAN, M. Some critical comments on the new Swedish rules on non-recognition of foreign child marriages. *Journal of Private Internatonal Law*, 2019, pp. 247–256.

21 CJUE, 13 octobre 2016, aff. C-294/15, *Edyta Mikołajczyk c. Marie Louise Czarnecka*.

22 L'article 1§3 du projet précise en effet qu' « un litige n'est pas exclu du champ d'application du règlement lorsqu'une matière exclue en vertu de ce paragraphe est soulevée seulement à titre préalable, notamment à titre de défense ou de demande reconventionnelle ».

Si, en effet, il n'est pas inconcevable de traiter une action ou une décision en matière de nullité du mariage comme une demande ou une décision de divorce au stade de la compétence juridictionnelle ou de la circulation des décisions, l'assimilation est beaucoup plus difficile au stade de la détermination de la loi applicable. Divorce et nullité du mariage sont conceptuellement deux choses bien différentes sous l'angle du droit interne et, partant, sous l'angle des qualifications traditionnelles du droit internationale privé. Le premier s'est progressivement entièrement émancipé de la catégorie « mariage », la seconde, par nature, y appartient pleinement. La loi applicable est donc nécessairement différente. Un règlement unique, sur le modèle des successions ou des régimes matrimoniaux, devait donc ou bien prévoir un double régime de conflit de lois, ajoutant de la complexité à l'ensemble, ou bien exclure la nullité du mariage du champ d'application. C'est, pour d'évidentes raisons de simplicité, ce second choix qui a été fait.

L'exclusion serait évidemment regrettable en ce qu'elle pourrait constituer une régression par rapport à l'état du droit positif qui a permis l'adoption de règles communes en matière de nullité du mariage. L'objection, toutefois, ne fait que renforcer la nécessité d'une refonte plus globale des règles de droit international privé européen de la famille qui prévoirait aussi des règles propres au mariage.

2. LES RÈGLES DE COMPÉTENCE

Incontestablement, les règles de compétence sont celles qui ont fait l'objet de l'attention la plus grande, tant les critiques semblent unanimes à l'encontre des solutions du droit positif européen et les propositions de réformes ne manquent pas.[23]

Le projet GEDIP propose de réformer en profondeur la compétence internationale en matière de divorce pour répondre à ces critiques. Pour ce faire, deux modifications fondamentales sont soumises à la discussion. La première, sans doute la plus évidente, concerne les critères de compétence et leur hiérarchisation ; la seconde, les fors exorbitants et les liens avec les pays tiers.

A) CRITÈRES DE RATTACHEMENT ET HIÉRARCHISATION DES RÈGLES DE COMPÉTENCE

L'article 3 du règlement Bruxelles 2 bis fait sans doute partie des règles les plus unanimement critiquées du règlement.[24] Il prévoit, rappelons-le brièvement, un ensemble de compétences en matière de divorce, fondées sur une longue liste de critères qui, tous, tournent autour de la résidence habituelle des époux ou de leur nationalité. Sont ainsi compétentes les juridictions de : la résidence des époux ; la dernière résidence

[23] V. not. BONOMI, *op. cit.*, p. 511.

[24] GONZALEZ BEILFUSS, C. Jurisdiction Rules in matrimonial Matters under Regulation Brussels 2 bis. Dans : FULCHIRON, H. – NOURISSAT, C. (dir.). *Le nouveau droit communautaire du divorce et de la responsabilité parentale.* Dalloz, 2005, p. 55 ; dans le même sens, BONOMI, *op. cit.* ; KRUGER – SAMYN, *op. cit.*, pp. 10 et seq.

habituelle des époux dans la mesure où l'un d'eux y réside encore ; la résidence habituelle du défendeur ; en cas de demande conjointe, la résidence habituelle de l'un ou l'autre époux ; la résidence habituelle du demandeur s'il y a résidé depuis au moins une année immédiatement avant l'introduction de la demande ; la résidence habituelle du demandeur s'il y a résidé depuis au moins six mois immédiatement avant l'introduction de la demande et s'il est ressortissant de l'État membre en question ; la nationalité des deux époux (à la nationalité pouvant être substituée le domicile dans le cas du Royaume-Uni et de l'Irlande).

Chacun de ces critères peut être discuté : si certains semblent incontestables (la résidence commune ou la nationalité commune, par exemple), d'autres peuvent être plus critiquables (la résidence de l'époux demandeur, notamment). Mais, surtout, ce qui semble le plus regrettable est l'absence de hiérarchie entre tous ces critères. Tous ces tribunaux sont en effet simultanément disponibles, multipliant, ce faisant, les risques de *forum shopping*[25] et, combinés avec la règle rigide de litispendance, de course au for.[26] La multiplication des règles de compétence accroît, qui plus est, le risque de dissociation entre le for compétent pour le divorce et celui qui aura à connaître des effets du divorce.

Toutes ces critiques, ici fort sommairement résumées, sont bien connues. La décision n'en a pas moins été prises de ne pas y répondre lors de l'adoption du règlement Bruxelles 2 ter en juillet 2019, puisque le nouveau texte reprend, presque à l'identique, l'ancienne disposition de l'article 3. C'est sans doute l'un des aspects les plus regrettables du nouveau règlement.

L'un des objectifs du projet GEDIP, en revanche, est précisément de répondre à cette difficulté, c'est l'objet, plus précisément, des articles 5 et 6.

Tout d'abord, en effet, les règles de compétence ordinaires prévoient désormais une échelle de chefs de compétence en cascade, dont l'objectif est de lutter contre l'éclatement du contentieux. Le premier choix a été de favoriser le rattachement à la résidence habituelle des époux par rapport à la nationalité de ceux-ci. En matière de statut personnel, le rattachement à la résidence habituelle (notamment sous l'influence des conventions de La Haye) devient progressivement le rattachement de principe, le projet GEDIP s'inscrit nettement dans cette tendance. Surtout, les rattachements sont hiérarchisés. La technique est ici celle des rattachements en cascade : les critères de compétence sont strictement conditionnés et ce n'est que si le premier n'est pas disponible que le deuxième est ouvert, et ainsi de suite. Dans ce cadre, les hypothèses de conflits de compétence sont éliminées, sauf éventuelle discussion sur la localisation de la résidence habituelle, bien sûr.

Ensuite, deuxième innovation, est insérée à l'article 5 la possibilité de conclure une clause attributive de juridiction. L'expansion progressive de l'autonomie de la volonté en matière de droit international privé de la famille n'est plus à démontrer et elle avait d'ailleurs déjà trouvé sa place dans le règlement Rome 3 en matière de loi applicable, on le verra. La possibilité d'une clause attributive de juridiction en la matière permet de fixer par avance le tribunal compétent, apportant peut-être un élément de certitude qui

[25] V. p. ex. CJUE, 16 juillet 2009, aff. C-168/08, *Haddadi*.
[26] V. p. ex. CJUE, 16 juillet 2015, aff. C-184/14, *A*.

fait gravement défaut dans le texte actuel. L'équilibre choisi, à nouveau relativement classique en droit international privé de la famille,[27] utilise une technique d'encadrement de l'autonomie de la volonté, puisque le choix ne peut porter que sur les tribunaux du domicile ou de la nationalité. Il reste que les considérations de déséquilibre et de protection ne sont pas entièrement absentes du contentieux du divorce, aussi le troisième paragraphe de l'article 5 permet-il au juge d'écarter la clause si celle-ci s'avère manifestement déraisonnable ou inéquitable à l'égard d'une partie.

Il faut enfin mentionner l'existence à l'article 10 d'une règle de transfert de compétence inspirée par l'article 15 du règlement 2201/2003, devenu 12 du règlement 2019/1111.

L'équilibre proposé est donc bien fondamentalement différent de celui qui existe actuellement dans le règlement Bruxelles 2 bis. Il y a là, sans doute, l'une des suggestions les plus importantes du projet, tant l'état du droit positif est peu convaincant. Mais la proposition ne serait pas complète sans la réorganisation du régime de la compétence lorsque celle-ci concerne les relations avec les États tiers.

B) FORS EXORBITANTS ET RELATIONS AVEC LES ÉTATS TIERS

La nature même des règles de compétence a pour conséquence que les dispositions d'un règlement européen ne peuvent évidemment ne rendre compétents que les seuls tribunaux européens. A la différence des règles de conflit de lois, dont le caractère universel ne fait aucun doute, les règles de compétence sont nécessairement limitées aux tribunaux des États membres. Il n'en demeure pas moins que cette limite n'exclut nullement d'étendre l'applicabilité des règles de compétence à des situations parfois qualifiées d' « externes », en ce sens qu'elles se localisent au moins partiellement dans des États tiers. La question des liens avec les États tiers est donc d'une particulière difficulté en matière de compétence internationale.[28]

Trois régimes principaux coexistent en la matière.

Le premier, historiquement, est celui de la Convention de Bruxelles et désormais du règlement Bruxelles 1, et consiste à fixer comme critère d'applicabilité principal le domicile du défendeur. Celui-ci, non content d'être une règle de compétence, est aussi la règle qui déclenche l'application même du règlement. Dès lors, si le défendeur est domicilié en Europe, s'appliquent les règles de compétence du règlement, si le défendeur est domicilié hors d'Europe, s'appliquent les règles nationales, en ce compris les règles de compétence exorbitantes, au grand dam des litigants non européens.[29]

On a pu justifier cette règle en estimant qu'il s'agissait avant tout de bâtir un régime juridique propre aux « citoyens européens » afin d'en assurer la protection juridiction-

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27 KOHLER, C. L'autonomie de la volonté en droit international privé : un principe universel entre libéralisme et étatisme. *Rec. Cours Académie de droit international de La Haye*, 2013, vol. 359, spéc. pp. 398 et seq.

28 Sur l'ensemble, v. part. MALATESTA, A. – BARIATTI, S. – POCAR, F. (dir.). The external dimension of EC private international law in family and succession matters. *Studi et pubblicazioni della rivista di diritto internazionale privato et processuale*, 2008, vol. 71.

29 V. par ex. les critiques de JUENGER, F. A shoe unfit for globetrotting. *UC Davis Law Review*, 1995, vol. 28, nº 3, p. 1027.

nelle, ou aux litiges « intégrés à l'Union européenne ».[30] La justification, pourtant, ne paraît pas absolument convaincante.[31] Elle suppose une délimitation entre litige européen et litige international qui est presque impossible à tracer *a priori* et qui, en toute hypothèse, ne peut guère résulter des critères de compétence eux-mêmes. Qualifier ainsi « d'européen » un litige uniquement en raison du domicile ou de la résidence européenne du défendeur n'apparaît guère convaincant, tant des litiges peuvent être intégrés à l'ordre juridique de l'Union même lorsque le défendeur est domicilié dans un État tiers. Il est difficile de comprendre, par exemple, qu'une compétence aussi simple que celle fondée sur le lieu d'exécution du contrat puisse être déterminée en application du droit judiciaire de l'Union lorsque le défendeur est domicilié en Europe et du droit national d'un État membre lorsqu'il ne l'est pas. L'opportunité d'un critère de compétence ne varie pas en fonction des rattachements, plus ou moins européens, d'une situation juridique. Aussi d'ailleurs la solution a-t-elle été nuancée pour un certain nombre de chefs de compétence particulièrement importants (compétences exclusives, compétences de protection, clauses attributives de juridiction). La solution du règlement Bruxelles 1, nous semble donc aborder la question complexe des relations avec les États tiers par un biais contestable.

Le second régime est celui du règlement Bruxelles 2 et paraît plus convaincant.[32] Les articles 6 et 7 du règlement Bruxelles 2 bis (bientôt remplacés par l'article 6 du règlement Bruxelles 2 ter) organisent en matière de divorce une hiérarchie des règles de compétence dont il résulte en substance une double solution. D'une part, si l'un des critères de compétence du règlement permet de rendre compétent le tribunal d'un État membre, la disposition du règlement est applicable à l'exclusion de toute règle nationale, quels que soient par ailleurs les autres éléments de rattachement.[33] D'autre part, les règles nationales sont applicables à défaut de tribunal européen rendu compétent par une disposition du règlement, même si elles ne sont pas opposables aux ressortissants des États membres ou aux personnes domiciliés sur le territoire des États membres. Une telle solution permet donc d'organiser une hiérarchie, sur le modèle de celle qui a été mise en place en France par le célèbre arrêt *Cognacs et Brandies de France*,[34] entre les règles de compétence « ordinaires », ici celles du règlement, et les règles de compétence « exorbitantes », ici celles du droit international privé national, les secondes n'étant applicables qu'à défaut des premières.

Cette seconde ligne de solution est un progrès par rapport à la précédente. Elle repose sur un critère de pure compétence qui semble plus rationnel que celui de champ d'application du règlement Bruxelles 1, les compétences exorbitantes restent nationales,

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30 Sur ces expressions, v. DROZ, G. *Compétence judiciaire et effets des jugements dans le marché commun*. Dalloz : Bibliothèque de droit international privé, 1972, Vol. XIII, p. 45 ; GOTHOT, P. – HOLLEAUX, D. La Convention entre les Etats membres de la CEE sur la compétence judiciaire et l'exécution des décisions en matière civile et commerciale. *Clunet*, 1971, pp. 747 et seq., spéc. p. 755.

31 Pour le détail de l'argumentation sur le règlement Bruxelles 1, on se permettra de renvoyer à PATAUT, E. Qu'est-ce qu'un litige intracommunautaire? *Mélanges Normand*. Litec, 2003, p. 365.

32 V. aussi, FRANCQ, *op. cit*., p. 57.

33 En ce sens : CJCE, 29 novembre 2007, aff. C-68/07, *Sundelind Lopez* ; en France, v. p. ex. Civ. 1, 15 novembre 2017. *Rev. Crit*, 2018, 581, note C. Chalas.

34 Civ. 1, 19 novembre 1985, *Grands arrêts de la jurisprudence française de droit international privé*. Dalloz, nº 71.

mais elles ne sont disponibles qu'au cas où aucun tribunal européen n'est rendu compétent par le règlement. Elle n'en reste pas moins critiquable.

La multiplication de ces règles exorbitantes rend en effet délicate la situation des litigants étrangers domiciliés dans un État tiers. Ceux-ci sont soumis à un ensemble disparate et difficile à connaître de règles exorbitantes, dont l'efficacité est d'autant plus grande qu'elles n'empêchent nullement la décision rendue de circuler automatiquement sur le territoire de tous les autres États membres. En réalité, la difficulté ici n'est pas tant l'existence de règles de compétence exorbitantes, qui peuvent être politiquement justifiées, que leur empilement anarchique. L'unification des règles de compétence est faite en Europe, et s'il faut conserver des compétences exorbitantes pour se protéger contre les justices étrangères, il n'est pas convaincant que la charge de l'organisation de cette protection soit confiée à chaque État membre plutôt que de résulter d'une décision politique commune.

Aussi est-il permis de préférer un troisième modèle, permettant une intégration plus complète : celui qui avait été proposé par le GEDIP en matière civile et commerciale[35] et qui a été retenu par les règlements en matière de droit patrimonial de la famille. Ce modèle est celui de l'exclusion pure et simple des règles nationales de compétence, qui sont donc entièrement remplacées par les règles européennes. Ainsi par exemple en matière de successions. Ce règlement, en effet, se substitue entièrement au droit national, mesures provisoires et conservatoires mises à part (article 19). Le critère principal, celui de la résidence habituelle du défunt (article 4), se double ainsi, outre d'une possibilité de choix de for (article 5), d'une série de règles de compétence dites « subsidiaires » (article 10) qui permettent de saisir un tribunal européen malgré l'absence de domicile du défunt en Europe (nationalité, lieu de situation des biens…). Aucune place n'est donc laissée aux règles nationales. Les relations avec les États tiers n'en sont pas pour autant oubliées, mais sous la forme de règles particulières, plus ou moins développées selon les règlements.

Telle est bien la voie dans laquelle s'engage résolument le projet du Groupe européen de droit international privé. Les dispositions des articles 4 et suivants ont en effet vocation à remplacer entièrement le droit international privé des États membres. Dès lors, si un tribunal européen n'est pas compétent en application des dispositions du règlement, aucun tribunal européen n'est compétent.

La solution n'interdit pas de prévoir des règles de compétence particulières, éventuellement exorbitantes, résultant d'une politique spécifiquement européenne. Ainsi, notamment, a été incluse dans le texte une compétence fondée sur le « *forum necessitatis* » (article 9) qui est aujourd'hui suffisamment répandue pour se passer d'explications.[36]

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[35] V. les « Propositions de modification du règlement 44/2001 en vue de son application aux situations externes », adoptées à la session de Copenhague de 2010, disponibles sur : https://www.gedip-egpil.eu/documents/gedip-documents-20vcf.htm.

[36] V. RETORNAZ, V. – VOLDERS, B. Le for de nécessité : tableau comparatif et évolutif. *Rev. Crit*, 2008, pp. 225–261. Le for de nécessité a été admis dans les règlements Obligations alimentaires (article 7), Successions (article 11) et Régimes matrimoniaux (article 11).

A été beaucoup plus longuement discutée l'éventuelle introduction d'une règle de compétence résiduelle ou subsidiaire, qui ouvrirait une compétence exceptionnelle en faveur des tribunaux de la nationalité d'un ou des époux sur le modèle du règlement 4/2009 en matière alimentaire (art. 6). Cette règle de compétence particulière aurait constitué une forme de « privilège de citoyenneté européenne ».

Cette solution a finalement été exclue, au profit d'une compétence spécifique figurant à l'article 4§2, litt. d). L'effet de cette règle est que, si aucun tribunal n'est compétent sur la base de la résidence habituelle des époux (a et b) ou du défendeur (c), le citoyen européen qui fixe sa résidence habituelle dans un État membre peut saisir les tribunaux de cet État, sans attendre le délai d'un an prévu pour les autres demandeurs.

Il s'agit d'un privilège de citoyenneté, mais qui diffère grandement d'une simple compétence fondée sur la nationalité. D'abord, la compétence ne résulte pas de la seule nationalité, mais de la double condition de la résidence habituelle dans un État membre et de la nationalité. Elle se distingue aussi de l'actuel article 3 du règlement 2019/1111, car elle n'exige pas que le demandeur ait la nationalité de l'État de résidence et, surtout, elle n'est disponible qu'en l'absence de résidence habituelle du défendeur dans l'Union. L'utilisation du for de la nationalité du demandeur est donc beaucoup plus strictement encadrée. La politique proposée vise donc bien à réaliser un équilibre entre la nécessité de ne pas laisser le citoyen européen sans protection, tout en veillant à ne pas empiéter abusivement sur la compétence raisonnable des États tiers.

C'est encore cette préoccupation qui guide la rédaction de l'article 6. Celui-ci vise à traiter de la question de l'élection d'un for d'un État non membre. Son objectif est de parvenir à un équilibre entre l'efficacité de la clause et la compétence des tribunaux de l'Union, en autorisant les tribunaux européens, à certaines conditions, à décliner leur compétence lorsqu'un accord des parties a rendus compétents les tribunaux d'un État tiers. Cette considération de la compétence des États tiers est encore renforcée par l'existence de la règle de litispendance, qui permet, sur le modèle de l'article 33 du règlement Bruxelles 1, de surseoir à statuer et de se dessaisir lorsqu'un tribunal d'un État tiers a été premier saisi (article 13§3). Le projet cherche donc sur ce point une cohérence (encore renforcée, on le verra, par les règles relatives à la circulation des décisions en provenance d'États tiers) dans l'articulation du régime de compétence avec les États tiers.

Il va donc, sur ce point, bien plus loin que l'actuel règlement Bruxelles 2 ter, dont les règles relatives à la litispendance ne concernent que les États membres (article 19) ou encore que le règlement aliments, qui, s'il admet le choix de for (article 4) ne l'envisage, comme la litispendance (article 12), que pour les États membres. De tels choix soulèveront à terme d'importantes difficultés quant au sort à réserver à une clause attributive de juridiction aux tribunaux d'un État tiers.

Comme on le voit, la proposition du GEDIP vise à réformer en profondeur le régime de la compétence en matière de divorce. Une telle voie permettrait, à nos yeux, d'ajouter simplicité et prévisibilité à un contentieux du divorce aujourd'hui d'une excessive et regrettable complexité.

Les modifications proposées sont moins spectaculaires en matière de conflit de lois.

3. LES RÈGLES DE CONFLIT DE LOIS

Sous réserve de ce qui sera discuté quant aux divorces sans juge, les propositions du GEDIP sont beaucoup moins fondamentales en ce qui concerne la loi applicable.

De fait, le règlement Rome 3 reflète un système qui, déjà présent dans plusieurs codifications nationales récentes et repris depuis lors par d'autres règlements, établit une échelle de rattachements en cascade privilégiant la localisation de la résidence habituelle des époux dans le même pays, au nom d'un principe de proximité. Il ouvre également une faculté de choix de loi aux parties. Cette faculté a déjà été discutée et analysée en profondeur,[37] parfois critiquée.[38] Il reste que ces critiques ne semblent pas sans réplique, notamment parce que la liberté de choix participe, quoi qu'on en dise, d'un mouvement à la fois de libéralisation du divorce et d'ouverture aux parties de facultés d'anticipation du règlement des conséquences personnelles et pécuniaires de leur union et de son éventuelle dissolution.[39] L'extension progressive de son empire en matière de droit de la famille inclut désormais le divorce et il n'a pas semblé opportun de revenir sur ce point.

Dès lors, les articles 16 et 17 de la proposition sont largement repris des articles 5 et 8 du règlement 1259/2010, rapprochés pour des raisons de simplicité et faisant l'objet de quelques ajustements techniques.

Le choix de loi, tout d'abord, est assoupli, qu'il porte sur la loi de la nationalité ou sur la loi de la résidence habituelle.

Dans le premier cas, le projet d'article 17§4 propose de permettre aux époux de choisir la loi de l'une ou l'autre de leur nationalité lorsqu'ils en possèdent plusieurs. Cette solution se distingue de celle du règlement Rome 3, qui renvoie simplement au droit national dans son considérant nº 22, à l'instar des règlements sur les régimes matrimoniaux ou patrimoniaux entre partenaires.[40]

La solution semble cohérente avec la faculté de choix qui est ouverte aux parties, qui ne suppose nullement de faire prévaloir une nationalité sur l'autre. La solution du conflit de nationalités, en effet, peut sans difficulté être laissée à la discrétion des parties lorsque le choix de loi ne dépend pas d'un élément objectif mais bien de la volonté de celles-ci. Dans ce cas, en effet, il n'est pas nécessaire que l'ordre juridique du for fasse un choix entre les deux nationalités pour préférer l'une à l'autre, puisque ce choix appartient aux intéressés eux-mêmes. Dès lors, aucune nécessité, ni logique, ni juridique, n'oblige l'État du for à choisir entre les nationalités des époux, qu'il convient au contraire d'investir de la possibilité de choisir entre leurs nationalités. Cette solution est

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37 KOHLER, *Cours précité*, spéc. pp. 420 et seq.

38 V. not. MAYER, P. – HEUZE, V. – REMY, B. *Droit International Privé*. 12e éd. LGDJ, 2019, nº 606.

39 Pour une discussion d'ensemble, v. not. CORNELOUP, S. – JOUBERT, N. Autonomie de la volonté et divorce : le règlement Rome III. Dans : FULCHIRON, H. – PANET, A. – WAUTELET, P. (dir.). *L'autonomie de la volonté en droit des personnes et de la famille dans les règlements de droit international privé européen.* Bruylant, 2017, p. 179. Sur l'anticipation, v. aussi CHALAS, C. Contrats de mariages et nuptial agreements : vers une acculturation réciproque ? *Journal du Droit International*, 2016, pp. 781–826.

40 V. les considérants nº 50 du règlement 2016/1103 et 49 du règlement 2016/1104.

cohérente avec le projet GEDIP en matière de conflits de nationalités[41] et, plus positivement, avec le règlement successions, dont l'article 22-1 al. 2 permet lui aussi le choix de loi en faveur des différentes nationalités du *de cujus*.

L'assouplissement porte aussi sur le choix en faveur de l'une des résidences habituelles des époux, puisque celui-ci peut se porter sur la loi « d'une résidence habituelle commune des époux au cours du mariage » (article 17§1 litt. a), ce qui est incontestablement plus libéral que la solution actuelle du règlement Rome 3, qui exige que le choix se fasse ou bien en faveur de la résidence habituelle des époux « au moment de la conclusion de la convention » ou bien en faveur de la « dernière résidence habituelle des époux, pour autant que l'un d'eux y réside encore au moment de la conclusion de la convention » (article 5§1). La solution du règlement Rome 3 a l'avantage de la sécurité et de la prévisibilité, mais l'inconvénient corrélatif de la rigidité. Elle risque notamment, dans le premier cas, de conduire à l'application d'une loi avec laquelle les époux n'ont plus de lien depuis fort longtemps.

Pour y répondre, la souplesse proposée vise à permettre aux époux de se soumettre à une loi avec laquelle ils entretiennent ou ont entretenu un lien étroit et donc de conférer aux époux le soin de choisir entre plusieurs possibilités s'ils ont eu, au cours de leur mariage, plusieurs résidences habituelles. La solution n'exclut certes pas totalement l'inconvénient du règlement Rome 3 : celui de risquer de figer un choix en faveur d'une loi avec laquelle les époux n'ont plus de liens, choix qui, au moment du divorce, sera difficile à remettre en cause par un accord des parties qui ne peut plus être obtenu en raison de la dégradation de leurs rapports. Le risque n'en paraît pas moins atténué et, en donnant une plus grande liberté aux époux, il leur permet de choisir celui des rattachements qu'ils estiment le plus pertinent.

Surtout, pour pallier les risques d'un choix de loi aux conséquences regrettables pour l'une des parties qui aurait consenti, par exemple au moment du mariage, sans peser toute la portée d'un choix, il a été décidé d'introduire une limite à la liberté de choix. Il est en effet proposé de permettre au juge de remettre en cause le choix de loi. L'article 18§3 du projet affirme ainsi que :

« À moins que les parties n'aient été pleinement informées et conscientes des conséquences de leur choix au moment de la désignation, la loi désignée ne s'applique pas lorsque son application entraînerait des conséquences manifestement inéquitables ou déraisonnables pour l'une ou l'autre des parties ».

La formulation est directement inspirée de l'article 8§5 du Protocole de La Haye de 2007 sur la loi applicable aux obligations alimentaires ; elle vise à introduire un élément de justice matérielle, laissé entre les mains des juges, compensant ainsi le relatif assouplissement en matière de liberté de choix.

On le voit, si l'équilibre fondamental du texte reste celui du règlement Rome 3, les quelques ajustements réalisés sont loin d'être négligeables.

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[41] V. l'article 9 de la position du Groupe européen de droit international privé sur la solution des conflits positifs de nationalités dans les instruments existants de droit international privé de l'Union européenne, adopté à sa session de Lausanne, 2013. Disponible sur : https://www.gedip-egpil.eu/documents/gedip-documents-23.htm.

Ce sont les mêmes ajustements auxquels il est suggéré de procéder en matière d'ordre public. On sait en effet que la question, délicate entre toutes, des lois prohibitives en matière de divorce a donné lieu à de complexes négociations dans l'Union européenne, expliquant en partie le recours au mécanisme de la coopération renforcée.[42] Le résultat de ces difficultés a donné lieu à un ensemble complexe et fréquemment critiqué, des articles 10, 12 et 13 du règlement, qui prévoient des mécanismes s'apparentant à l'ordre public.[43]

La proposition vise à simplifier radicalement cette difficulté, en prévoyant simplement que la loi du for s'applique lorsque la loi étrangère désignée ne connaît pas le divorce (article 21) et en revenant à la formulation traditionnelle de l'ordre public (article 23). La première disposition permet de consacrer ce véritable « droit au divorce » auquel tend désormais l'ordre juridique européen,[44] la seconde semble suffisante pour s'opposer aux lois qui porteraient une atteinte grave aux règles de l'ordre juridique du for. L'ordre public est suffisamment large et plastique pour pouvoir s'adapter à de nombreuses difficultés, les tentatives de précisions apportant souvent plus de confusion que de clarté.

En revanche, sous réserve d'une admission limitée du renvoi lorsque celui-ci permet d'appliquer la loi d'un État membre plutôt que celle d'un État tiers (article 22§2), la règle de conflit objective n'a pas fait l'objet de modification et l'article 16 du projet GEDIP est le décalque de l'article 8 du règlement Rome 3.

On le voit, ajustements et non bouleversements. C'est un peu la même chose en matière de reconnaissance des décisions, à l'importante nuance près du régime de reconnaissance des décisions rendues dans des pays tiers.

4. LA RECONNAISSANCE DES DÉCISIONS

La proposition de modification la plus fondamentale en matière de reconnaissance des décisions ne concerne pas les décisions rendues dans un État membre. Le règlement Bruxelles 2 ne concernant que le principe du divorce, aucune disposition relative à l'exécution n'est nécessaire. Le régime actuel est donc un régime de reconnaissance simple, libéral et peu contesté. Le principe fondamental en est la reconnaissance automatique (article 30), qui permet de se prévaloir de la dissolution du lien matrimonial sans procédure particulière dans tous les États membres. Cette reconnaissance automatique permet par exemple la transcription d'un divorce sur les registres d'état civil sans procédure particulière (article 30-2).

La reconnaissance, bien sûr, peut être discutée, par les voies habituelles de la reconnaissance incidente, ou de l'action en opposabilité ou en inopposabilité (articles 30 et 59 à 62). Si une telle procédure est déclenchée, les conditions de contrôle sont

[42] HAMMJE, P. Le nouveau règlement (UE) nº 1259/2010 du Conseil du 20 décembre 2010 mettant en œuvre une coopération renforcée dans le domaine de la loi applicable au divorce et à la séparation de corps. *Revue Critique de Droit International privé*, 2011, pp. 291–338, nº 1 et 13.

[43] *Ibid*., nº 41 et seq.

[44] V. la discussion dans HAMMJE, P. Divorce et séparation de corps. *Répertoire Dalloz de droit international*, 2018, nº 205.

peu nombreuses, puisque, en substance, seul l'ordre public, de fond ou procédural, ou l'inconciliabilité de décisions peut conduire au refus de reconnaissance. On sait que ce régime est extrêmement libéral, ne permettant que très exceptionnellement un tel refus de reconnaissance. La Cour a, encore récemment, rappelé sa conception très restrictive de l'ordre public, qui n'empêche pas la circulation de la décision, même lorsque le juge qui l'a rendu a violé les dispositions du règlement sur la litispendance, en refusant de se dessaisir, quoique second saisi.[45]

Aucune justification ne paraît devoir conduire à remettre en cause cette orientation libérale et favorable au divorce. Aussi le texte proposé par le GEDIP, au-delà de quelques modifications de langage, propose-t-il de reconduire purement et simplement le régime de reconnaissance des décisions. Les motifs de refus de reconnaissance, tout particulièrement, sont les mêmes (article 28 du projet).

L'innovation principale est ailleurs. La proposition suggère en effet d'inclure un régime complet de reconnaissance des décisions en provenance des États tiers. Il ne s'agit pas d'une nouveauté pour le GEDIP, qui s'est déjà prononcé en faveur d'un régime commun de reconnaissance des décisions rendues dans des États tiers. La solution avait été proposée en matière civile et commerciale aux sessions de Padoue (2009) et Copenhague (2010).[46] Le principe de cette inclusion est évidement susceptible d'être contesté, notamment sous l'angle de la compétence de l'Union. En 2010, il avait toutefois été estimé que l'obstacle n'était pas dirimant, dans la mesure d'une part où la disparité des règles de reconnaissance pouvait conduire à d'insurmontables difficultés de fonctionnement du marché intérieur en cas de divergences entre États membres relativement à la reconnaissance ou l'exécution d'une décision et, d'autre part, où l'avis 1/03 sur la compétence externe de l'Union sur la Convention de Lugano[47] conférait bien une compétence à l'Union en la matière.[48]

Depuis, l'évolution des textes n'a fait que confirmer cette analyse ; il n'est que de songer au règlement Bruxelles 1bis qui a commencé, certes timidement, à réglementer certains des aspects des relations avec les États tiers.[49]

En outre, et même si, comme on le verra, le règlement Bruxelles 2 ter n'a pas suivi cette ligne, l'inclusion de divorces non juridictionnels dans le domaine d'un régime de circulation des divorces sans tenir compte de ceux obtenus dans des États tiers serait problématique. En raison, précisément, de leur nature privée, la ligne de démarcation entre les divorces privés « européens » et les divorces privés « non européens » risque de poser de nombreuses difficultés, rendant bien moins intéressantes et opératoires les solutions proposées pour faciliter la circulation de ces divorces.

Ces arguments ont convaincu et conduit à inclure dans la proposition un régime complet de reconnaissance des décisions de divorce rendues dans les États tiers.

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45 CJUE, 16 janvier 2019, aff. C-386/17, *Liberato*.

46 V. la « Proposition de modification du chapitre II du règlement 44/2001 en vue de son application aux situations externes » adoptée à la session de Copenhague. Disponible sur : https://www.gedip-egpil.eu/documents/gedip-documents-20vcf.htm.

47 CJUE, Assemblée Plénière, avis du 7 février 2006, 1/03.

48 FALLON, M. Commentaire de la proposition. Disponible sur : https://www.gedip-egpil.eu/documents/gedip-documents-20cf.htm.

49 Ainsi par exemple de la litispendance, v. l'article 33 et les considérants 23 et 24 du règlement.

En ce qui concerne le régime de cette reconnaissance, le texte proposé pour les décisions de divorce rendues dans les États tiers est, donc, inspiré des propositions adoptées par le Groupe lors de ces précédentes sessions.

Celui-ci est calqué sur celui des décisions rendues dans les États membres, notamment sur le point essentiel de la reconnaissance de plein droit. Aucune procédure préalable n'est donc, ici encore, nécessaire pour procéder à une transcription sur les registres de l'état civil d'une décision de divorce obtenue dans un État tiers (article 36).

Les différences importantes portent plutôt sur les conditions de reconnaissance en cas de contestation. Les exigences de contrôle de l'ordre public et d'inconciliabilité sont maintenues. Mais la rigueur du contrôle est doublement renforcée.

On notera tout particulièrement le maintien à l'article 37§1 d'une forme de contrôle de la compétence du juge d'origine, sous la forme d'un contrôle de l'étroitesse des liens entre le juge d'origine et le divorce, sur le modèle que connaissent déjà certains Etats européens,[50] mais pas tous, loin s'en faut.[51] La généralisation d'une telle condition participerait donc bien d'une libéralisation des mécanismes de reconnaissance.

La fraude, en revanche, n'est pas retenue, mais elle n'est pas étrangère à l'adoption d'une disposition, plus objective, de conflit de procédures : une décision étrangère qui aurait été rendue avant une décision européenne antérieure ne pourrait pas être reconnue si le tribunal européen avait été saisi en premier lieu (art. 37§2). La précision doit être lue comme le pendant de la règle de litispendance qui autorise les juges européens à surseoir à statuer lorsqu'ils sont saisis en second et que la décision étrangère fait l'objet d'un pronostic de reconnaissance favorable (article 13). Dans la situation inverse, la priorité de compétence revendiquée par le tribunal européen se traduit, si elle n'est pas respectée, par un barrage à la reconnaissance de la décision étrangère qui l'aurait violée.

On le voit, le système de reconnaissance n'est pas, en lui-même, révolutionnaire. Il a en revanche l'avantage d'être libéral, raisonnablement simple et, surtout, exhaustif, ce qui permet aussi de régler une importante difficulté relative à la reconnaissance des divorces sans juge.

5. LE DIVORCE SANS JUGE

Les modes de dissolution du mariage évoluent rapidement en Europe. Alors, en effet, que la dissolution judiciaire était manifestement la seule à l'esprit des rédacteurs des règlements Rome 3 et Bruxelles 2, la difficulté posée par les divorces obtenus par actes privés s'est progressivement imposée dans le débat.

La question, historiquement, concerne avant tout les divorces obtenus hors d'Europe et, plus particulièrement, les répudiations musulmanes. La difficulté était d'abord méthodologique : s'agissant de divorces dépendant fondamentalement de la volonté des parties, il était permis d'hésiter entre la méthode du conflit de lois, suivie par certains

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[50] V. not. en droit français, le célèbre arrêt *Simitch* de la Cour de cassation : Civ. 1, 6 février 1985, *Rev. Crit. DIP*, 1985, p. 369.

[51] V. les remarques comparatives de CUNIBERTI, G. Le fondement de l'effet des jugements étrangers. *Recueil des Cours*, 2018, vol. 394, pp. 93 et seq., spéc. nº 77, p. 146.

pays,[52] et celle de la reconnaissance des décisions, suivie par d'autres.[53] La même question se pose désormais pour les divorces privés acceptés dans certains pays d'Europe, avec d'autant plus d'acuité que le législateur national s'est parfois purement et simplement désintéressé des aspects internationaux de ceux-ci.[54]

Le débat ne pouvait donc manquer de se déplacer du droit national vers le droit de l'Union, au fur et à mesure de l'européanisation du droit international privé du divorce. C'est bien ce qui a eu lieu, lorsque, la première, la Cour de justice, a été saisie de la difficulté.[55]

L'affaire *Sahyouni* illustre à merveille les enjeux méthodologiques propres aux divorces privés et les difficultés à tracer en la matière une ligne entre les divorces « européens » et les autres. Il s'agissait en effet d'un divorce obtenu en Syrie par un couple dont les deux époux possédaient la double nationalité, syrienne et allemande, et dont le domicile avait été alternativement en Allemagne, en Syrie et dans d'autres pays arabes.

En 2013, le mari a déclaré vouloir divorcer de son épouse et son représentant a prononcé la formule de divorce devant le tribunal religieux de la charia de Latakia (Syrie). Le 20 mai 2013, ce tribunal a constaté le divorce des époux.

L'épouse s'opposant à la reconnaissance du divorce en Allemagne, il convenait de savoir si le droit de l'Union était applicable et, si oui, quel texte. Cette première question avait d'ailleurs conduit à une première décision d'incompétence de la Cour de justice, celle-ci n'étant pas convaincue de l'application d'un texte de droit de l'Union à un divorce obtenu dans un État tiers.[56] Il ne faisait aucun doute, en effet, que le règlement Bruxelles 2 n'était pas applicable. L'applicabilité du règlement Rome 3, en revanche, était plus discutable. Telle était pourtant bien la position du droit allemand, reprise par la Cour :

« En particulier, il ressort des informations fournies par cette juridiction ainsi que des observations du gouvernement allemand que, en vertu du droit allemand, la reconnaissance des divorces prononcés dans un État tiers est effectuée dans le cadre de la procédure prévue à l'article 107 du FamFG. Conformément à cette disposition, la reconnaissance des décisions d'une juridiction ou d'une autorité étatiques étrangères prononçant un divorce de manière constitutive est accordée en l'absence de tout examen de leur légalité, alors que la *reconnaissance des divorces privés est subordonnée au contrôle de leur validité au regard du droit matériel de l'État désigné par les règles de conflit de lois pertinentes* » (nº 30, c'est moi qui souligne).

Le droit allemand subordonnait donc l'efficacité en Allemagne d'un divorce privé étranger au respect de la loi qui lui aurait été applicable en droit allemand, laquelle s'établissait, au moment du litige, par application de la règle de conflit de lois issue du

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52 Sur le débat en Allemagne, v. part. GRUBER, U. P. Scheidung auf Europäisch – die Rom III-Verordnung. *Praxis des Internationalen Privat und Verfahrensrechts*, 2012, p. 381.

53 EL-HUSSEINI, R. Le droit international privé français et la répudiation islamique. *Revue Critique de Droit International Privé*, 1999, pp. 427 et seq. V. en Belgique l'article 57 de la loi du 16 juillet 2004 portant le Code de droit international privé. *Revue Critique de Droit International Privé*, 2005, pp. 154–226.

54 Sur le débat français, v. part. HAMMJE, P. Le divorce par consentement mutuel extrajudiciaire et le droit international privé. Les aléas d'un divorce sans for. *Revue Critique de Droit International Privé*, 2017, p. 143.

55 CJUE, 20 décembre 2017, aff. C-372/16, *Sahyouni 2*.

56 CJUE, 12 mai 2016, aff. C-281/15, *Sahyouni 1*.

règlement Rome 3.[57] La question posait donc bien une difficulté d'interprétation du droit de l'Union.

Au rebours du droit allemand, la Cour a toutefois décidé que le règlement n'était pas applicable, les divorces privés restant en dehors de son champ d'application. La décision a incontestablement suscité quelques difficultés, dont la moindre n'était pas la résurrection de règles de conflit dont on pensait parfois qu'elles étaient sorties du droit positif.[58] Elle n'en posait pas moins l'importante difficulté des liens entre divorces privés et droit de l'Union, question d'autant plus brûlante que, précisément, les divorces privés faisaient progressivement leur apparition en Europe.

Aussi faut-il se féliciter que le règlement Bruxelles 2 ter ait proposé une solution en la matière.[59]

Il n'est pas certain, toutefois, que celle-ci soit entièrement satisfaisante.

Le règlement contient tout d'abord une définition de l'accord à l'article 2 ; cette définition est ensuite complétée par une section nouvelle, consacrée aux « actes authentiques et accords » (articles 64 et suivant). La règle concernant les accords est méthodologiquement proche d'une règle de reconnaissance des décisions, puisque l'article 65 renvoie, pour les accords et les actes authentiques, aux dispositions générales gouvernant la reconnaissance des décisions. La solution est encore explicitée par le considérant nº 70, aux termes duquel :

« Les actes authentiques et les accords entre parties relatifs à la séparation de corps et au divorce qui ont un effet juridique contraignant dans un État membre devraient être assimilés à des 'décisions' aux fins de l'application des règles de reconnaissance ».

La *ratio legis* ne fait guère de doute, donc, et il s'agit bien d'une règle de reconnaissance, fort libérale, des divorces privés. Il reste toutefois à régler la difficulté des relations avec les États tiers. Une décision privée n'étant pas, par nature, aisément localisable et les autorités des États membres n'étant pas gouvernées par des règles de compétence internationale identiques à celle des juges, la difficulté est de taille.

Pour la contourner, le nouveau règlement procède, là encore, par détermination d'un champ d'application spécifique au règlement. Il faut d'une part que l'accord ait été « enregistré » par une autorité publique dans un État membre (article 2§3). Mais, d'autre part et surtout, les dispositions nouvelles relatives à la reconnaissance ne sont applicables qu'aux actes et accords qui ont été enregistrés ou dressés « dans un État membre dont les juridictions sont compétentes au titre du chapitre II » (article 64).

Cette dernière condition est bien une disposition de champ d'application en ce sens que si cette condition n'est pas remplie, les règles relatives à la reconnaissance ne seront tout simplement pas applicables. En d'autres termes, lorsque l'accord aura été ou bien conclu dans un État tiers ou bien conclu dans un État membre, mais dans une hypothèse où les juridictions de cet État membre n'auraient pas été compétentes si elles avaient été saisies du divorce, les nouvelles règles relatives à la reconnaissance ne s'applique-

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[57] Sur ces points, v. le commentaire de l'arrêt *Sahyouni 2* par COESTER-WALTJEN, D. *Praxis des internationalen Privat- und Verfahrensrechts*, 2018, p. 238.

[58] Sur le droit français et l'inopportune résurrection de l'article 309 du Code civil, v. le commentaire de la décision par P. HAMMJE, P. *Revue Critique de Droit International Privé*, 2018, pp. 902 et seq.

[59] V. la présentation critique exhaustive de FRANCQ, *op. cit*., pp. 69 et seq.

ront pas. Il faudra donc nécessairement, dans ce cas, en revenir au droit international privé du for. Dans la mesure où les autorités en question (avocats, notaires ou autorités publiques) ne sont pas nécessairement gouvernées par des règles de compétence, l'hypothèse n'est nullement d'école.

Dès lors, si la solution est incontestablement habile, elle a le défaut de laisser en dehors de son champ d'application non seulement des divorces privés étrangers, mais encore des divorces privés européens.

C'est cette regrettable issue qu'a tenté d'éviter le projet avancé par le Groupe européen de droit international privé, dont les articles 3, 40, 41 et 42 sont consacrés à cette question.

La difficulté première tenait à la définition même des divorces privés, qui est malaisée. La solution a consisté à distinguer tout d'abord entre les divorces « juridictionnels » et les divorces « non juridictionnels », tels que définis dans l'article 3 du projet. L'article 3§1 s'inspire très directement de la formulation de l'article 3§2 du règlement 2016/1103 sur les régimes matrimoniaux et vise à englober dans sa définition non seulement les divorces prononcés par un juge, au sens étroit et classique du terme, mais encore par une autorité qui aurait en la matière des prérogatives équivalentes et, surtout, dont la décision pourrait faire l'objet d'un recours. L'article 3§2, pour sa part, renvoie à toutes les formes de divorce obtenues sans le concours de cette juridiction.

Cette définition étant posée, reste à en déterminer le régime juridique de reconnaissance, qui vise, on le rappelle, les divorces obtenus dans les États membres et ceux obtenus dans les États tiers.

Le point principal est d'assimiler purement et simplement les divorces « reçus par une juridiction » au sens de l'article 3§1 aux décisions (article 40) et, en revanche, de rester plus proche de la méthode du conflit de lois pour les divorces purement privés (articles 41 et 42).

L'article 40 vise ainsi les divorces « juridictionnels » basés sur un acte authentique ou un accord. Pourvu qu'ils aient fait l'objet de l'intervention d'une juridiction au sens de l'article 3§1, ce qui suppose en particulier qu'ils soient dotés d'une force équivalente à celle d'une décision selon le droit de l'État d'origine, ces divorces suivent le régime des décisions.

En revanche, d'autres formes de divorce issues d'un acte ou d'un accord ne répondant pas aux conditions de l'article 3§1 (et visées à l'art. 3§2) ne sont pas purement et simplement assimilées aux décisions. Elles relèvent au moins en partie de la méthode du conflit de lois en ce qu'elles vont être soumises aux exigences d'une vérification de loi appliquée, combinée avec un contrôle d'ordre public et d'inconciliabilité.

Il paraissait toutefois difficile de condenser le régime de reconnaissance de ces décisions en une seule disposition. Il est apparu, en effet, que des modèles différents, posant des difficultés différentes, pouvaient être isolés, selon que le divorce était consensuel ou, au contraire, purement unilatéral.

Le premier cas vise un contrat ou un acte consensuel enregistré d'une façon ou d'une autre, par une autorité administrative (tel l'officier de l'état civil ou un notaire dans plusieurs États membres, comme la Lettonie ou le Danemark, mais aussi le nouveau divorce consensuel français). Ces divorces purement consensuels doivent avoir

été conclus en conformité de la loi de nationalité ou de la loi de la résidence d'un époux pour pouvoir être efficaces sur le territoire des États membres. La solution retenue retient donc les rattachements de l'option de droit, tout en étant plus flexible, notamment en ce qu'elle accepte que soit appliquée la loi de la résidence habituelle d'une seule partie.

Ils doivent en outre ne pas être contraires à l'ordre public ni inconciliables avec une décision ou un autre accord. La formulation des règles sur l'inconciliabilité est adaptée des règles classiques, et notamment du nouvel article 68 du règlement 2019/1111. La formulation vise à rendre compte de la possible divergence entre un accord et une décision ou un autre accord.

Le second cas porte sur le divorce unilatéral (tel le *talak* en droit islamique) et la solution proposée est plus rigoureuse. Celui-ci, pour pouvoir circuler, doit répondre à deux conditions. D'une part, il doit avoir été prononcé en conformité avec la loi applicable telle que déterminée par le règlement et d'autre part, avoir été prononcé dans un État dont la loi admet ce mode de divorce. Cette double vérification permet à la fois de contrôler la loi appliquée (y compris, en vertu de l'art. 23, la conformité à l'ordre public de celle-ci) et de s'assurer qu'un tel divorce purement unilatéral n'a pas été prononcé dans un État tiers qui ne l'admettrait pas (ainsi, par exemple d'un *talak* prononcé en Suisse ou en Australie entre époux dont la loi nationale commune l'admettrait).

En outre, les divorces purement unilatéraux doivent avoir été acceptés sans équivoque par l'autre partie pour pouvoir être reconnus, sauf exception. Une exception possible, que vise la fin de la phrase du paragraphe 1, est celle de l'écoulement d'un temps relativement long depuis le prononcé de la dissolution. La réalité de la vie familiale pourrait dans ce cas conduire à estimer que ce divorce prononcé en application de la loi compétente est valable en Europe. La formulation essaie de rendre compte de cette situation, pour le cas où la portée du critère de l'intensité de rattachement (*Inlandsbeziehung*) inhérent à l'appréciation de l'exception générale d'ordre public ne s'avérerait pas suffisamment précise. En revanche, ce critère peut aider à apprécier la reconnaissance d'un tel divorce prononcé à un moment où l'un des époux résidait dans un pays qui ne connaît pas cette forme de dissolution du mariage.

Les règles relatives à la contrariété de décisions, enfin, sont les mêmes que celles de l'article 41.

L'ensemble, comme on le voit, vise à l'exhaustivité. Il est en tout cas beaucoup plus large, à défaut d'être tout aussi libéral, que le nouveau règlement Bruxelles 2 ter. A ce titre, il constitue à tout le moins une base de débat qui permettrait de tenir compte non seulement de l'évolution des droits internes européens, qui s'ouvrent progressivement aux divorces privés, mais encore de la réserve que peuvent inspirer certains divorces purement unilatéraux, dont on sait les importants débats auxquels ils ont donné lieu dans tous les pays européens.

* * *

Les litiges internationaux en matière de divorce sont des litiges souvent âpres, humainement douloureux et d'une insondable complexité juridique. La codifica-

tion progressive du droit international privé de la famille en Europe a le mérite d'offrir aux parties un cadre juridique ferme. Les règlements européens n'en recèlent pas moins de redoutables chausse-trappes et difficultés, qui permettent de penser que les choses sont encore largement améliorables. C'est ce qu'a tenté de faire, à son modeste niveau, le projet du GEDIP et la codification globale du divorce international qui y est suggérée.

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LIMITS OF JURISDICTION FOR DIVORCE UNDER THE BRUSSELS IIA REGULATION FROM THE CZECH PERSPECTIVE

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Abstract: Jurisdiction for divorce in a marriage with an international element is in the Czech Republic governed primarily by "the Brussels IIa Regulation". There are, however, other legal sources on which Czech courts can base their jurisdiction. When a national court is seized with a cross-border divorce case, the first step is to establish or decline the jurisdiction. In purely intra-EU cases, the Brussels IIa Regulation is the only legal instrument that comes into play. If the case involves a third State, the jurisdiction can be based on rules contained in a specific bilateral international agreement or, the provision for residual jurisdiction in the Brussels IIa Regulation permitting, on the rules in the national legislation of private international law. Complex situations can occur, especially when the case presents several international elements, some related to EU Member State(s) and the others related to the third State(s). The jurisprudence developed by the CJEU to interpret the Brussels IIa Regulation is shedding light on some provisions thereof, although there are still several questions waiting to be answered, one of them being the autonomous EU interpretation of the term "marriage" in the context of the scope of the Regulation.

Keywords: marriage; divorce; Brussels IIa Regulation; jurisdiction; bilateral international agreement

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1. INTRODUCTION

The Czech Republic acceded to the European Union on the 1st of May 2004. Since then, EU legislation has been applicable on its territory. In the field of family law, accession brought to the Czech legal system the Brussels II Regulation[1] which was soon replaced by *the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000* (hereinafter referred to as "the Brussels IIa Regulation" or "Regulation").

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1 Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses.

The Brussels IIa Regulation introduced several new concepts to the Czech doctrine of international family law: priority of EU rules over the national Private International Law Act[2] (and, to some extent, over bilateral international treaties), multilateral rules for jurisdiction based primarily on habitual residence as the main connecting factor, unified rules for recognition (and enforcement) of judgments, integration of the Hague Convention of 25 October 1980 on the Civil aspects of international child abduction etc. Acceptance and proper understanding of the new Regulation and its mechanism by the judiciary and legal practitioners was not immediate. Today, however, the Brussels IIa Regulation presents an indisputable cornerstone of international procedural law in family matters.

This article tries to focus primarily on the rules on jurisdiction for divorce proceedings as applied by Czech courts. The main aim is to outline a picture of the legislative framework as well as of some practical issues the legal practice faces today when solving the question as to which court is competent to decide on a cross-border divorce case. The first chapter therefore describes different legal sources comprising competence rules and tries to clarify their interconnection; the second chapter concentrates on selected problems explicitly or implicitly related to jurisdiction.

2. JURISDICTION FOR DIVORCE: SOURCES OF LAW IN THE CZECH CONTEXT

There are three main legal sources (the Brussels IIa Regulation, Private International Law Act and bilateral agreements), each having a different material, geographical, temporal and, in some respect, personal scope. If a cross-border divorce case occurs, the first procedural step of the court seized is to establish its jurisdiction.

2.1 BRUSSELS IIA REGULATION

The substantive scope of the Regulation extends to "civil matters relating to […] divorce, legal separation or marriage annulment" (Article 1a). The Regulation furthermore applies "in civil matters relating to […] the attribution, exercise, delegation, restriction or termination of parental responsibility" (Article 1b). Substantive scope in matrimonial matters is further clarified in Recital 8 of the Regulation, which reads: "As regards judgments on divorce, legal separation or marriage annulment, this Regulation should apply only to the dissolution of matrimonial ties and should not deal with issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures." Concerning geographical scope, the Brussels IIa Regulation applies in all Member States of the EU with the exception of Denmark (see Recital 31).[3]

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[2] Act No. 91/2012 Coll., on Private International Law, replaced the former Act No. 97/1963 Coll. as of 1 January 2014.

[3] Recital 31: Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation and is therefore not bound by it nor subject to its application.

As regards temporal scope, the Regulation in principle applies as of 1 March 2005 (see Article 72). As for the personal scope, the Regulation does not provide for any definition of terms such as "marriage" or "spouse" (see chapter 3.2. below), the latter being used in the text in a strictly gender-neutral way. In contrast to its predecessors, the Convention of 1998 and Brussels II Regulation No 1347/2000, "in the case of Brussels IIa Regulation the respondent is not required to have his/her domicile in a Member State, nor is there any other rule which defines the personal scope of application".[4]

Even though the rules in Article 3 (general jurisdiction) provide for a large array of jurisdictions (there are seven different connecting factors), the Regulation does not formally allow for a choice of court. The introduction of a choice of court provision was considered in the preliminary discussions on the recast of the Brussels IIa Regulation. The proposal of the European Commission as well as the final text of the Regulation adopted in 2019 retained, however, the *status quo* as regards jurisdiction in matrimonial matters and concentrated mainly on parental responsibility.[5] General jurisdiction rules are based primarily on habitual residence. Alternative connecting factors in Article 3 para. 1(a) are delimited as follows: i) common habitual residence of the spouses, ii) last common habitual residence if one spouse still resides there, iii) habitual residence of the respondent, iv) in the case of a joint application the habitual residence of either of the spouses, v) habitual residence of the applicant if he or she resided there for at least a year immediately before the application was made, or vi) habitual residence of the applicant if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there. This range is completed in Article 3 para. 1(b) by a connecting factor of a common nationality of the spouses or, in the case of the United Kingdom and Ireland, of their common "domicile". The rules on the jurisdiction for counterclaims (Article 4) and for the conversion of legal separation into divorce (Article 5) are only rarely applied in the Czech context. On the other hand, provisions on the exclusive nature of jurisdiction (Article 6) and on residual jurisdiction (Article 7) are of significant importance when one has to consider the relationship with national competence rules (see further).

2.2 PRIVATE INTERNATIONAL LAW ACT (PILA)

Private International Law Act No. 91/2012 (hereinafter referred to as "PILA") replaced the former act governing private international law as of 1 January 2014 together with the new Civil Code[6] and Business Corporation Act.[7] Although the relationship between national competence rules and the rules on jurisdiction in the Brussels IIa Regulation were not altered, the content of the act changed considerably. The structure of the rules on jurisdiction in the new PILA are strongly influenced by the

4 MANKOWSKI, M. *Brussels IIbis Regulation*. Munich: Sellier, 2012, p. 89.

5 Recast of the Brussel IIa Regulation (Regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction) will be applicable as of August 1, 2022.

6 Act No. 89/2012 Coll., Civil Code.

7 Act No. 90/2012 Coll., on Commercial Companies and Cooperatives (Business Corporation Act).

Brussels IIa Regulation and by the fact that the latter is applicable even in cases with third States (i.e., States that are not members of the European Union). National competence rules can be invoked only if the Regulation allows for it by way of the Article 7 on residual jurisdiction.[8]

In this context, it is worth mentioning the importance of the Court of Justice of the European Union (hereinafter referred to as "CJEU" or "ECJ") case-law on residual jurisdiction embodied in Article 7 of the Brussels IIa Regulation. In its judgment C-68/07[9] of 29 November 2007, Kerstin Sundelind Lopez v. Miguel Enrique Lopez Lizazo, the ECJ ruled that "Articles 6 and 7 of the Brussels IIa Regulation are to be interpreted as meaning that where, in divorce proceedings, a respondent is not habitually resident in a Member State and is not a national of a Member State, the courts of a Member State cannot base their jurisdiction to hear the petition on their national law, if the courts of another Member State have jurisdiction under Article 3 of that regulation." If we observe the ruling through the Czech legal framework, we can draw the conclusion that the national rules on jurisdiction in PILA are applicable if, and only if, there is no competent court in any Member State of the EU based on Articles 3 to 6 of the Brussels IIa Regulation.

The substantive scope of PILA rules coincides with the substantive scope of the Brussels IIa Regulation as it is applicable not only to establish the jurisdiction for proceedings concerning the dissolution of a marriage (divorce) but also for the annulment of marriage and the designation of whether or not a marriage has been legally concluded. Concerning personal scope, the PILA provides for a definition of neither "marriage" nor "spouse". In contrast to the Brussels IIa Regulation, PILA comprises conflict-of-law rules[10] to determine the applicable material law.

PILA establishes the competence of Czech courts for divorce proceedings in Section 47. The structure of the provision is twofold. The first part governs situations when at least one spouse has Czech nationality or when the defendant has habitual residence in the Czech Republic. The second part covers situations where both spouses are foreign nationals and the defendant has neither habitual residence in any EU Member State nor

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8 Article 7 Residual jurisdiction.
1. Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that State.
2. As against a respondent who is not habitually resident and is not either a national of a Member State or, in the case of the United Kingdom and Ireland, does not have his "domicile" within the territory of one of the latter Member States, any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State.

9 Before their separation, Mrs. Sundelind Lopez (Swedish national) and Mr. Lopez Lizazo (Cuban national) had their common habitual residence in France. Mr. Lopez Lizazo then left to live in Cuba. Mrs. Sundelind Lopez filed for divorce in Sweden. It was not disputed that the French courts had jurisdiction in accordance with Article 3/1a) of the Brussels IIa Regulation. The CJEU (ECJ) was asked whether the courts of a Member State could base their jurisdiction on national law "where the respondent in a case concerning divorce is neither resident in a Member State nor a citizen of a Member State, even though a court in another Member State may have jurisdiction by application of one of the rules on jurisdiction set out in Article 3 of the Regulation".

10 The Czech Republic is not bound by the Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III Regulation).

the nationality of any EU Member State. The first situation allows any Czech court to establish its jurisdiction under the condition that an international treaty or a directly applicable EU regulation (i.e., the Brussels IIa Regulation) does not state otherwise. Establishing the jurisdiction of a Czech court if both spouses are foreigners and the defendant is neither the national of nor habitually resident in any EU Member State is possible only if i) both spouses had their habitual residence in the Czech Republic and the applicant still has his/her habitual residence in the Czech Republic,[11] or ii) the applicant has his/her habitual residence in the Czech Republic and the second spouse has agreed with the motion, or iii) the applicant has his/her habitual residence in the Czech Republic and has had this residence for a period of at least one year directly prior to the submission of the motion. The choice of court is not possible under PILA rules.

2.3 BILATERAL INTERNATIONAL AGREEMENTS

As mentioned above, before the Brussels IIa Regulation became applicable in the Czech Republic, courts applied rules on jurisdiction contained either in the Private International Law Act or in bilateral agreements. With some exceptions, these bilateral agreements were concluded mainly in the 70's and 80's, especially with countries of the former socialistic bloc,[12] and they usually follow a similar pattern. These complex legal instruments may cover, among other issues, cross-border judicial cooperation in civil and criminal matters (including rules on the service of documents, taking of evidence, legalization of public documents etc.) as well as private and procedural international law issues such as jurisdiction, applicable law, and the recognition and enforcement of judicial decisions. The bilateral agreements are in principle still in force, however, between the EU Member States they have been in most parts superseded by EU legislation.

The typical structure of divorce rules in a bilateral agreement comprises both conflict-of-law rules on applicable law and jurisdiction, the latter derived either from the former or formulated independently. In all cases, the rules on jurisdiction are based on the nationality or residence (not usually on the *habitual* residence) of one or both of the parties. As the agreements regulate cooperation and legal issues between the two contracting States it is obvious that the concept of nationality and residence takes into account the nationality and residence of one or the other contracting State only. This attitude is easily compatible with the national PILA rules over which the agreement takes precedence. It could, however, be more intricate to accommodate with a multilateral instrument such as the Brussels IIa Regulation (see below).

The PILA rules as described above clearly define their subordination to the EU Regulation or international agreements. On the other hand, the relationship between bilateral international agreements with third States and the Brussels IIa Regulation is

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[11] It might seem that there is no difference between this provision and the second item in Article 3 para. 1(a) of the Brussels IIa Regulation. The PILA provision, however, does not operate with the "last" habitual residence, therefore the extent of such a provision is broader.

[12] The Czech Republic (the former Czechoslovak Socialist Republic) concludes bilateral agreements for example with Romania, Hungary, Poland, ex-Yugoslavia, ex-Soviet Union etc.

not delimited explicitly. The Regulation includes provisions that govern the relationship with international agreements (including bilateral) between Member States. According to Article 59, the Regulation shall for Member States of the EU supersede conventions existing at the time of entry into force of the Regulation, which have been concluded between two or more Member States and relate to matters governed by the Regulation. There is only one exception for Nordic countries.[13]

Even though the Brussels IIa Regulation does not have a specific provision on a relationship with existing international instruments concluded between a Member State and a third State, one can lean on the rules incorporated into more recent legislative acts such as the Maintenance Regulation[14] or the Regulation on succession.[15] The general principle can be described as follows: The EU Regulation shall not affect the application of bilateral or multilateral conventions and agreements to which one or more Member States are party at the time of adoption of the Regulation and which concern matters governed by the Regulation. Notwithstanding this principle, the EU Regulation shall, in relations between Member States, take precedence over the conventions and agreements which concern matters governed by the Regulation and to which Member States are party.[16] The bilateral (or multilateral) conventions or agreements that are still applicable vis-à-vis third States have to be in line with the obligations of Member States under the Article 351 of the Treaty on the functioning of the EU[17] (former Article 307 of the Treaty), especially to take all appropriate steps to eliminate possible incompatibilities.

Similarly to the Brussels IIa Regulation or PILA, bilateral agreements do not provide definitions of "marriage", "divorce", or "spouse". The temporal scope has to be analysed for each agreement separately. Due to the limited external competences of EU Member States, no bilateral agreement has been concluded or ratified since the accession of the Czech Republic to the EU.

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13 Finland and Sweden have the option of declaring that the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption, and guardianship, together with the Final Protocol thereto, will apply, in whole or in part, in their mutual relations, in place of the rules of the Brussels IIa Regulation (see Article 59(2)).

14 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

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

16 Conf. Article 69 of the Maintenance Regulation or Article 75 of the Regulation on succession.

17 Treaty on the Functioning of the European Union.
Article 351 (ex Article 307 TEC)
The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.
To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.
In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

2.4 THE INTERPLAY OF THE THREE LEGAL SOURCES FOR JURISDICTION IN DIVORCE PROCEEDINGS

Let us assume two situations before the Czech courts: First, the divorce of a mixed marriage of a Czech national and a German national, and second, the divorce of a mixed marriage of a Czech national and a Russian national. In the first case, the Czech court will ponder its jurisdiction automatically on the basis of the Brussels IIa Regulation, in the second case it is supposed to apply the bilateral agreement between the Czech Republic and the Russian Federation.[18] This interpretation is perfectly straightforward if the (habitual) residence of the spouses "copies" the nationality. In other words, if in the first case the spouses have their habitual residence in (a) Member State(s) of the EU and in the second case their residence lies within one or both contracting parties of the agreement (the Czech Republic and/or the Russian Federation). What happens if the German citizen has his/her habitual residence in a third State, for instance in Russia? And, how will the situation of the second case be altered if the Russian citizen has his/her habitual residence in an EU Member State, for instance Germany? On which legal instruments will the Czech court base its consideration whether it is competent to decide on the case?

It seems that the first modified situation (a couple of Czech-German citizens, the latter having habitual residence in Russia) has a clear solution drawn from the rule in Article 6 (b) of the Brussels IIa Regulation (exclusive nature of jurisdiction). A spouse who is habitually resident in the territory of a Member State, or is a national of a Member State, may be sued in another Member State only in accordance with Articles 3, 4 and 5. It is questionable if the rules for residual jurisdiction in Article 7 (1) apply in the situation when no court of a Member State has jurisdiction (for instance because both the spouses have their habitual residence in Russia). Since the provision of Article 7 (1) refers only to Articles 3, 4 and 5, it is not clear how to interpret the rule on the exclusive nature of jurisdiction in Article 6. In other words, if no court of any Member State has jurisdiction based on Articles 3 to 5 of the Regulation, can a claim against a German (or other EU) citizen be brought before a Czech court on the basis of national rules on jurisdiction by way of the application of provisions on residual jurisdiction in Article 7?

Although the answer is not clear from the linguistic interpretation of the text of the Regulation, the above-mentioned CJEU case-law (C-68/07) seems to allow for an affirmative conclusion, which is in line with the logic of Article 7 as well.

In the second modified case (a couple of Czech and Russian citizens, the latter having habitual residence in Germany) the situation seems rather complex as well. It has already been mentioned that there is a bilateral agreement between the Czech Republic and Russia, which provides rules on jurisdiction for a divorce. The question is whether we are still dealing with a bilateral Czech-Russian case. Or, due to the habitual residence of the Russian defendant in Germany, should the court omit the cross-border element based on nationality, give priority to the habitual residence of the defendant within the

[18] International agreement between the Czechoslovak Socialist Republic and the Soviet Union on legal aid in civil, family and criminal matters, No. 95/1983 Coll.

EU, consider it as a purely EU case, and establish or decline the jurisdiction only on the basis of the Brussels IIa Regulation?

The author of this article tends to answer the last question affirmatively and perceive the case primarily from the intra-EU perspective, even though the Brussels IIa Regulation itself and the subsequent jurisprudence of the CJEU (see next chapter) do not prioritize between nationality and habitual residence as connecting factors. It is possible to add another supporting argument: although the recognition of judgements is not further analysed in this text, it seems rather obvious that even for a third State national (a Russian citizen) habitually resident in a Member State (Germany) it may be more favourable to seek there the recognition of a divorce decision rendered and certified in compliance with the EU Regulation.

3. SELECTED ISSUES INHERENT IN RULES ON JURISDICTION IN THE BRUSSELS IIA REGULATION

3.1 INTERNATIONAL ELEMENT IN DIVORCE PROCEEDINGS: NATIONALITY AND (HABITUAL) RESIDENCE

Previous practical examples demonstrate that a case can contain more than one international element, the most important in matrimonial matters being the nationality and/or (habitual) residence of the spouses. "Habitual residence" is a connecting factor originally developed by the Hague Conference on Private International Law and systematically used in EU legislation. Contrary to the connecting factor of "nationality", it guarantees proximity to the life circumstances of the person concerned. Unfortunately, defining habitual residence of a person can be more cumbersome than determining his/her nationality. Neither the modern Hague family law conventions, which employ the habitual residence as a connecting factor, nor EU regulations define it.[19]

PILA in its Section 47 bases the rules on jurisdiction on habitual residence and nationality. In bilateral agreements, however, the main connecting factors are nationality and (mere) residence. In all legal sources the (habitual) residence can be further qualified (common / last habitual residence, habitual residence for at least a year immediately before the application was made) or even combined with nationality (e.g., jurisdiction based on the habitual residence of the applicant if he/she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there[20]).

The CJEU, safeguarding the autonomous interpretation of the EU law, has in past years developed a jurisprudence concerning the concept of habitual residence, mainly for the cases of parental responsibility. In matrimonial matters, one of the very first decisions was rendered in the case C-168/08 Laslo Hadadi (Hadady) v. Csilla Marta Mesko

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[19] For further reading: PFEIFFER, M. *Kritérium obvyklého pobytu v mezinárodním právu soukromém.* Praha: Leges, 2013.

[20] Conf. Article 3 para. 1(a) sixth item of the Brussels IIa Regulation.

(Judgment of 16 July 2009).[21] The CJEU ruled that "Where the court of the Member State addressed must verify, […], whether the court of the Member State of origin of a judgment would have had jurisdiction under Article 3(1)(b) of that regulation, the latter provision precludes the court of the Member State addressed from regarding spouses who each hold the nationality both of that State and of the Member State of origin as nationals only of the Member State addressed. That court must, on the contrary, take into account the fact that the spouses also hold the nationality of the Member State of origin and that, therefore, the courts of the latter could have had jurisdiction to hear the case." The CJEU further clarified that spouses who both possess the nationalities of the same two Member States may seize the court of the Member State of their choice.

The case-law is relevant from two perspectives. First, it gives a clear interpretation of the rules on jurisdiction in Article 3 of the Brussels IIa Regulation as to the equality of all connecting factors and the practical claimant's autonomy to decide which court to seize if the courts of more than one Member State are competent, despite the absence of any formal rules on choice of court. Second, it may collide with national rules on multiple nationality (citizenship).

PILA provides for a special rule for multiple or uncertain citizenship in its Section 28: "If an individual is a citizen of the Czech Republic in the appropriate period and if another State also considers the individual to be its citizen, the decisive citizenship will be that of the Czech Republic. If an individual is simultaneously a citizen of several foreign States, the appropriate citizenship will be decided according to the last acquired citizenship, provided that the individual's living situation does not significantly favour the citizenship of another State of which the individual is also a citizen. The citizenship of any such State will be decisive in such a case." Even though the attribution of citizenship and its conditions fall within the competence of the respective Member State, the interpretation of multiple citizenship (nationality) must be in conformity with EU law and CJEU jurisprudence. The author of this article concludes, therefore, that PILA rules cannot hamper the possibility of a party to the proceedings having more than one nationality to base the jurisdiction on either of them.

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[21] Two Hungarian nationals who married in Hungary in 1979 emigrated to France in 1980, where they subsequently resided. In 1985 they became naturalised French citizens. Mr. Hadadi instituted divorce proceedings on 23 February 2003 in Hungary, and Mrs. Hadadi instituted divorce proceedings in France on 19 February 2003. After the accession of Hungary to the EU on the 1st of May 2004, the Hungarian court granted the divorce on 4 May 2004. The French court dealing with divorce proceedings declared the proceedings inadmissible. Upon appeal by the (ex-)wife the Cour d'appel de Paris held that the Hungarian divorce decision could not be recognised in France. Mr. Hadadi appealed on a point of law to the Cour de cassation, reasoning that the Court of Appeal had rejected the recognition of the Hungarian decision solely on the basis of Article 3(1) a) of the Brussels IIa Regulation without having examined Article 3(1) b) of the Regulation. The French Court of Cassation referred the following questions to the CJEU: "1. Is Article 3(1)(b) [of Regulation No 2201/2003] to be interpreted as meaning that, in a situation where the spouses hold both the nationality of the State of the court seised and the nationality of another Member State of the European Union, the nationality of the State of the court seised must prevail? 2. If the answer to Question 1 is in the negative, is that provision to be interpreted as referring, in a situation where the spouses each hold dual nationality of the same two Member States, to the more effective of the two nationalities? 3. If the answer to Question 2 is in the negative, should it therefore be considered that that provision offers the spouses an additional option, allowing those spouses the choice of seising the courts of either of the two States of which they both hold the nationality?"

The Brussels IIa Regulation applies "in matters relating to […] divorce, legal separation or marriage annulment" but it does not contain any definition of "marriage" or of other terms used in Article 1(a). The situation has remained unchanged even after the adoption of several new EU regulations in the field of family law. Neither the recast of Brussels IIa Regulation nor the new Regulation on matrimonial property regimes[22] contain any definition of "a marriage". There was an attempt to produce a definition of a "registered partnership" in the parallel Regulation on the property consequences of registered partnerships,[23] although the very broad wording of the definition does not provide sufficient guidance for interpretation. In other words, the provision is completely silent as to whether partnerships covered by the Regulation concern exclusively same-sex couples or whether the scope can be extended to different-sex (non-marital) unions, too.[24]

The cardinal question in this context seems to be whether the rules on jurisdiction for divorce proceedings in the Brussels IIa Regulation apply equally to same-sex marriages bearing in mind that same-sex marriages only exist in a limited number of EU Member States (even though this number is growing) while other EU Member States allow only for same-sex registered partnerships. There is still a third category of EU Member States where same-sex partners are denied the opportunity to formalise their relationship in either way. So far, there is no common approach within the EU to the question of whether same-sex partners should be able to marry and whether the term marriage could include same-sex marriage.[25] Some authors are of the opinion that when it comes to the term marriage in the Brussels IIa Regulation, an autonomous interpretation is required, i.e., the applicability of the Regulation to same-sex marriage cannot depend on the national law notion of the term marriage. Nonetheless, the different approaches to same-sex marriage in the EU play a role in the arguments exchanged between those who favour the applicability of the Regulation to same-sex marriage and those who argue against it.[26] Despite of the requirement for uniform interpretation, concrete experience seems to

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22 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

23 Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

24 See Article 3 (definitions): 'registered partnership' means the regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation.

25 For further reading on the legal situation of same-sex couples in Europe: BOELE-WOELKI, K. – FUCHS, A. *Same-Sex Relationships and Beyond, Gender Matters in the EU*. 3rd edition. Cambridge: Intersentia, 2017, or FUCHS, A. Registered partnership, same-sex marriage and children: crossing borders. *Rivista di diritto internazionale private e processuale*, 2016, No. 2.

26 Conf. Hirsch Juliane in Better Applying the EU Regulations on Family and Succession Law (ERA, Case study on divorce and maintenance obligations): "Those opposing the applicability of the Brussels IIa Regulation to same-sex marriage refer, inter alia, to the fact that at the time the Regulation was drafted only one EU Member State (the Netherlands) allowed same-sex marriage and that therefore clearly it was not intended that Brussels IIa would include same-sex marriage. Others argue that even if Brussels IIa was drafted at a time when same-sex marriage was not yet widely permitted, this is no argument against

lead to the conclusion that the jurisdictions of each Member State address the absence of the definition of marriage through their national substantive law or, through the relevant applicable law.

Czech material law[27] provides the possibility to conclude a same-sex registered partnership, while same-sex marriages are neither permitted nor recognised (in principle). National material law is reflected in PILA in specific provisions on "the registered partnerships and similar relationships" (Section 67). According to PILA, Czech courts are entitled to rule on the annulment, invalidity, and non-existence of a registered partnership or a similar relationship if the registered partnership has been concluded in the Czech Republic or at least one of the partners is a citizen of the Czech Republic and has his or her habitual residence in the Czech Republic. Registered partnerships and similar relationships and their effects, the capacity to conclude them and their annulment, invalidity, and nonexistence are subject to the law of the State in which the registered partnership or similar relationship has been or was concluded. The same law also governs the regulation of the personal and property relations of the partners.

The question arises when a same-sex couple concludes a "marriage" in a foreign country that permits this kind of formalised union, and then one or both of the spouses seize a Czech court with a "divorce" motion. The court has to decide whether there is a marriage or a registered partnership or no formal bond at all. The situation might be even more ambiguous if the same-sex marriage concluded abroad was subsequently adapted and registered in the Czech Republic by the civil registry office as a "registered partnership". Presumably, there are two possible ways how to deal with such a case, neither of them being without difficulties.

One option is to treat the case as a marriage. This approach means that the court should give effects to the same-sex marriage concluded abroad and overcome the question of public policy. The public policy clause under PILA in Section 4 stipulates that "provisions of any foreign applicable law which is supposed to be used in accordance with the provisions of this act cannot be applied, if the effects of such application would clearly contravene public order. Likewise, it is not possible on the same grounds to recognise any foreign judgements, foreign court settlements, foreign notary or other public documents or foreign arbitration judgements or to execute a judicial cooperation request from abroad or to recognise any legal relations or any facts which have arisen abroad or according to a foreign law". In a very informal way, the author of this article inquired a group of Czech judges in order to establish whether the public policy clause could present an insurmountable obstacle to the recognition of the same-sex marriage concluded abroad simply for the sake of the admissibility of the divorce proceedings. Rather surprisingly, many voices claimed that there is no more room for the public poli-

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its application to same-sex marriage today. The Regulation does not define 'marriage' and thus does not expressly exclude same-sex marriage. Furthermore, the rules of EU law must today be applied in a way that is compatible with the rights enshrined in the EU Charter of Fundamental Rights, and the Charter expressly prohibits any discrimination based on grounds of sex or sexual orientation (Article 21 (1) of the Charter). As said, the issue is not yet resolved, the Court of Justice of the EU (CJEU) has not yet had occasion to decide the matter and we might, for the time being, see different interpretations of the term 'marriage' in the Brussels IIa Regulation across Europe."

27 Act on the Registered Partnership, No. 115/2006 Coll.

cy reservation as regards acceptance or even recognition of a same-sex marriage. If this approach prevails in the future, courts will establish their jurisdiction on the basis of the Brussels IIa Regulation similarly to the cases of different-sex marriages.

The other possible approach is to adapt the same-sex marriage to the circumstances of national material and administrative law and to deal with it as with a registered partnership. Even this option, however, has several hidden drawbacks. In such a case, the jurisdiction has to be established on the basis of the PILA rules. The first obstacle may be the necessary connection to the Czech territory as there is the condition for the partnership to be registered in the Czech Republic or the condition that at least one of the partners has Czech nationality and has habitual residence in the Czech Republic. Nonetheless, trickier is the interconnection between the jurisdiction and the conflict of laws rules. According to PILA, the law applicable for the dissolution of a registered partnership is the law of the State where the partnership was concluded. If the union was concluded under a foreign law as a "marriage", how would the Czech court apply the same material law in the proceedings for the dissolution of a "registered partnership"? Therefore, even this approach leads to similar difficulties as the first one, although at a later stage of the considerations.

3.3 LIS PENDENS

The analysis of the rules on jurisdiction would not be complete without a reflexion on the *lis pendens*. Each of the above-mentioned sources of law (the Brussels IIa Regulation, bilateral agreements, PILA) deals with this issue in a different way and sets up a specific set of rules.

The Brussels IIa Regulation provides for a rigorous system in Article 19 (*Lis pendens* and dependent actions) strictly prioritising the court first seized. "Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established." Once the jurisdiction of the court first seized is established, the court second seized shall automatically decline jurisdiction in favour of that court. This rule is similar to the provision enshrined in several bilateral agreements on legal aid, for instance in Article 18 of the agreement in force between the Czech Republic and the Russian Federation. Where proceedings on the same matter between the same participants have been commenced before courts in both contracting States and the jurisdiction is either based on the agreement or on the national rules of the contracting parties for matters that are not covered by the agreement, the court that was seized later shall stay the proceedings. Although the provisions seem perfectly straightforward, the practice may face some difficulties when establishing which court was seized first and when communicating the information to the court second seized.

The CJEU rendered a judgment of 5 October 2015 in the case A v B (C-489/14)[28] where it ruled that in the case of judicial separation and divorce proceedings brought

[28] French spouses, parents of two children, residing for years in the UK, separated in 2010. The husband brought proceedings for judicial separation in France, the wife filed a petition for divorce in the UK.

between the same parties before the courts of two Member States, Article 19(1) and (3) of the Brussels IIa Regulation, "[…] must be interpreted as meaning that, in a situation such as that at issue in the main proceedings in which the proceedings before the court first seised in the first Member State expired after the second court in the second Member State was seised, the criteria for lis pendens are no longer fulfilled and, therefore, the jurisdiction of the court first seised must be regarded as not being established". In the case C-173/16 M.H. v. M.H. the CJEU provided the interpretation of Article 16[29] and the moment when the proceeding are initiated if different procedural rules apply in the two respective Member States where courts have been seized with the similar case. According to the order rendered on 22 June 2016 Article 16(1)(a) of the Brussels IIa Regulation must be interpreted to the effect "that the 'time when the document instituting the proceedings or an equivalent document is lodged with the court', within the meaning of that provision, is the time when that document is lodged with the court concerned, even if under national law lodging that document does not of itself immediately initiate proceedings".

The rules on *lis pendens* in PILA are in contrast with the Brussels IIa Regulation and the general clause in bilateral agreements. PILA in Section 8(2) provides the Czech court later seized with the option (not the obligation) to suspend the proceedings if, and only if, several conditions are met. It explicitly says that proceedings initiated in a different State will not prevent the commencement of proceedings pertaining to the same matter between the same participants before a Czech court. If the proceedings in the Czech court commence later than the proceedings held in another State, the Czech court "may" suspend the proceedings in justified cases, if it can be expected that the foreign authority's judgement will be recognised in the Czech Republic. Particular attention should be paid to the fact that according to PILA the condition of reciprocity regarding the recognition of the respective foreign judgment is a *conditio sine qua non* for the application of the *lis pendens* clause.

4. CONCLUSION

Family law usually reflects cultural traditions of the country. Traditions, historical context, geographical situation and other specificities may have an impact on the national material and procedural laws as well as on the private international law rules of the respective country. They can equally influence judges and other legal practitioners when interpreting and applying national and international rules on jurisdiction and applicable law in their everyday practice. National legislation and jurisprudence

[29] Article 16 (Seising of a Court)
1. A court shall be deemed to be seised:
(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent; or
(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

proportionately affect the positions and mandate of a State when negotiating new legal instruments at the international level (European Union, Hague Conference on Private International Law etc.). As international family law is an area of law where achieving a consensus proves itself to be challenging, the European Union has repeatedly had recourse to alternative solutions in the form of "enhanced cooperation".[30]

When a national court is seized with a cross-border divorce case, the first step is to establish or decline the jurisdiction. In purely intra-EU cases, the Brussels IIa Regulation is the one and only legal instrument that comes into play. If the case involves a third State, the jurisdiction can be based on rules contained in a specific bilateral international agreement or, if the provision for residual jurisdiction in the Brussels IIa Regulation permits, on the rules in the national legislation on private international law. Complex situations can occur, especially when the case presents several international elements, some of them related to the EU Member State(s), and others related to the third State(s). The jurisprudence of the CJEU developed to interpret the Brussels IIa Regulation is shedding light on some provisions thereof, although there are still several questions that waiting to be answered, among them the autonomous EU interpretation of "marriage" in the context of the scope of the Regulation.

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[30] "Enhanced cooperation" is a procedure where a specific number of EU member states are allowed to establish advanced integration or cooperation in an area within EU structures but without the other members being directly involved. This procedure has been used so far in the fields of divorce law, EU patents, property regimes of international couples, and in the European Public Prosecutor Office.

APPLICABLE LAW IN INTERNATIONAL INSOLVENCY PROCEEDINGS (FOCUSED ON THE RELATION OF ARTICLES 3 AND 7 OF THE INSOLVENCY REGULATION)

JAN BRODEC

Abstract: This article deals with the legal regulation governing the ascertaining of applicable law under the Insolvency Regulation while focusing on the provisions of Articles 3 and 7 and classifying this legal regulation from the perspective of private international law. The part dedicated to the provisions of Article 3 as a norm of international insolvency law introduces the concept of COMI – a basis to determine the jurisdiction of the court that should commence insolvency proceedings. Furthermore, the essential case-law of the CJEU and Czech courts addressing COMI is presented. Regarding Article 7, an opinion is expressed that the legal regulation contained in Article 7 constitutes a conflict-of-laws rule for which the applicable law is determined by the location of the court that opened the given insolvency proceedings. At this point, a fundamental connection is seen between the legal regulation contained in Articles 7 and Article 3. In addition, an opinion is expressed that the legal regulation contained in the Insolvency Regulation leads to the unity of international court jurisdiction and the determination of applicable law, which can be seen as the current trend in European private international law.

Keywords: COMI; applicable law; international insolvency law; insolvency regulation; international jurisdiction

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1. INTRODUCTION

The insolvency laws of the individual Member States differ from each other, and thus the issue of the unambiguous determination of applicable law governing insolvency proceedings is of paramount importance, primarily from the perspective of the parties (even potential parties) to the proceedings. The need for the unambiguous determination of applicable law follows from the principle of foreseeability.[1] In this respect the importance of the foreseeability of the law applicable to insolvency proceedings was expressed also by Advocate General F. G. Jacobs in his opinion in the case

[1] In connection with the applicable law provision, the foreseeability principle was mentioned also in CJEU 16 April 2015, Hermann Lutz v Elke Bäuerle, Case C-557/13.

Eurofood.[2] In agreement with the Virgos-Schmit Report,[3] he concluded that insolvency proceedings pose a foreseeable risk and that "it is important that international jurisdiction (which entails the application of the insolvency laws of a given State) be based on a place known to the debtor's potential creditors, thus enabling the legal risks which would have to be assumed in the case of insolvency to be calculated."[4,5]

The principle of foreseeability goes hand in hand with the principle of efficiency, which is reflected in Recital 3[6] and Recital 8[7] of the Insolvency Regulation,[8] as is shown later in this article.

It is thus apparent that it is the setting of clear and foreseeable rules for the determination of international jurisdiction and applicable law that should facilitate the efficient conduct of international insolvency proceedings.

The main rule for determining the applicable law is contained in Article 7 of the Insolvency Regulation. Articles 8 to 18 of the Insolvency Regulation set out exceptions to the general rule of Article 7. A common aspect of all these exceptions is that they regulate situations in which it is necessary to modify the *lex fori concursus* rule in a certain manner.[9]

The rule set in Article 7 is closely connected to Article 3 of the Insolvency Regulation, which defines COMI and sets up rule for determining the jurisdiction of the court that shall open the insolvency proceedings.

This article aims to analyse the provisions of Article 7 and Article 3 (focusing on the concept of COMI) in terms of their content and relationship and to classify these rules in the context of private international law.

2. CONFLICT-OF-LAWS RULES VS. JURISDICTIONAL RULES

The purpose of the conflict-of-laws rules is to determine the applicable law for a given legal relation with an international aspect. A conflict-of-laws rule consists of two parts, namely the scope of application and the determination of applicable law. The scope of application of a conflict-of-laws rule is defined by a sphere of legal rela-

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2 Opinion of Advocate General Jacobs, delivered on 27 September 2005, Eurofood IFSC Ltd., Case C-341/04 (hereinafter referred to as "Opinion Eurofood").

3 VIRGOS, M. – SCHMIT, E. *Report on the Convention of Insolvency Proceedings.* European Union, the Council. Brussels, 3 May 1996, 6500/96.

4 Opinion Eurofood, point 122, Virgos-Schmit Report, Article 75.

5 BRODEC, J. Determination of Applicable Law in International Insolvency Proceedings. In: QUEIROLO, I. – DOMINELLI, S. *European and national perspectives on the application of the European insolvency regulation.* Rome: Aracne editrice, 2017, p. 85.

6 Recital 3 of the Insolvency Regulation: "The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively."

7 Recital 8 of the Insolvency Regulation: "In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Union measure which is binding and directly applicable in Member States."

8 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

9 BRODEC, Determination of Applicable Law in International Insolvency Proceedings, p. 90.

tions or questions of law (e.g., contractual obligations, inheritance, effects of insolvency proceedings).[10] The part referred to as the determination of applicable law includes a reference to the relevant law made by means of a connecting factor.[11]

Jurisdictional rules serve for the determination of a state whose courts or other authorities have international jurisdiction to decide defined matters of private law. However, it is impossible to speak of procedural conflict-of-laws rules in general, as at least jurisdictional rules of a national origin do not address the transfer of matters to the jurisdiction of a foreign court, but only define the jurisdiction of the state's own courts.[12] But a conflict of different state jurisdictions and the determination of a state, whose courts or other authorities have international jurisdiction to decide certain defined matters of private law, are covered by jurisdictional rules contained in international agreements or directly applicable EU legislation.[13] This determination is made with the use of certain criteria.

The applicable law and jurisdiction can also thus be determined by directly applicable EU legislation including the Insolvency Regulation with the use of certain criteria that are referred to as connecting factors in conflict-of-laws rules or as jurisdictional criteria in jurisdictional rules. Typical connecting factors include, for example, parties' choice and habitual residence[14] and these can be frequently found as determining criteria also in jurisdictional rules. The seat of the court as a connecting factor is also worth paying attention,[15] because it clearly unifies jurisdiction and applicable law.

This approach is not incidental, as in European private international law a general tendency can be observed towards the unity of the jurisdiction of the court and applicable law. This unity is a manifestation of the principle of efficiency thanks to which proceedings are not protracted due to the content of foreign law being ascertained, consequently costs are not incurred from such ascertaining.[16] Examples of legal regulations that are based on the unity of jurisdiction and applicable law include the Succession Regulation[17] with the uniform criterion being "the habitual residence of the deceased at

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[10] PAUKNEROVÁ, M. Kolizní norma. In: KUČERA, Z. – PAUKNEROVÁ, M. – RŮŽIČKA, K. a kol. *Mezinárodní právo soukromé.* 8. vydání. Plzeň – Brno: Vydavatelství a nakladatelství Aleš Čeněk, s. r. o., 2015, p. 104.

[11] In addition to a standard conflict-of-laws rules with the above-defined structure there are also atypical conflict-of-laws rules such as the so-called dependent conflict-of-laws rules. A dependent conflict-of-laws rule alone does not lead to the determination of applicable law and, therefore, further conflict-of-laws rules need to be used. Cf. PAUKNEROVÁ, M. Třídění kolizních norem. In: KUČERA, Z. – PAUKNEROVÁ, M. – RŮŽIČKA, K. a kol. *Mezinárodní právo soukromé.* 8. vydání. Plzeň – Brno: Vydavatelství a nakladatelství Aleš Čeněk, s. r. o., 2015, p. 111.

[12] RŮŽIČKA, K. Pravomoc tuzemských soudů ve vztahu k zahraničí. In: KUČERA, Z. – PAUKNEROVÁ, M. – RŮŽIČKA, K. a kol. *Mezinárodní právo soukromé.* 8. vydání. Plzeň – Brno: Vydavatelství a nakladatelství Aleš Čeněk, s. r. o., 2015, p. 353.

[13] *Ibid*.

[14] PAUKNEROVÁ, M. Hraniční určovatelé. In: KUČERA, Z. – PAUKNEROVÁ, M. – RŮŽIČKA, K. a kol. *Mezinárodní právo soukromé.* 8. vydání. Plzeň – Brno: Vydavatelství a nakladatelství Aleš Čeněk, s. r. o., 2015, p. 118.

[15] *Ibid*.

[16] SCHWEMMER, S. *Anknüpfungsprinzipien im Europäischen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2018, pp. 135–136.

[17] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of

the time of death" or Regulations dealing with divorce issues (Brussels II bis and Rome III) with the uniform criterion of "the habitual residence of the spouses at the time the court is seized".[18]

For the sake of completeness, it should be mentioned that jurisdictional criteria or connecting factors found in directly applicable EU legislation need to be subjected to an autonomous interpretation that is independent from national laws.[19]

But one more key question arises from the examples of jurisdictional and conflict-of-laws criteria given above. Determination of the content of a given concept (such as habitual residence) is one thing, the time to which the consideration of whether factual circumstances possess the characteristics of the concept should be connected is another. Regarding the determination of international jurisdiction, it can be concluded that a general rule states that the decisive time is the point at which the proceedings are opened and/or when a motion to commence proceedings is lodged. For conflicts-of-laws rules the determination of the decisive time seems to be more diverse. It can be, e.g., the point at which a circumstance that is decisive for the creation of a legal relation occurred (conclusion of a contract) or also the point at which the court is seized (in the case of divorce under the Rome III Regulation). Thus, the Succession Regulation connects the jurisdictional criterion and connecting factor with the time of death of the deceased. The Brussels II bis and Rome III Regulations connect the jurisdictional criterion and connecting factor to the time the court is seized.

In the Insolvency Regulation, the aforementioned temporal aspect is crucial for the determination of COMI. We will address this topic in the next chapter.

3. COMI – PHENOMENON OF INTERNATIONAL INSOLVENCY LAW

COMI – the centre of a debtor's main interests – is a cornerstone concept in international insolvency law. On the EU level, two regulations relating to insolvency proceedings with an international aspect have been successively adopted, namely the Bankruptcy Regulation[20] and the Insolvency Regulation; both use the concept of COMI. In this chapter we will deal with the criteria to be used in determining a debtor's COMI and the importance of COMI for international insolvency proceedings.

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authentic instruments in matters of succession and on the creation of a European Certificate of Succession; Article 4 for jurisdiction and Article 21 for applicable law.

18 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, Article 3 for jurisdiction; Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, Article 8 for applicable law.

19 PAUKNEROVÁ, M. *Evropské mezinárodní právo soukromé*. 2. vydání. Praha: Nakladatelství C. H. Beck, 2013, p. 63–64; CJEU 14 October 1976, *LTU Luftransportunternehmen GmbH & Co. KG v. Eurocontrol*, Case 29–76.

20 Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.

3.1 WHERE IS A DEBTOR'S COMI SITUATED?

The concept of COMI is found in Article 3 of the Insolvency Regulation. Unlike in the Bankruptcy Regulation, the term "centre of the debtor's main interests" (COMI) is defined more precisely in the Insolvency Regulation, as Article 3(1) of the Insolvency Regulation was supplemented by the following sentence: "The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties."[21]

Furthermore, Article 3 of the Insolvency Regulation contains a rebuttable presumption that the COMI of a company or legal person is where their registered office is situated. In the case of an individual exercising an independent business or professional activity, COMI is presumed to be that individual's principal place of business, and in the case of any other individual, COMI is presumed to be the place of the individual's habitual residence. In order to restrict forum shopping, Article 3 of the Insolvency Regulation was expanded by a rule under which the presumption that COMI is the company's registered office or the principal place of business of an individual exercising an independent business or professional activity "shall only apply if (…) has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings."[22] In the case of any other individuals, that period is extended to six months.

As a result of the insufficient definition of COMI in the Bankruptcy Regulation, courts of the Member States interpreted the concept of COMI in various ways; in particular English courts preferred an interpretation that COMI is the place where the most important decisions relating to the debtor are adopted (*the mind-of-management-theory*) which did not take into account the ascertainability of COMI by third parties.[23]

However, such an approach was dismissed by the CJEU in its *Eurofood*[24] ruling in which the CJEU reached the conclusion that a subsidiary administers its interests as an independent entity in the Member State where its registered office is situated, and in a manner ascertainable by third parties, which cannot be overridden by the fact that the parent company is in a position that it can control the policy of the subsidiary (a 100% shareholding, power to appoint directors), if this is not ascertainable by third parties, and thus being in direct contradiction to Recital 13 of the Bankruptcy Regulation (currently Article 3 of the Insolvency Regulation).[25]

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21 In this manner Recital 13 of the Bankruptcy Regulation was included directly in Article 3 of the Insolvency Regulation.

22 Cf. Recital 5 of the Insolvency Regulation.

23 GRUBER, P. U. The International Jurisdiction for Main Proceedings: Practical Difficulties in the Application of Art. 3 InsRRecas. In: QUEIROLO, I. – DOMINELLI, S. *European and national perspectives on the application of the European insolvency regulation.* Rome: Aracne editrice, 2017, pp. 45–46. The author makes a reference to the judgment of the *High Court of Justice Leeds* no. 861-867/03 of 16 May 2003. See also VAVŘINA, J. COMI v judikatuře českých insolvenčních soudů a pohled do zahraničí. *Právní rozhledy*, 2012, No. 23–24, pp. 825–829.

24 CJEU 2 May 2006, Eurofood IFSC Ltd., Case C-341/04, (hereinafter referred to as "*Eurofood*"). Cf. GRUBER, *op. cit.*, pp. 45–46.

25 According to the Opinion Eurofood, point 123 : "strong evidence of overriding and ascertainable control by a parent company would be required."

Czech courts also take the approach of determining COMI by emphasising its ascertainability by third parties. In two major cases, namely Slovkord[26] and ECM,[27] the Regional Court in Brno and the Municipal Court in Prague respectively expressly declared that in considering the question of their international jurisdiction they relied on what is called the *head office functions test*[28] which is a test of management powers conducted on the basis of objective facts that are ascertainable by third parties. During this test, the courts assessed the following criteria: the place where commercial policy is determined and funds obtained, the place of negotiations with strategic partners, and the place of administration of personnel policy, bookkeeping and the administration of information systems. The courts furthermore examined a second condition for their jurisdiction, i.e., whether the Czech Republic as the place where they administer their interests on a regular basis is ascertainable also by third parties. When assessing this condition the courts took into account the following facts, for example: the address stated as the contact address for creditors, the address at which the company was contacted by business partners, and where negotiations with most creditors took place.[29]

In the *Interedil*[30] ruling the CJEU followed up the *Eurofood* approach and specified more precisely a procedure for determining COMI and handling defined rebuttable presumptions. In this ruling the CJEU defined the basic steps, namely (i) ascertaining whether the central administration of a company (decision-making by the bodies responsible for the management of and supervision over a company) takes place in the Member State where the company's registered office is situated, and (ii) whether this fact is ascertainable by third parties,[31] and if not, the court should proceed with (iii) the overall assessment of all relevant factors relating to the company including the place where the company pursuits an economic activity, the localisation of its assets etc. Also in the case of the third step, it is crucial for third parties to have the possibility to check that "the company's actual centre of management and supervision and of the management of its interests is located in that other Member State" – i.e., other than where the company's registered office is situated.[32]

In its judgments the CJEU emphasised that the concept of COMI is peculiar to the Bankruptcy and/or the Insolvency Regulation and that it therefore has a separate meaning and needs to be interpreted in a uniform way, independently of national legislation.[33]

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26 Ruling of the Regional Court in Brno no. KSBR 39 INS 2464/2009-A-12 of 14 May 2010.

27 Ruling of the Municipal Court in Prague no. MSPH 79 INS 6021/2011-A-24 of 24 May 2011.

28 In the past this test was adopted also in other EU Member States such as England (in the ruling of the High Court of Justice, Chancery Division Leeds District Registry in the case Daisytek - ISA Ltd. of 16 May 2003), Germany (in the ruling of the *Amtsgericht München* in the case Hettlage AG & Co KG, Innsbruck of 4 May 2004), and also France (in the judgment of the *Tribunal du commerce de Nanterre* of 15 June 2006 in the case Emtec Consumer Media Benelux Nv). See decision of the Municipal Court in Prague no. MSPH 79 INS 6021/2011-A-24 of 24 May 2011.

29 From the perspective of the value of the creditor's claims.

30 CJEU 20 October 2011, Interedil Srl, vin liquidation v. Fallimento Interedil Srl and Intesa Gestione Crediti SpA, Case C-396/09 (hereinafter referred to as "*Interedil*").

31 If this condition is met, COMI is situated in the Member State where the company's registered office is situated and this presumption set out in Article 3(1), second sentence of the Bankruptcy Regulation cannot be rebutted.

32 *Interedil* ruling, point 53.

33 *Eurofood* ruling, point 31; *Interedil* ruling, point 42.

This is why for its interpretation which should be independent, the specification of this concept in the Insolvency Regulation and the CJEU case-law is of crucial importance. The importance of the interpretation and application of this determinant is stressed by the fact that it is not a concept the fulfilment of which can be proven, e.g., by an entry in a register. Indeed, in the case of COMI the matter of fact is finally given priority, i.e., the place of the debtor's actual activity and the perception of the debtor's centre by the creditors. The approach taken is a compromise between legal certainty and flexibility in ascertaining COMI.

An important question the CJEU also dealt with is the time at which the debtor's COMI is determined.[34] In simple terms, COMI is ascertained at the time when the request to open insolvency proceedings was lodged, or, at the time when the debtor ceases to exist (i.e., the last place of the debtor's activity).[35] A transfer of COMI after the lodging of a request does not affect international jurisdiction and its transfer before a request is lodged also does not change anything regarding the manner of ascertaining COMI.[36]

3.2 THE IMPORTANCE OF COMI IN INTERNATIONAL INSOLVENCY LAW

We come across the concept of COMI only in international insolvency law, as it is not known to any other field relating to private international law. However, in international insolvency law COMI is of crucial importance for tackling several questions of law.

Article 3 of the Insolvency Regulation is primarily a norm of international procedural law, as COMI is a criterion for determining the international jurisdiction of a court for opening main insolvency proceedings.[37] The location of COMI also determines the scope of application of the Insolvency Regulation. If the debtor's COMI is located outside the EU, the insolvency proceedings are excluded from the applicability of the Insolvency Regulation.[38] But the importance of COMI extends even further. Another sphere of international insolvency law impacted by COMI is the subject of the next chapter.

4. ARTICLE 7 AND *LEX FORI CONCURSUS*

4.1 PRINCIPLE *LEX FORI CONCURSUS* AS A GENERAL RULE

The basic rule of the Insolvency Regulation relating to the determination of applicable law is set out in Article 7, pursuant to which the law applicable to insolvency proceedings and their effects (*lex fori concursus*) is the law of the Member State

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34 CJEU 17 January 2006, Susanne Staubitz-Schreiber, Case C-1/04 (hereinafter referred to as "*Staubitz*") and the *Interedil* ruling.

35 *Staubitz* ruling, point 29.

36 *Interedil* ruling, point 54 et seq.

37 The Insolvency Regulation establishes only international jurisdiction; however, territorial jurisdiction within a Member State should be established by the national law of the Member State concerned. See Recital 26 of the Insolvency Regulation.

38 Recital 25 of the Insolvency Regulation.

within whose territory such insolvency proceedings were commenced, unless otherwise provided by the Insolvency Regulation.

The main rule provided in Article 7 of the Insolvency Regulation is identical to the rule in Article 4 of the Bankruptcy Regulation. The differences between the Bankruptcy Regulation and the Insolvency Regulation regarding applicable law relate only to the exceptions, which are not the topic of this article.

The rule determines which law is to be applied to insolvency proceedings during their entire conduct, i.e., which law is to be applied in considering the conditions for the opening of those proceedings, their conduct, and their closure. Since this rule can be considered in EU law as a uniform rule for insolvency proceedings involving an international aspect, it can be derived, that this rule replaces within its scope of application national rules of private and procedural international laws of the individual EU Member States.

A reference pursuant to Article 7 is made to the national law of a particular EU Member State with the exception of rules of national private international law, thus renvoi is not permitted.[39]

Regarding the content of unifying provisions on conflict of laws relating to the applicable law, remission and transmission are excluded. However, these rules on conflict of laws are not of a universal nature. Regarding the territorial applicability of the Insolvency Regulation these rules may refer only to the law of a certain Member State. In relation to third states it will still be necessary to use the rules of national or international law, which regulate these matters.[40]

The applicable law determined under Article 7 of the Insolvency Regulation has a universal effect on the entire proceedings. Thus the *lex fori concursus* as the rule for a uniform main insolvency statute purports to apply one law to the entire insolvency proceedings which will govern substantive and procedural questions relating to the insolvency proceedings.[41,42] In Article 7(2) of the Insolvency Regulation, questions to which the *lex fori concursus* principle is in particular to be applied are demonstratively set out; these questions include for example which assets form part of the insolvency estate or the rules governing the lodging, verification and admission of claims.[43]

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[39] MOSS, G. – FLETCHER, I. F. – ISAAC, S. *Moss, Fletcher and Isaacs on the EU regulation on insolvency proceedings.* Third edition. Oxford: Oxford University Press, 2016, p. 339.

[40] PAUKNEROVÁ, M. *Evropské mezinárodní právo soukromé*. 2. vydání. Praha: Nakladatelství C. H. Beck, 2013, p. 224.

[41] EU Council: Report on the Convention of Insolvency Proceedings, Brussels, 3 May 1996, 6500/96, Art. 90.

[42] BRODEC, Determination of Applicable Law in International Insolvency Proceedings, p. 89.

[43] The *lex fori concursus* determines in particular: (a) the debtors against which insolvency proceedings may be brought on account of their capacity; (b) the assets which form part of the insolvency estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings; (c) the respective powers of the debtor and the insolvency practitioner; (d) the conditions under which set-offs may be invoked; (e) the effects of insolvency proceedings on current contracts to which the debtor is party; (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of pending lawsuits; (g) the claims which are to be lodged against the debtor's insolvency estate and the treatment of claims arising after the opening of insolvency proceedings; (h) the rules governing the lodging, verification and admission of claims; (i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right *in rem* or through a set-off; (j) the conditions for, and the effects of closure of, insolvency proceedings, in particular by composition;

It is important to emphasise that the CJEU confirmed the broadest possible application of the *lex fori concursus* to all questions that may arise in the main insolvency proceedings.[44,45]

However, certain precisely defined issues (i.e., cases "otherwise provided" for in the Insolvency Regulation) are subject to other applicable law. These exceptions to the basic *lex fori concursus* rule are enumerated in Articles 8 to 18 of the Insolvency Regulation.

However, it is necessary to note that irrespective of the absence of an express regulation in the Insolvency Regulation, the rules enshrined in Articles 7 to 18 of the Insolvency Regulation will not apply to the determination of a law applicable to questions which arise in main or secondary insolvency proceedings but to which such proceedings are not linked in any specific manner. The law applicable to such questions will be determined under the rules of private international law of the relevant Member State which are otherwise applicable.[46] Thus, it is necessary to apply the insolvency statute only to questions which are closely related to the relevant international insolvency proceedings. It is therefore necessary to analyse, whether a given insolvency is only a precondition of the facts of the case or whether the rules alone serve directly the purposes of insolvency proceedings (such as the equal treatment of creditors).[47]

It can be concluded that Article 7 of the Insolvency Regulation constitutes a norm having an aspect of rules on the conflict of laws, as it determines the applicable law for substantive questions in international insolvency proceedings but, as we believe, it also possesses the characteristics of international procedural law, as it determines the rules under which given international proceedings will be conducted.[48]

4.2 ARTICLE 7 AND ARTICLE 3 AND THEIR ASPECTS AS NORMS OF PRIVATE INTERNATIONAL LAW

First of all, it should be emphasised that insolvency law as such is not only procedural law; rather, it is a set of norms of a procedural and substantive nature.[49] It can be stated that procedural norms in insolvency law prevail in particular with regard to the fact that insolvency law should regulate how the court and insolvency administrator are

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(k) creditors' rights after the closure of insolvency proceedings; (l) who is to bear the costs and expenses incurred in the insolvency proceedings; (m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors.

44 CJEU 9 November 2016, ENEFI Energiahatékonysági Nyrt v Direcția Generală Regională a Finanțelor Publice Brașov (DGRFP), Case C-212/15.

45 The same opinion can be found, e.g., in DUURSMA-KEPPLINGER, H.-Ch. – DUURSMA, D. – CHALUPSKY, E. *Kommentar – Europäische Insolvenzverordnung.* 1st edition. Vienna: Springer Verlag, 2002, Article 4, no. 15. On the other hand, some authors urge forbearance in this respect: BĚLOHLÁVEK, A. J. *Evropské a mezinárodní insolvenční řízení. Komentář k nařízení EP a Rady (EU) 2015/848 o insolvenčním řízení*. Praha: Nakladatelství C. H. Beck, 2020, p. 256.

46 DUURSMA-KEPPLINGER – DUURSMA – CHALUPSKY, *op. cit.*, Article 4, no. 6.

47 ČIHULA, T. *Aktuální otázky insolvenčního řízení s cizím prvkem*. Dissertation. Prague: Charles University, Faculty of Law, 2007, p. 71, with reference to Virgos-Schmit Report, Article 90. See also CJEU 2 July 2009, SCT Industri, Case C-111/08, point 21: "[…] an action is related to bankruptcy if it derives directly from the bankruptcy and is closely linked to proceedings for realising the assets or judicial supervision."

48 BRODEC, Determination of Applicable Law in International Insolvency Proceedings, p. 88.

49 BĚLOHLÁVEK, *op. cit.*, p. 252.

supposed to proceed. However, it is also possible to identify certain typical questions and concepts of substantive law that are regulated by insolvency law.

A typical concept of substantive law that is regulated in insolvency proceedings is the admissibility of a bankrupt's setting off his claims against the claims of his contractual partners as provided, e.g., in the provisions of Section 140 of the Czech Insolvency Act.[50] Another question of this kind is the ineffectiveness of legal acts as regulated, e.g., in the provisions of Section 235 et seq. of the Insolvency Act. This occurs in a situation in which a certain legal act towards the bankrupt is inefficient, i.e., the bankrupt's contracting partner is obligated to surrender performance obtained through an ineffective legal act to the bankruptcy estate. Important questions of substantive law dealt with in insolvency proceedings that should be mentioned include the liability of members of a debtor's governing body for belated lodging of a request to open insolvency proceedings which is regulated in the provisions of Sections 98 and 99 of the Insolvency Act.

Above we presented the opinion that Article 7 can be considered a norm for a conflict of laws and for international procedural law. In this connection it is important to make a reference to certain specifics of Article 7 as a conflict-of-laws rule.

Article 7 as a conflict-of-laws rule has its scope of application and its part referring to the applicable law including a connecting factor. Article 7 (1) can be considered as a general definition of the substantive part. Article 7 (2) sets out questions to which the law determined pursuant to Article 7 (1) should apply. Because as mentioned above, Article 7 should be applied as broadly as possible to questions relating to insolvency proceedings, the list provided in Article 7 (2) must be considered as demonstrative.

The situation is rather more complicated as concerns a connecting factor. Regarding the determination of applicable law, Article 7 refers to the law of the Member State within the territory of which insolvency proceedings are opened. The rule for determining international jurisdiction for opening insolvency proceedings is contained in the previously mentioned Article 3 and is based on the determination of COMI.

It is important to note that the legal literature presents opinions that COMI itself is a connecting factor for the determining of applicable law.[51] If we take the definition of a connecting factor as a fact contained in the part of the conflict-of-laws rule referring to the applicable law and creating the closest link to a given legal relation, then we arrive at a different conclusion. Article 7 refers to the law of the Member State within the territory of which insolvency proceedings are opened as an applicable law. Thus, we can opine that the connecting factor for the determination of applicable law under Article 7 as a conflict-of-laws rule is the seat of the court that opened the proceedings.[52]

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[50] Act No. 182/2006 Coll., the Insolvency Act (hereinafter referred to as "Insolvency Act").

[51] RINGE, W.-G. Insolvency Forum Shopping, Revisited. In: LAZIĆ, V. – STUIJ, S. *Recasting the insolvency regulation: improvements and missed opportunities*. Hague: T.M.C. Asser Press, 2020, p. 2.

[52] For simplification, we refer to the court's seat as a connecting factor despite a different formulation in Article 3 of the Insolvency Regulation which does not mention directly the court's seat but refers to the law of the Member State within the territory of which insolvency proceedings were opened. The reason for this formulation may be the fact that pursuant to Article 4 (2) of the Insolvency Regulation, insolvency proceedings may be opened even without a court ruling.

The court which shall have the jurisdiction to open the insolvency proceedings is to be determined pursuant to Article 3 of the Insolvency Regulation by the COMI location. This suggests that Article 3 of the Insolvency Regulation has the function of a norm of international procedural law on the one hand, and leads to the determination of a connecting factor for establishing the applicable law for insolvency proceedings[53] on the other. *Lex fori concursus* will be the law that has the closest link to the given insolvency proceedings.[54]

As the determination of international jurisdiction and subsequently the determination of applicable law will be based on the same objective facts, i.e., on COMI, there will be unity of international jurisdiction and applicable law. Therefore, it is important for the determination of COMI to be objectively predictable in advance, as it is important not only to determine in advance which court has international jurisdiction, but also which substantive law is applicable based on the conflict-of-laws rule in Article 7.[55] This may be of crucial importance for a debtor's (company's) governing bodies whose responsibility for the period preceding the opening of insolvency proceedings will be considered in accordance with the law to be determined on the basis of COMI ascertained at the point when a request for opening insolvency proceedings is lodged. If COMI is not defined so as to provide sufficient legal certainty regarding its location, the governing bodies may hardly fulfil their duties, if it is not known to them which law lays down such duties (e.g., the aforementioned duty to lodge a request to open insolvency proceedings in a timely manner).[56]

The stipulation of unity of jurisdiction and applicable law in the Insolvency Regulation can be regarded as an expression of the principle of efficiency, as set out in Recitals 3 and 8 of the Insolvency Regulation.

5. CONCLUSION

This article analysed the content of Articles 7 and 3 of the Insolvency Regulation and their classification as norms of private international law. Furthermore, the inherent interconnectedness between Articles 7 and 3 was pointed out.

Article 7 can be described as a norm having the nature of an international procedural law norm and, at the same time, a conflict-of-laws rule. This is due to the fact that it determines the law that is applicable to procedural questions of international insolvency proceedings and, at the same time, it stipulates the governing law which should be applied to substantive questions relating to international insolvency proceedings.

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53 See also BĚLOHLÁVEK, *op. cit.*, 2020, p. 254.

54 Ibid., p. 253.

55 KOKORIN, I. Contracting Around Insolvency Jurisdiction: Private Ordering in European Insolvency Jurisdiction Rules and Practices. In: LAZIĆ, V. – STUIJ, S. *Recasting the Insolvency Regulation Improvements and Missed Opportunities*. Hague: T.M.C. Asser Press, 2020, pp. 25–26.

56 BRODEC, J. Určení COMI v případě přeshraničního insolvenčního řízení a jeho vliv na určení rozhodného práva ohledně odpovědnosti členů statutárních orgánů úpadce. In: *Rekodifikace obchodního práva – pět let poté. Svazek I. Pocta Stanislavě Černé*. Praha: Wolters Kluwer, 2019, p. 90.

For the determination of the law applicable to substantive questions, the connecting factor under Article 7 is the seat of the court which opened the international insolvency proceedings. In this respect a connection can be seen between Articles 3 and 7 of the Insolvency Regulation. As a matter of fact, Article 3 operates as a norm of international procedural law for the determination of international jurisdiction, and for the determination of a connecting factor for the reference to applicable law under Article 7.

In the above context, the importance of COMI was also pointed out as a specific concept of international insolvency law. COMI leads to the determination of international jurisdiction but it is important also for the determination of the law applicable to substantive-law matters relating to international insolvency proceedings. Hence, it is crucial for COMI to be determined based on unambiguous, determinate, and objectively ascertainable criteria in compliance with the requirement of foreseeability of applicable law for insolvency proceedings.

The aforementioned interconnectedness between the determination of international jurisdiction and applicable law in insolvency proceedings leads to unity in the determination of international jurisdiction and applicable law which can be seen as a current trend in the European norms of private international law.

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CZECH PERSPECTIVE ON THE VALIDITY OF INTERNATIONAL ARBITRATION CLAUSES CONTAINED IN AN EXCHANGE OF EMAILS UNDER THE NEW YORK CONVENTION

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Abstract: The article deals with the writing requirement of the arbitration clause under the New York Convention (the "Convention"). The discussion has been triggered by the recent Czech Supreme Court decision on the formal validity of an arbitration clause contained in an exchange of emails. The author first recalls the drafting history of the Convention and *rationale* behind the writing requirement. Then he analyses its interpretation in the practice of court before and after the 2006 UNCITRAL Recommendation, which suggested extending the interpretation to modern forms of communication such as email. The main part of the article closely scrutinizes the Czech Supreme Court's decision on the issue. The Court followed the 2006 Recommendation and the majority of its foreign counterparts. However, it also had to deal with the question of whether an email has to be accompanied by a qualified electronic signature for the written form to be met, as this is (unfortunately) the Court's requirement when it comes to relations governed by Czech law. Fortunately, the Court has taken an international approach looking both to foreign courts' practice and to its own case-law under other international conventions such as the CISG or the CMR. Thus it has arrived at the conclusion that the writing requirement under the Convention is met also in the case of an arbitration agreement contained in an exchange of simple emails.

Keywords: arbitration clause; New York Convention; written form; electronic legal act; arbitration proceedings

Klíčová slova: rozhodčí doložka; Newyorská úmluva; písemná forma; elektronické právní jednání; rozhodčí řízení

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1. INTRODUCTION

The 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the "New York Convention" or the "Convention")[1] with its more than 160 contracting parties is one of the most successful conventions

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1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958. UNTC. United Nations Treaty Collection. [online]. Accessed [April 11, 2020] at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&clang=_en.

in the field of private international law and is owed a lot by international commercial arbitration for its success. However, the more than 60-year-old text of the Convention faces new challenges, as the world around us is quickly evolving and changing. This is true particularly in the area of communication, where emails, Internet, social media, and other means of electronic communication have entirely revolutionized not only the speed at – but also in particular the forms in – which people communicate, transact, and do business in general.

In the era of the Convention's birth it was quite common for an arbitration agreement to be contained in an exchange of letters or telegrams. Nowadays, the younger generation often does not know what a "telegram" even is and most of everyday business is done via email/Internet, not via hard copy contracts or letters. However, the Convention requires written form for an arbitration agreement (clause) to be valid and the electronic communication of our times was not foreseen in the text of the Convention. This paper deals with the question of whether and how this problem has been overcome by interpretation and, in particular, how the Czech Supreme Court approached the issue in its recent decision, where the arbitration clause was contained in an exchange of emails without a qualified electronic signature.[2]

2. LEGAL FRAMEWORK – NEW YORK CONVENTION'S FORM REQUIREMENT

2.1 THE RULE OF ART. II(2) OF THE CONVENTION

The New York Convention defines an arbitration agreement or arbitral clause[3] as "an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration".[4] The contracting States undertake to recognize such an agreement and their court, when faced with the arbitration agreement, "shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed".[5]

What is meant by "agreement in writing" is defined in Art. II(2) of the Convention, which, being crucial for our topic, reads as follows:

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2 By "qualified electronic signature" is meant an electronic signature that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signature or its equivalent. See, e.g., Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC. *Official Journal of the European Union*, L 257. 23. 7. 2014, Art. 3(12).

3 The author will use the term "arbitration agreement" even for the agreement contained in an arbitral clause (which is part of a contract), as the difference is not relevant in this paper.

4 See Art. II (1) of the Convention.

5 See Art. II (3) of the Convention.

"The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

The question, discussed in more detail below, is whether this text should be construed to encompass also arbitration agreements contained in an exchange of emails without an electronic signature.

One last provision to be mentioned which might also assist in understanding the true purpose and the scope of the writing requirement is Art. IV(1)(b) of the Convention. It stipulates that in order to obtain the recognition of an arbitral award under the Convention, an applicant must provide "[t]he original agreement referred to in article II or a duly certified copy thereof".

2.2 RATIONALE BEHIND THE WRITTEN-FORM REQUIREMENT

To better understand the rule, we should first look at the reasons for the writing requirement. In general, at least in the civil law tradition, there are several reasons for the written form of a contract. First is the *evidential* function, in that the written form enables to better prove the content of the contract and thus does away with (or minimizes) disagreements over what was agreed and when. Second, the writing requirement often has much to do with a *cautionary* function, i.e., it puts the parties on notice. The fact that something has to be written down before it is binding enables parties to reflect upon their decision, it alerts them that something significant is taking place.[6] Also, formalities might be required to *mark the transition* from negotiation to contract, so that the parties (including third parties) are clear on the moment at which the negotiations have reached the stage of consensus and legal obligation. Sometimes, and especially in consumer contracts, the primary purpose of the written-form requirement is to *provide information*.[7]

It is not entirely clear which of these reasons – and especially to what extent – was behind the writing requirement of Art. II, when the Convention was adopted. It seems that the goal was to exclude cases involving acceptance by performance, conduct, or tacit acceptance.[8] This was also confirmed by the practice, as the courts generally ruled out oral arbitration agreements, even when it was confirmed by the other party (only) in writing or when there was a tacit acceptance or performance of the contract.[9] The

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6 Some authors distinguish between the *cautionary* and the *channelling* function, the latter meaning that the writing requirement "allows for certain types of agreement to be singled out as special legal mechanisms with particular attributes" or "[e]qually, it requires that particular transactions take a prescribed form, in order to attract specific legal consequences or characteristics". See LANDAU, T. – MOOLLAN, S. Article II and the Requirement of the Form. In: GAILLARD, E. – DI PIETRO, D. (eds.). *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention 1958 in Practice*. London: Cameron May Ltd, 2008, p. 220.

7 For details on all these written-form functions see KÖTZ, H. *European Contract Law*. 2nd Edition. Oxford University Press, 2017, p. 75–76. For a similar yet slightly different account of these functions see LANDAU, *op. cit.*, pp. 219–221.

8 See LANDAU, *op. cit.*, p. 190, footnote 5 and the vast literature cited therein.

9 United Nations, Commission on International Law. *Article II (2) of the Convention on the Recognition an Enforcement of Foreign Arbitral Awards (New York, 1958).* [online]. 14 December 2005. A/CN.9/WG.II

courts' practice (though diverging) shows that the evidentiary function is usually at the forefront, in that it either proves the initial consent of the parties to arbitration, or proves (records) the exact terms of the arbitration agreement, thus bringing certainty to the ensuing arbitral process.[10] The UNCITRAL Working Group on Arbitration summed it up in the following words: "[b]y requiring either a signature or an exchange of documents, the form requirement ensures that the parties' assent to arbitration is expressly recorded."[11] It follows that the writing requirement under the Convention should primarily serve an evidentiary and information purpose.

From this point of view there is no reason to interpret the circumstances (forms) described in Art. II(2) of the Convention to be exhaustive. If the arbitration agreement is somehow recorded for future reference, it should suffice for the writing requirement to be met, provided there is either the signature of both parties or an exchange of communication between them, even though the given means of communication is not explicitly listed in the Convention. This is confirmed by the UNCITRAL recommendation of 2006, to which we now turn.

2.3 THE UNCITRAL RECOMMENDATION REGARDING THE INTERPRETATION OF ART. II(2)

There were several reasons behind UNCITRAL's adoption of the 2006 Recommendation regarding the interpretation of Art. II(2) of the Convention (the "Recommendation").[12] First of all, there had been some diverging court practice and also some differences of expression between the five equally authentic texts of the Convention.[13] Secondly, UNCITRAL had to react to the fact that the text of the Convention had been outgrown by advances in technology and the rise of electronic commerce.

Bearing in mind the rationale behind the writing requirement, the fast-evolving electronic commerce, other recent UNCITRAL instruments or their amendments[14] and also domestic legislation of States, UNCITRAL proposed a subtle, yet very effective clarification of the Convention's text. It recommends that "article II, paragraph 2, of

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/WP.139, p. 7–9. Accessed [April 11, 2020] at: https://undocs.org/en/A/CN.9/WG.II/WP.139. ("*UNCITRAL 2005*").

10 For more details see *UNCITRAL 2005*, *supra* note 9, paras. 12–23. See also United Nations. *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.* [online]. New York: United Nations Publications, 2016, 2016 Edition, pp. 51–57. Accessed [April 12, 2020] at: http://newyorkconvention1958.org/pdf/guide/2016_Guide_on_the_NY_Convention.pdf (the "*NYC Guide*").

11 See *UNCITRAL 2005*, *supra* note 9, at 6.

12 United Nations, General Assembly. *Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958.* Official Records of the General Assembly, Sixty-first Session, Supplement No. 17, 2006. A/61/17, paras. 177-81 and Annex II. [online]. Available at: www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf (the "*Recommendation*").

13 English and Russian texts differ from French and Spanish. See in more detail LANDAU, *op. cit.*, p. 245, or *NYC Guide*, *supra* note 10, at 56 n. 271.

14 The 1985 UNCITRAL Model Law on International Commercial Arbitration, as subsequently revised, particularly with respect to Article 7 (2006), the UNCITRAL Model Law on Electronic Commerce (1996), the UNCITRAL Model Law on Electronic Signatures (2001) and the United Nations Convention on the Use of Electronic Communications in International Contracts (2005).

the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive". Instead of enlarging the list of circumstances meeting the form requirement, UNCITRAL simply emphasized the fact that the list is not meant to be exhaustive, thus ensuring that any new communication that reflects the basic idea of the norm (guaranteeing a record of the agreement)[15] will fit in the scope of the rule. One has to applaud this highly efficient way of achieving the desired purpose.

Despite it being ancillary to the main theme of this paper, it is still worth mentioning that the Recommendation also clarified the interpretation of Art. VII para. 1 of the Convention, which reads: "The provisions of the present Convention shall not […] deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon." UNCITRAL recommends that this provision "should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement".[16] This enables interested parties to rely on more favourable domestic provisions on the form requirement to uphold arbitration agreements even where the writing requirement set out in Art. II(2) of the Convention would otherwise not be met. To give a specific example, if the domestic legislation (of the country where an arbitration agreement is sought to be relied upon) allows for an arbitration agreement to be concluded orally, an interested party may rely on it to uphold the validity of the agreement regardless the text of Art. II(2) of the Convention. UNCITRAL hopes that this "would allow the development of rules favouring the validity of arbitration agreements in a wider variety of situations".[17] The truth is that many domestic laws allow for a more lenient form requirement than is stipulated in Art. II(2) of the Convention[18] and thus the recommended interpretation may significantly buttress the formal validity of arbitration agreements within the scope of the New York Convention.[19]

3. COURTS' INTERPRETATION OF THE RULE

We will now take a brief look at the practice of national courts before and after the adoption of the Recommendation to suggest how other States courts (would) approach the question of formal validity of an arbitration agreement contained in exchange of emails without an electronic signature. The following is not a comprehensive

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15 The same view is expressed by GROBHANS, A. – LANDI, N. Arbitration Agreements: Written Form Requirements and New Means of Communication. *Bocconi Legal Papers*, 2014, 4, p. 226.

16 See the last paragraph of the *Recommendation*.

17 See *UNCITRAL 2005*, *supra* note 9, at 20.

18 For a comprehensive overview see GROBHANS, *op. cit.*, pp. 228–231. One can also add Czech arbitration law to this list, as described below in note 38.

19 According to the *NYC Guide*, p. 51, since the Recommendation's adoption, national courts have more consistently enforced arbitration agreements pursuant to the less stringent formal requirements available under their national laws or treaties.

survey of all relevant decisions on various aspects of the writing requirement, but only a simplified overview of selected judgments closely related to the central theme of this paper.

3.1 PRE-RECOMMENDATION PRACTICE

Only one reported decision from the pre-Recommendation times deals directly with the issue of arbitration agreement contained in an exchange of emails. It is the (in)famous Halogaland (Norway) Court of Appeal decision of 1999,[20] in which the court held that a contract (for the fixture of a vessel for the carriage of 3,500 m.t. of herring) concluded by an exchange of emails by reference to the GENCON charter party did not constitute an arbitration agreement in writing. The court held that the basic requirements of legal protection set up by the Convention were not met.[21]

Other courts seemed to be less formalistic, even though the decisions concerned other new means of communication (not listed in the Convention) than email. Most of the courts considered telexes and (tele)faxes as meeting the form requirement of the Convention.[22] One Swiss court stated that, in the light of modern means of communication, unsigned writings play an increasingly important role and signature requirements are less important.[23] It also confirmed that when the arbitration agreement is contained in an exchange of documents, the signature requirement does not apply.[24] Another Swiss court held that it suffices that the agreement be contained in a document allowing for written proof and confirmation of the common intent of the parties.[25]

3.2 POST-RECOMMENDATION PRACTICE

The reported decisions issued after the Recommendation show almost an unanimous support for the conclusion that an arbitration agreement contained in an exchange of emails without (qualified) electronic signature(s) still qualifies as formally valid under Art. II(2) of the Convention.

There are two decisions of the Federal Court of Australia from 2006 and 2007, respectively, showing that the court had no doubts whatsoever that emails are included in Art. II(2) of the Convention. In the first case, *Comandante Marine Corp v Pan Australia*

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20 Halogaland Court of Appeal, 16 August 1999, cited in *UNCITRAL 2005*, *supra* note 9, at 7 n. 20.

21 For a more detailed account of the case see LANDAU, *supra* note 6, pp. 210–211.

22 See *UNCITRAL 2005*, *supra* note 9, at 14 nn. 52–53 with examples from Germany, USA, Switzerland, France, Austria or Italy. See also Manitoba Court of Appeal in *Proctor v Schellenberg* [2003] 2 WWR 621 at 628.

23 Case *Compagnie de Navigation de Transports SA v. MSC Mediterranean Shipping Company SA* (1995) BGE 121 III 38. See *UNCITRAL 2005*, *supra* note 9, at 15 n. 56. The decision is criticized in UZELAC, A. The Form of the Arbitration Agreement and the Fiction of Written Orality. How Far Should We Go? *Croatian Arbitration Yearbook*, 2001, 8, pp. 87–88.

24 See *Compagnie*, cited *supra* note 23. See also Tradax Export SA v. Amoco Iran Oil Company, Federal Tribunal, Switzerland, 7 February 1984. See *NYC Guide*, *supra* note 10, at 56.

25 Court of Appeal in Basel, DIETF Ltd v RF AG (1994). See United Nations, *supra* note 10, p. 14 n. 55.

Shipping Pty Ltd,[26] the court cited with approval the Canadian case *Proctor v Schellenberg*,[27] emphasizing that "[w]hat is important is that there be a record to evidence the agreement of the parties to resolve the dispute by an arbitral process. This flexibility is important in this day and age of changing methods of communication".[28] The second decision only cited the Comandante case with approval.[29]

Other courts followed the Australian suit. In the US case *Glencore Ltd. v. Degussa*[30] the court concluded that a sales contract contained in an exchange of emails and incorporating an arbitration agreement by reference meets the writing requirement and even the parties did not dispute that email communications qualify as "letters and telegrams" within the meaning of the Convention.[31] Also, there are at least two cases from the Indian Supreme Court where it did not hesitate to find that the arbitration agreement contained in an exchange of emails was valid, even though the contract itself may have been incomplete.[32] A 2012 Spanish decision held that the list of documents set out in Article II is not exhaustive and therefore an arbitration agreement concluded by electronic means of communication fulfils the writing requirement.[33] Finally, there is also a decision of the Greek court in Piraeus, which the Czech Supreme Court mistook for a US decision (see in part 4 below).[34] The Greek court held that an exchange of letters, which fulfils the writing requirement under Article II(2) of the Convention, also includes an exchange of emails, as under the applicable rules on evidence of the Greek Civil Procedure Code, an email is by its nature equated to a document such as a letter.[35]

It seems that the only "outlier" in the post-Recommendation practice is a Brazilian court, which in 2007 denied recognition to an unsigned arbitration agreement that had been exchanged via telexes.[36]

Still, it is safe to say that the courts practice overwhelmingly shows that an exchange of emails meets the writing requirement of the Convention.

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26 *Comandante Marine Corp. v. Pan Australia Shipping Pty Ltd.*, 20 December 2006, [2006] FCAFC 192, available at: http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2006/192.html.

27 *Sheldon Proctor v. Leon Schellenberg*, Court of Appeal of Manitoba, Canada, 11 December 2002.

28 See *Comandante*, para. 154.

29 *APC Logistics Pty Ltd. v. CJ Nutracon Pty Ltd.*, 16 February 2007, [2007] FCA 136, at 4. The decision is available at: http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2007/136.html.

30 *Glencore Ltd. v. Degussa Engineered Carbons L.P.*, 24 January 2012, 2012 WL 223240 (S.D.N.Y.). The case is available at: https://cases.justia.com/federal/district-courts/new-york/nysdce/1:2011cv07153/385995/48/0.pdf?ts=1411558949.

31 See *Glencore*, at 42 n. 27.

32 See *Shakti Bhog Foods Limited vs. Kola Shipping Limited*, (2009) 2 SCC 134, available at: https://indiankanoon.org/doc/1911324/, or *Trimex International FZE Ltd. v. Vedanta Aluminium Ltd.*, (2010) 3 SCC 1, available at: https://indiankanoon.org/doc/658803/.

33 High Court of Justice of Cataluña, 15 March 2012, RJ 2012/6120. See *NYC Guide*, *supra* note 10, at 56 n. 270.

34 Piraeus Single-Member First-Instance Court Judgment 2150/2017 (Admiralty Division).

35 See the comment cited in note 52.

36 *Oleaginosa Moreno Hermanos Sociedad Anónima Comercial Industrial Financeira Imobiliaria y Agropecuaria v. Moinho Paulista Ltda.*, Superior Court of Justice, Brazil, 7 March 2007, Motion for Clarification on SEC 866. See *NYC Guide*, *supra* note 10, at 57 n. 275.

4. CZECH APPROACH TO THE ISSUE – ZEVETA LITIGATION

4.1 CZECH PRACTICE UP TO ZEVETA

Interestingly there are no reported Czech decisions on the issue. The author cannot exclude that there are some unreported lower court cases, but what we can say with the utmost certainty is that the issue has never reached the Czech Supreme Court. This only happened in the case which we dub ZEVETA (the name of the claimant), which was decided on May 16, 2019[37] and which is analysed further below in parts 5.2 and 5.3.

Also, Czech doctrinal writings (to the best of the author's knowledge) have not addressed the issue directly. They rather commented on the domestic law on arbitration,[38] whose section 3 para. 1 stipulates that the written form is preserved, if the arbitration agreement is concluded by telegraph, telex, or electronic means that provides a record of the content and identification of parties to the agreement. There is a unanimous opinion that email communication is covered by this provision,[39] but according to some authors there might be instances, where a qualified electronic signature will be necessary to preserve the validity of the agreement.[40]

Thus, in ZEVETA the Supreme Court faced an issue on which the Czech practice to date was of little assistance, if any.

4.2 ZEVETA LITIGATION: FACTS OF THE CASE AND LOWER COURTS' OPINION

The ZEVETA dispute arose out of the contract between a Czech company called ZEVETA Bojkovice (the claimant) and a Spanish company FAGOR ARRASATE S. COOP (the defendant). It is not quite clear from the decision what the exact subject matter of the contract was, except that it was some kind of a contract for work ("smlouva o dílo" in Czech, "der Werkvertrag" in German). In any event, it was undisputed that there had been an exchange of the draft contract between the parties via emails. The defendant sent the draft contract (without any signature) as an attachment to an email, in which it asked the claimant to send it back signed and stamped. Five days later the claimant sent the contract back via email, together with a proforma invoice. The contract contained in its Art. 11 an arbitration clause, which read "all disputes, which may arise and cannot be settled amicably, will be submitted to a court of arbitration and settled according to European principles laid down for this field."[41] It is quite obvious at first glance that the arbitration clause is very poorly drafted and that it would require

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37 Decision of the Supreme Court of the Czech Republic dated 16. 5. 2019 No. 23 Cdo 3439/2018.

38 Act No. 216/1994 Coll., on arbitration and enforcement of arbitral awards, as amended.

39 See PFEIFFER, M. – PAUKNEROVÁ, M. – RŮŽIČKA, K. et al. *Mezinárodní obchodní právo*. 1. vyd. Plzeň: Aleš Čeněk, 2019, p. 315.

40 See BĚLOHLÁVEK, A. J. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů. Komentář.* 2. vyd. Praha: C. H. Beck, 2012, marg. 03.29 ff.

41 It is the author's working translation of the Czech version, which reads "všechny spory, které by mohly vzniknout, a nebude je možné řešit smírně, budou postoupeny rozhodčímu soudu a řešeny podle evropských zásad stanovených pro tuto oblast".

considerable effort to figure out, which court of arbitration (probably an *ad hoc* tribunal or an *ad hoc* arbitrator?) and under which "European principles" should conduct the arbitration. It could have been a reason why the claimant tried to avoid this clause by bringing a claim before Czech courts (in that particular case to the District court in Ostrava) instead of pursuing the arbitration. However, the defendant opposed this move by contesting the court's jurisdiction, claiming that there is a valid arbitration clause.

Both the first instance court and the appellate court (the Regional Court in Ostrava) dismissed the action in favour of arbitration, holding that the clause is valid under the Czech law on arbitration[42] and the European Convention on International Commercial Arbitration of 1961 (the "Geneva Convention").[43] The appellate court noted that the fact that electronic communication is not explicitly mentioned in the Geneva Convention does not mean that it is excluded, but only that it was not a usual means of communication at the time of the drafting of the convention. The court also took into account the fact that the content of the contract was not disputed between the parties; the claimant only objected that given the lack of the defendant's signature the contract was concluded only orally. It rejected the claimant's argument that the clause was invalid also because of its ambiguity, including its silence on how to constitute the tribunal. In this respect the court referred to Art. 4(3) of the Geneva Convention, from which it follows that if the arbitral clause contains no indication regarding the organization of the arbitration there are steps to be taken to resolve this.[44] As the clause is not even clear on whether there should be a sole arbitrator or more arbitrators, the court's conclusion might seem doubtful. However, as the ambiguity of the clause at hand is not central to the theme of this article and it did not come up again in the ensuing Supreme Court litigation (the claimant did not raise it for some reason), we will leave it aside without delving into any more details on this issue.

The claimant filed an extraordinary appeal ("dovolání" in Czech) to the Supreme Court (the "Court") claiming that the lower courts' opinion is at odds with the Court's case-law on written form requirements in electronic communication. It cited three Supreme Court cases, all related to purely internal relationships (without an international element) governed solely by Czech law, in which the Court, unfortunately,[45] required that the so-called qualified electronic signature be attached for the written form to be preserved in case of emails (electronic communication); "simple" emails were not sufficient.[46]

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42 See above, part 4.1 and note 38.

43 See its Art. 1 para. 2 letter a) reading "the term: 'arbitration agreement' shall mean either an arbitral clause in a contract or an arbitration agreement, the contract or arbitration agreement being signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter and, in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws".

44 See Art. 4(3) of the Geneva Convention.

45 In the author's opinion, these domestic cases have been wrongly decided on this point, but this goes well beyond the scope of this article.

46 See Judgment of the Supreme Court of the Czech Republic dated 30. 10. 2009 No. 33 Cdo 3210/2007, Judgment of the Supreme Court of the Czech Republic dated 4. 9. 2013 No. 21 Cdo 3693/2012 or Decision of the Supreme Court of the Czech Republic dated 1. 6. 2017 No. 20 Cdo 1741/2017.

The Court first distinguished the issue in question from the case-law relied upon by the claimant, stating that these cases related to purely domestic matters, while in this case it was a question of the formal validity of an arbitral clause concluded between entities from different states contained in an exchange of emails without a qualified electronic signature. Thus, in the Court's view it was a new question, as yet unsettled in its case-law. Moreover, it was a question of international trade reaching beyond Czech borders.

The Court then went on to determine, which law was applicable to this question. It first refused the application of the Czech-Spanish treaty on judicial cooperation of 1987,[47] as it contains a conflict-of-law rule for arbitral agreements validity only at the arbitral award enforcement stage.

The Court then shifted its attention to the Geneva Convention and the New York Convention. The Court first noted that neither of the conventions specifically address their mutual relationship. In such a case it was necessary, in the view of the Court, to find out, whether the later adopted (being in effect) convention would (and to what extent) supersede the older one (based on the principle of *lex posterior derogat legi priori*)[48] or whether it should apply the convention which enables reaching (its) goal more easily and efficiently. The Court stated that between the Czech Republic and Spain the older convention is the Geneva Convention, as Spain ratified first the Geneva Convention (in 1975) and only later (in 1977) the New York Convention. The latter is thus *lex posterior*. Also, given the New York Convention's higher number of signatory states and more case-law interpreting its text, the Court concluded that it was also more efficient for the resolution of the question at stake. However, the Court did not stop there and kept looking for further evidence to support its conclusion that the New York Convention should be applicable in this situation. The Court observed that the Geneva Convention has fewer signatory states but found no evidence that this convention should among them prevail over the New York Convention. On the other hand, the Court opined that the New York is *lex specialis*, as it contains the direct substantive rule on the question of the form of the arbitration agreement, while the Geneva Convention contains only a conflict-of-laws rule. This finding is quite surprising, as both texts are very similar and both read more like a substantive rule on form than a conflict rule. Unfortunately, the Court offered no reasons for this conclusion. Be that as it may, given the similarity of both texts (which the Court also explicitly acknowledged), the Court would probably have reached the same conclusion on the issue of form, regardless of which convention it interpreted. In any event, for the above reasons the Court applied the New York Convention.

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[47] *Agreement concerning judicial assistance and recognition and enforcement of judgments in civil matters*, done in Madrid, 4 May 1987. Treaty Series. Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations. Volume 1524. [online]. Accessed [April 12, 2020] at https://treaties.un.org/doc/Publication/UNTS/Volume%201524/v1524.pdf.

[48] This is basically the rule contained in Art. 30 para. 3 of the Vienna Convention on the Law of Treaties of 1969, but the Court did not specifically cite it, even though this convention should provide a primary tool for resolving conflicts of international treaties.

When applying the New York Convention, the Court rather quickly arrived at the conclusion that the list of forms contained in Art. II para. 2 of the Convention is not exhaustive. The Court cited with approval the Recommendation and also the International Council for Commercial Arbitration, which reached the same conclusion.[49] It also referred to two decisions of foreign courts that were of the same view. The first one was the Indian Supreme Court case *Great Offshore Ltd. v. Iranian Offshore Engineering*.[50] It is to be noted that this decision is concerned with the exchange of faxes rather than emails, but, admittedly, the rationale is the same.[51] The second case was the "Piraeus Single_Member First-Instance Court No. 2150/2017" case, which the Court identified as a "lower US court decision". However, at first glance this does not sound right, as the name of the court does not resemble any US court and Piraeus is a port city in Greece. Upon closer inspection, the author found out that the citation did indeed relate to a Greek court (admiralty division) decision on the issue.[52] Mistaking a Greek decision for a US one is a surprising oversight at a supreme court level, but it has in principle no bearing on the rationale of the Court's reasoning. As described in part 4.2, it is true that there are quite a few foreign courts' decisions following the logic of the Recommendation. The Court thus followed an expected path.

To further support this conclusion, the Court recalled that in the recent past it had made the same findings when it came to the CISG. In its decision No. 23 Cdo 1308/2011 of 17 December 2013, it construed Art. 13 of the CISG[53] in a way that the written form includes not only the telegram and telex explicitly mentioned by the convention, but also other forms of (electronic) communication, including email.

However, the Court's conclusion that an email belongs among the acceptable forms pursuant to Art. II(2) of the Convention does not dispose of the entire matter. The Court still faced the essential question as to whether it suffices for the form to be preserved to have a simple (plain) email without any qualified electronic signature. As we have seen above, in the domestic disputes the Court has held a rather formalistic view requiring a qualified electronic signature for the written form to be valid. Fortunately, the Court has proven to be less formalistic when it comes to the international arena.

First, the Court emphasized that the Convention permits an exchange of telegrams, which also do not contain any (qualified) signatures. Secondly, it referred to other signatory states courts' decisions which held that no signatures are necessary when it comes

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49 Unfortunately, it is not clear, which exact publication was cited by the Court, as the full citation is missing in the judgment (probably by omission).

50 Decision of August 25, 2008. Available at: https://indiankanoon.org/doc/123878146/, also annotated at http://newyorkconvention1958.org/index.php?lvl=notice_display&id=1392. Accessed [April 12, 2020].

51 The Supreme Court probably carried over slightly misleading description of the case as "an exchange by e-mails with a confirmation by fax" from the *NYC Guide*, *supra* note 10, at 55 n. 266. Available at: http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=618&opac_view=-1#50.

52 It seems that the Czech Supreme Court's source was an article by Antonios D. Tsavdaridis of 19 October 2017 called "Form and proof of arbitration agreements incorporated by reference under New York Convention", published by International Law Office and available at ROKAS law firm website: https://www.rokas.com/uploads/Form_and_proof_of_arbitration_agreements_incorporated_by_reference_under_New_York_Convention.pdf. Accessed [April 12, 2020].

53 *United Nations Convention on Contracts for the International Sale of Goods*, done in New York, 11 April 1980. UNTC. United Nations Treaty Collection. [online]. Accessed [October 13, 2019] at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=X-10&chapter=10&lang=en.

to the "exchange" of documents under Art. II para. 2 of the Convention.[54] The Court also cited, in support, the EU E-Commerce Directive of 2000,[55] which requires that the (EU States) national "legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means".[56] For the sake of completeness, the Court, in the very end of the decision, recalled its judgment on another international treaty, the CMR of 1956.[57] In that decision,[58] handed down by the Court's grand chamber, the Court stated that a "written claim" under Art. 32 para. 2 of the CMR Convention includes also email communication without a qualified electronic signature. The grand chamber arrived at that conclusion after a thorough comparative analysis of several sources and foreign courts' decisions (including the Supreme Courts of Austria, Germany, and the Netherlands).

Based on the above, the Court concluded that the requirement of a qualified electronic signature would be excessive and in breach of Art. II of the New York Convention, which does not require (any) signature when it comes to the arbitration agreement contained in an exchange of (any) documents.[59]

5. CONCLUSIONS

Arbitration is one of the favourite dispute resolution mechanisms in international commerce. The New York Convention provides the wide-spread framework for enforcing arbitration agreements and arbitral awards around the globe. Its provision on the formal validity of arbitration agreements has undoubtedly been far outgrown by the advance of technologies and an overall switch to electronic forms of communication. Yet, the majority of States' courts have been able to adapt the Convention's interpretation to the needs of the modern era, holding that an exchange of emails (without signatures) lends to a valid arbitration agreement. This majority view was further advanced by the 2006 UNICTRAL Recommendation that construed the list of forms in Art. II(2) of the Convention as inclusive, not exhaustive.

The Czech Supreme Court followed this majority opinion, when the Court encountered the issue in its 2019 ZEVETA decision. Despite its some rather formalistic decisions on purely domestic disputes, requiring qualified electronic signatures for emails to be considered a written form, the Court looked for an autonomous interpretation of the Convention and other States case-law to deviate from its domestic approach.

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54 The Court explicitly cited decision *Compagnie* and the *NYC Guide*, *supra* note 10, at 56–57.

55 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). *Official Journal of the European Union*, L 178. 8. 6. 2000

56 See Art. 17 of the E-Commerce Directive.

57 *Convention on the Contract for the International Carriage of Goods by Road*, done in Geneva, 19 May 1956. UNTC. United Nations Treaty Collection. [online]. Accessed [April 12, 2020] at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-B-11&chapter=11&clang=_en.

58 See Decision of the Supreme Court of the Czech Republic, dated 15. 11. 2016, No. 31 Cdo 1570/2015.

59 As the Court apparently based its view and conclusions on the international character and autonomous interpretation of the Convention, it is questionable as to whether it would be willing to transpose this approach also into a purely domestic arbitration setting (however commendable that might be).

The Court thus confirmed that an exchange of emails, even without signatures, meets the writing requirement of the Convention. The decision is to be welcomed for being attentive to the reality of international commerce and further supporting international commercial arbitration in the Czech Republic.[60]

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[60] Another past example of the Supreme Court's rather positive attitude to international commercial arbitration is decision No. 23 Cdo 1034/2012, dated 30. 9. 2013, under which it is possible to submit a wholly domestic commercial case to international arbitration. On the other hand, one may also find other decisions that fit less within the needs of international commercial arbitration.

RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN COMMERCIAL MATTERS RENDERED BY COURTS OF NON-EU COUNTRIES IN THE CZECH REPUBLIC

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Abstract: The article deals with the conditions under which Czech courts recognise and enforce judgments rendered in commercial matters by courts outside of the EU. The relevant rules on recognition and enforcement are contained in both the Czech Act on Private International Law and in a number of international treaties binding for the Czech Republic. The authors analyse in detail the Czech national rules with particular emphasis on grounds for non-recognition and on the enforcement procedure, including relevant national case-law. As the Czech Republic is bound by a significant number of bilateral treaties on legal assistance that contain relevant provisions, the authors also bring a brief overview of the rules therein.

Keywords: international civil procedural law; recognition; enforcement; foreign judgments; commercial matters

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1. INTRODUCTION

The enforcement of judgments rendered by foreign courts is far from automatic. Following the principle of territoriality, judgments have authority and effects limited only to the territory of the state whose courts rendered them.[1] It is up to every sovereign state if and under which conditions it will recognise judgments given by courts in another jurisdiction on its own territory. The aim of this paper is to present an overall analysis of the conditions for enforcement[2] of judgments rendered in commercial matters by courts outside of the European Union in the territory of the Czech Republic. The conditions under which the Czech Republic recognises the authority and attaches effects to foreign judgments in commercial matters vary according to the judgment's country of origin. As set out in more detail below, they vary depending on whether the foreign judgment in commercial matters is enforced based on EU law, international treaty or Czech national rules. But in every case only those foreign judgments that are recognised, can be enforced. Recognition is a *conditio sine qua non* of enforcement.

[1] VAŠKE, V. *Uznání a výkon cizích rozhodnutí v České republice*. Praha: C. H. Beck, 2007, p. 35.

[2] For purposes of this paper "enforcement" includes both the conditions and the procedure for enforcement of foreign judgments.

In cross-border commercial litigation the issue of enforcement plays a vital role.[3] If forum shopping is available, the plaintiff should consider enforcement chances already when looking for the most appropriate forum to file the suit. It is advisable to assess in advance whether, if litigating successfully in country A, the judgment given in country A can be enforced in country B, where the defendant has assets. If not, the plaintiff should consider instituting proceedings either in country B that will then enforce it as a national judgment rendered by its own courts, or in country C provided enforcement of judgments rendered by courts in country C is ensured in country B.

In international trade, we often hear about trade barriers, meaning restrictions of an economic nature imposed by governments to restrain the free flow of goods and services. But it is important to bear in mind that besides the economic barriers like tariffs, subsidies, licences or quotas, there are also significant legal barriers that may deter businesses from trading cross-border. In the field of private international law, the uncertainty with respect to enforcement of judgments in foreign jurisdictions may represent one of the indirect hurdles to international trade.[4] To overcome this uncertainty, business partners from different countries often opt for commercial arbitration to resolve their disputes because there is a unified global enforcement regime for arbitral awards in place that ensures a straightforward and simple enforcement procedure. The 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "New York Convention")[5] with its more than 160 contracting parties is the most successful multilateral treaty in the field of private international law and in large part responsible for the success of commercial arbitration. For the enforcement of judgments given in commercial matters, there had not been a comparable multilateral convention until 2019, when the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (hereinafter "Hague Judgments Convention")[6] was adopted under the auspices of the Hague Conference of Private International Law (hereinafter "Hague Conference"). Undoubtedly, it is a huge step forward, but there is still a long way to a unified global enforcement regime for judgments in commercial matters. The success of the Hague Judgments Convention will depend on the number of future contracting states.

Within the EU there is a well-functioning unified regime for the recognition and enforcement of judgments in commercial matters rendered by courts of the EU countries in the Brussels Ibis Regulation[7] that ensures their free circulation in all, now 27,[8] EU

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3 FENTIMAN, R. *International Commercial Litigation*. Second Edition. Oxford: Oxford University Press, 2015.

4 Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (signed at Brussels, 27 September 1968) by Mr. P. Jenard. OJ C 59/1, 5. 3. 1979, p. 3.

5 UNTC. United Nations Treaty Collection. [online]. Accessed [August 30, 2019] at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&clang=_en.

6 HCCH | #41 – Full text. HCCH | Splash. [online]. Copyright © HCCH 1951. Accessed [August 30, 2019] at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=137.

7 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

8 Great Britain formally left the EU on January 31, 2020 and under the terms of the Withdrawal Agreement will cease to apply the Brussels Ibis Regulation from 1 January 2021.

Member States.[9] The rules that were originally adopted in the Brussels Convention and Brussels I Regulation to enhance proper functioning of the internal market ensure that judgments given by the courts of one EU Member State in commercial matters are treated as if they had been given in the Member State where enforcement is sought.[10] This unified regime is limited only to judgments rendered by courts in the EU; the treatment of judgments rendered by courts outside of the EU is left to national law subject to international treaties. There has been some, though limited, discussion in the EU on whether to unify the rules on the recognition and enforcement of judgments of courts given in non-EU countries and how to conceive such rules.[11] In 2008 the GEDIP[12] prepared a Proposal for Amendment of the Brussels I Regulation[13] that included also provisions on the recognition and enforcement of judgments given in a state which is not a member of the EU, but avoided any analysis of the political desirability of such unification.[14] The majority of the proposed amendments were not reflected in the recast, the EU regulation on the relationship to non-EU countries thus remains one of the private international law issues calling for a more consistent approach.[15] Provided the EU joins the Hague Judgments Convention, it is to be expected that it will seek to promote the convention with third states to attract as many of them as possible for the convention to become a future dignified counterpart to the New York Convention.

2. LEGAL FRAMEWORK

2.1 CZECH NATIONAL RULES

Rules on the recognition and enforcement of foreign judgments that are rules of international civil procedural law and under the Czech doctrine part of private international law are contained in the Czech Act on Private International Law (hereinafter "Czech PILA").[16] General provisions in Sections 14–16 of the Czech PILA apply to judgments in commercial matters, provided the judgment was given by court of a country that is not an EU Member State and provided the Czech Republic and the country whose courts rendered the judgment are not parties to an international treaty laying down special rules for recognition and enforcement. Sections 17–19 of the Czech PILA contain special procedural rules that apply when the enforcement of a foreign judgment is subject to a declaration of enforceability (exequatur) required prior to the enforcement

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9 In Denmark based on the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed at Brussels on 19 October 2005.

10 Recital (26) Brussels Ibis Regulation.

11 In detail see: BONOMI, A. European Private International Law and Third States. *IPRax*, 2017, No. 2, pp. 190–193.

12 European Group for Private International Law.

13 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

14 Consolidated version of a proposal to amend Regulation 44/2001 in order to apply it to external situations (Bergen 2008, Padua 2009, Copenhagen 2010).

15 BONOMI, *op. cit.*, p. 193.

16 Act No. 91/2019 Coll., on Private International Law.

of foreign judgments in other than commercial matters by certain EU Regulations and international treaties.[17]

2.2 RELEVANT BILATERAL TREATIES ON LEGAL ASSISTANCE IN CIVIL MATTERS

The Czech Republic is bound by a number of bilateral treaties on legal assistance in civil matters concluded with countries outside of the EU[18] that contain, among others, provisions on the mutual recognition and enforcement of judgments rendered by the courts of the contracting parties. The majority of these treaties were concluded between the former Czechoslovakia (Czech and Slovak Federative Republic) before its dissolution at the end of 1992 and other socialist or people´s democratic states. They continue to apply because the Czech Republic, as one of the two successor states, assumed all rights and obligations of Czechoslovakia, except for the rights and obligations linked to the territory of Slovakia.[19]

Bilateral treaties on legal assistance in civil matters are part of the Czech legal order and therefore one of the sources of Czech private international law. The mutual relationship between international treaties and national law in favour of international treaties is anchored in both the Czech Constitution (Art. 10)[20] and the Czech PILA (Section 2). They have priority over national law provided the regulation of the issue in question is different.[21] In relation to the Brussels Ibis Regulation, the EU rules affect only the application of bilateral treaties that the Czech Republic concluded with EU Member States, not with third countries.[22]

Bilateral treaties operate on the basis of reciprocity, and the provisions on the recognition and enforcement contained in these treaties apply only to judgments rendered by the courts of contracting parties that are mutually recognised under the same conditions. The particular rules for the recognition and enforcement of judgments in commercial matters may differ in individual treaties but generally there is no special recognition procedure required, enforcement is not subject to prior declaration of enforceability in the requested state and judgments given by the courts of a contracting party are

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17 E.g., Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations the Maintenance Regulation, Convention on the International Protection of Adults.

18 Their list is available at the website of the Czech Ministry of Foreign Affairs or Ministry of Justice. The Czech Republic has concluded such treaty with, e.g., Ukraine, Vietnam, Cuba, Mongolia, Uzbekistan, Tunisia, the former Soviet Union or the former Yugoslavia.

19 Article 5 para. 3 of Constitutional Act No. 4/1993 Coll. of the Czech National Council, of December 15, 1992, on Measures Related to the Dissolution of the Czech and Slovak Federative Republic.

20 Act No. 1/1993 Coll., Constitution of the Czech Republic.

21 KUČERA, Z. – PAUKNEROVÁ, M. – RŮŽIČKA, K. et al. *Mezinárodní právo soukromé.* Eighth edition, Plzeň – Brno: Aleš Čeněk – Doplněk, 2015, pp. 59–60; BŘÍZA, P. In: BŘÍZA, P. – BŘICHÁČEK, T. – FIŠEROVÁ, Z. – HORÁK, P. – PTÁČEK, L. – SVOBODA, J. *Zákon o mezinárodním právu soukromém. Komentář*. Praha: C. H. Beck, 2014, pp. 13–14.

22 Art. 73 para. 3 Brussels Ibis Regulation.

recognised and enforced in the territory of the other contracting party when final and enforceable in the country of origin and when no ground for non-recognition exists. All relevant treaties contain an exhaustive list of grounds for non-recognition, while individual grounds vary. As outlined below in Part 3, the refusal grounds anchored in the Czech PILA are mostly to be found among the refusal grounds in bilateral treaties. According to all relevant bilateral treaties, the *lex fori* is the law governing the enforcement procedure, and a review as to the merits of the judgment (*révision au fond)* in the country where recognition and enforcement is sought is not permitted.

2.3 RELEVANT MULTILATERAL TREATIES BINDING FOR THE CZECH REPUBLIC

The Czech Republic is also bound by multilateral treaties that unify the rules for the recognition and enforcement of judgments given by the courts in contracting states in commercial matters within their material scope. As an EU Member State the Czech Republic is bound by the regional Lugano Convention[23] concluded in 2007 among the EU, Switzerland, Norway and Iceland which extends the application of the rules (including the rules for recognition and enforcement) of the Brussels I Regulation to the territory of the above-mentioned members of the European Free Trade Association (EFTA). In the field of international transport, the Czech Republic is bound by COTIF[24] and CMR[25] that provide for judgments given by competent courts pursuant to the provisions of the respective convention and enforceable in the state of origin to become enforceable in other contracting states on completion of formalities required in the state where enforcement is sought.[26]

On a global scale there are two recent international instruments on the recognition and enforcement of judgments in civil and commercial matters drafted by the Hague Conference that lay the foundations for the future effective circulation of judgments in commercial matters worldwide. Their aim is to enhance and facilitate cross-border trade by creating an international legal regime that provides greater predictability and certainty in relation to the global recognition and enforcement of foreign judgments. The Czech Republic, as well as the EU as an REIO,[27] are members of the Hague Conference. When the EU adheres to the Judgments Convention, which falls in the area of exclusive external competence of the EU, it will be automatically binding for the Czech Republic as a Member State.[28]

The Hague Convention on Choice of Court Agreements that entered into force first in 2015 currently has 32 contracting parties; in addition to the EU and its Member States,

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23 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

24 Convention concerning International Carriage by Rail from 1980 modified by the Vilnius Protocol from 1999.

25 Convention on the Contract for the International Carriage of Goods by Road signed in 1956 in Geneva.

26 Art. 12 COTIF and Art. 31 para. 3 CMR.

27 Regional Economic Integration Organisation.

28 Opinion of the Court of Justice of 7 February 2006 on the competence of the European Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (case No. 1/03), [2006] ECR I-1145.

the convention is binding for Mexico, Singapore, and Montenegro. Economic giants the USA and China signed the convention, but have not yet ratified it.[29] The aim of the convention is to ensure the effectiveness of choice of court agreements between parties in cross-border business transactions by unifying rules for the recognition and enforcement of judgments in civil and commercial matters given by the courts of contracting states designated in an exclusive choice of courts agreement. Pursuant to Arts. 8 and 9, any judgment rendered by the chosen court (that has effect and is enforceable in the state of origin) must be recognised and enforced in other contracting states, except where a ground for refusal applies.[30] The convention requires neither special recognition proceedings, nor a declaration of enforceability prior to enforcement and does not permit a review of the merits of the judgment in the requested contracting state (Art. 8 para. 2).

The second and most recent international instrument is the above-mentioned Hague Judgments Convention that was concluded in July 2019 after years of not always smooth and easy negotiations[31] and that has not yet entered in force.[32] For the EU, negotiating the Hague Judgments Convention represented a priority project of the gradual construction of an external EU policy on judicial cooperation in civil and commercial matters.[33] It is to be expected that the Hague Judgments Convention will be binding for the Czech Republic in the near future. Hopefully it will attract many states so that its unified legal framework will soon provide effective circulation of foreign judgments given by courts in commercial matters worldwide.[34] The number of contracting states is very crucial for its success as, unlike the New York Convention, the Hague Judgments Convention's operation is based on reciprocity (Art. 1 para. 2).

The Hague Judgments Convention anchors uniform core rules, by setting minimum standards for the recognition and enforcement of judgments in civil and commercial matters among future contracting states but not preventing the recognition and enforcement of judgments under national law (Art. 15). It is a complementary instrument to the Convention on Choice of Court Agreements as it introduces in principal an identical circulation regime (Art. 4 and Art. 7). The convention does not contain direct jurisdictional rules, but it stipulates alternative bases for the recognition and enforcement that are enumerated in Arts. 5 and 6. They shall act as indirect jurisdictional filters – connections that a requested state will accept as legitimate when asked to recognise or enforce

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29 HCCH | #37 – Status table. HCCH | Splash. [online]. Copyright © HCCH 1951. Accessed [May 20, 2020] at: https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.

30 Outline of the Convention. Accessed [August 30, 2019] at: https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf.

31 Van LOON, H. Towards a Global Hague Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters. *Collection of Papers of the Faculty of Law*, *University of Niš*, 2019, Year LVIII, No 82, pp. 15–36. Accessed [August 30, 2019] at: http://www.prafak.ni.ac.rs/files/zbornik/sadrzaj/ZFull/PF_Zbornik_2018_82.pdf.

32 HCCH | #41 - Status table. HCCH | Splash. [online]. Copyright © HCCH 1951. Accessed [May 9, 2020] at: https://www.hcch.net/en/instruments/conventions/status-table/?cid=137.

33 Van LOON, *op. cit.*, p. 30.

34 Critical assessment with respect of its future recently, e.g., SCHACK, H. Das neue Haager Anerkennungs- und Vollstreckungsübereinkommen. *IPRax*, 2020, No. 1, pp. 1–7.

a foreign judgment, independently of whether or not they match the direct rules for exercising jurisdiction.[35]

3. ENFORCEMENT OF FOREIGN JUDGMENTS UNDER CZECH NATIONAL LAW

National rules set in the Czech PILA remain the only legal basis for the enforcement of judgments in commercial matters rendered by courts in non-EU countries, provided no international treaty applies. Under Czech procedural law the enforcement of a foreign judgment means taking a coercive measure by a competent authority against a judgment debtor if the judgment debtor is unwilling to perform voluntarily, in the same manner that a judgment rendered by Czech courts would be enforced.[36] "In the same manner" means using the same procedures and methods of enforcement, but not necessarily under the same conditions. In order to be enforced, a foreign judgment has to be recognised by the Czech authorities.

3.1 RECOGNITION AS PREREQUISITE FOR ENFORCEMENT

Under Section 14 of the Czech PILA, two requirements must be fulfilled for the recognition of a foreign judgment: firstly, it has to be final in the state of origin; and secondly, it has to be recognised by the Czech authorities. The first condition implies that the judgment has become final under the law of the state of origin, which shall be certified by the competent foreign authority. Regarding the second condition, Czech authorities grant recognition provided none of the grounds for refusal of recognition pursuant Section 15 of the Czech PILA exists. The procedure of recognition varies with respect to the subject-matter of the judgment. Generally, in commercial matters, where monetary or other property claims are the subject-matter of a judgment, Czech law does not require a special recognition procedure; the conditions for recognition are assessed by courts or competent authorities in the course of the enforcement procedure. Pursuant to Section 16 para. 3 of the Czech PILA, a Czech court can order the enforcement of a foreign judgment in property matters by a reasoned decision provided the foreign judgment complies with the recognition requirements set out in the Czech PILA.

3.2 GROUNDS FOR REFUSAL OF RECOGNITION

Under the Czech PILA, the recognition of a judgment rendered by the courts of a non-EU country may only be refused based on one of the grounds listed in its Section 15. The provision has an exhaustive list of six refusal grounds analysed below

[35] Study on the Hague Conference on Private International Law "Judgments Convention", 2018, p. 13. 301 Moved Permanently. [online]. Copyright © [cit. 30. 8. 2019]. Accessed [August 30, 2019] at: https://europeanciviljustice.files.wordpress.com/2018/04/studyforeuparliament-haguejudgmentsproject-2018.pdf.

[36] KUČERA, Z. – PAUKNEROVÁ, M. – RŮŽIČKA, K. et al. *Mezinárodní právo soukromé.* Eighth edition, Plzeň – Brno: Aleš Čeněk – Doplněk, 2015, p. 375.

that are to be assessed by a court, some of its own motion, some on application by the judgment debtor. The recognising authority is not allowed to review the findings of fact and legal conclusions of the court of origin; Czech private international law follows the general principle of prohibition of *révision au fond*.

3.2.1 TEST OF JURISDICTION

Pursuant to Section 15 para. 1 lit. a) of the Czech PILA, foreign judgments will not be recognised where jurisdictional rules applied in the territory of the Czech Republic confer exclusive jurisdiction on Czech courts, i.e., jurisdiction in certain matters is conferred solely on Czech courts. In commercial matters there are no applicable exclusive jurisdictional rules in the Czech PILA, as jurisdictional rules in EU regulations and binding international treaties have to be considered too. Therefore, for example, Czech courts have to take account of the rules on exclusive jurisdiction in Art. 24 of the Brussels Ibis Regulation. Pursuant to this provision they have exclusive jurisdiction, among others, for disputes on rights *in rem* in immovable property and tenancies of immovable property situated in its territory, in disputes on the validity of the constitution, nullity, or dissolution of companies or the validity of the decisions of company organs provided the seat of the company is in the Czech Republic, or for disputes on the registration or validity of patents, trademarks, designs, or other similar rights required to be deposited or registered in the Czech Republic.

Czech authorities will also refuse to recognize of foreign judgments issued in proceedings where the court of origin would not have had jurisdiction if rules on jurisdiction applicable in the Czech Republic (including rules on jurisdiction in relevant EU Regulations and binding international treaties) had been applied, unless the defendant submitted voluntarily to the jurisdiction of the foreign court. This provision shall prevent the recognition of foreign judgments based on exorbitant rules of jurisdiction where there is no close connection between the subject-matter and the issuing state, whereby this connection is to be assessed under the Czech law. The Czech recognising authority conducts the test of jurisdiction of the court of origin *ex officio*, of its own motion (Section 15 para. 2 of the Czech PILA).

The test of jurisdiction of the court of origin is one of the main differences between the respective national rules in the Czech PILA applicable to the recognition of judgments rendered by the courts of non-EU countries, and the EU rules in the autonomous Brussels – Lugano regime applicable to the recognition of judgments rendered by the courts in both EU Member States and in three of the four EFTA Member States: Switzerland, Norway, and Iceland. Mutual trust in the functioning of the judicial systems of the EU and the EFTA Member States is one of the leading principles in the Brussels – Lugano regime. Therefore, subject to certain exceptions,[37] it is not allowed to use the test of jurisdiction to refuse recognition of judgments rendered in this territory.

The test of jurisdiction can also be found among the grounds for refusal of recognition in some bilateral treaties on legal assistance concluded by the Czech Republic (e.g.,

[37] Exclusive jurisdiction and special jurisdiction protecting weaker parties in matters relating to insurance, consumer contracts and individual contracts of employment (see Art. 45/1, lit. e) Brussels I bis Regulation and Art. 35/1 Lugano Convention).

with the former Yugoslavia,[38] Ukraine[39] or Cuba).[40] A judgment shall not be recognised if the judicial authority of the contracting party on whose territory the judgment was issued lacked the jurisdiction to decide according to the treaty or according to national law.

3.2.2 LIS PENDENS *AND* RES IUDICATA

Proceedings on the same subject-matter pending before a Czech court, provided they were initiated prior to the proceedings before a foreign court, hinder the recognition of a judgment rendered abroad (Section 15 para. 1 lit. b) of the Czech PILA). "The same subject-matter" is given by both the identity of the parties and the identity of the subject-matter (legal relation). Under the national procedural law, the identity of the subject-matter means the identity of the claim, i.e., the identity of the legal ground and the factual circumstances of the claim (the identity of action and/or result).[41] To the best knowledge of the authors, there has so far been no case-law where Czech courts interpret *lis pendens* and *res iudicatae* with respect to foreign judgments given by the courts of a non-EU country. It remains to be seen whether Czech courts would give preference to the broader "EU approach" in interpreting the "same cause of action" in extra-EU relations.[42]

Recognition of a foreign judgment will also be refused when a final judgment has been issued on the same subject-matter either by a Czech court or a by a foreign court provided that such foreign judgment was recognised in the Czech Republic. The issuance date of the judgment is irrelevant in this context. It is sufficient that at the time when the conditions for the recognition of the foreign judgment are assessed either the Czech "hindering" judgment is final, or the foreign "hindering" judgment has been recognised by Czech authorities. "The same subject-matter" shall be interpreted as having an identical meaning as in the context of the *lis pendens* ground for refusal of recognition.

The Czech recognising court considers the *lis pendens* and *res iudicata* refusal grounds only on application of the party against which the foreign judgment is to be recognised, unless the court is otherwise aware of their existence (Section 15 para. 2 of the Czech PILA).

Both *lis pendens* and *res iudicata* refusal grounds are common in bilateral treaties on legal assistance (as for example in the treaty with Uzbekistan).[43] In some cases, howev-

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38 Art. 51 letter b) Treaty between the Czechoslovak Socialist Republic and the Socialist Federative Republic of Yugoslavia on Legal Assistance in Civil, Family and Criminal Matters (No. 207/1964 Coll.).

39 Art. 54 letter b) Treaty between the Czech Republic and Ukraine on Legal Assistance in Civil Matters (No. 123/2002 Coll. of Int. Treaties).

40 Art. 47 para. 1 letter b) Treaty between the Czechoslovak Socialist Republic and Cuban Republic on Mutual Legal Assistance in Civil, Family and Criminal Matters (No. 80/1981 Coll.).

41 Judgments of the Supreme Court of the Czech Republic, Case No. 25 Cdo 1751/98 dated 24. 3. 1999 and No. 25 Cdo 2503/2011 dated 25. 11. 2012.

42 Judgments of the Court of Justice of the European Union 144/86 (Gubish Maschienenfabrik v. Palumbo), C-406/92 (Tatry v. Maciej Rataj), C-39/02 (Maersk Olie & Gas).

43 Art. 51 para. 1 Treaty between the Czech Republic and the Republic of Uzbekistan on Legal Assistance and Legal Relations in Civil and Criminal Matters (No. 133/2003 Coll. of Int. Treaties).

er, the proceedings on the same subject-matter pending before a Czech court would not constitute a refusal ground (e.g., the treaty with the former Yugoslavia).

3.2.3 BREACH OF FAIR TRIAL

This ground for the refusal of recognition of foreign judgments in Section 15 para. 1 lit. d) of the Czech PILA aims to protect the fundamental procedural rights of the defendant by allowing Czech courts to carry out a limited test of procedure of the court of origin. The "defendant" is the judgment debtor in the recognising jurisdiction and the review can only be performed on his/her application, the nationality is irrelevant. The scope of review is limited, Czech courts may only investigate whether the defendant was precluded from participating duly in the proceedings in the state of origin. In particular, the court shall investigate whether pursuant to the procedural rules in the state of origin the summons to appear or the document instituting the proceedings were served on the defendant in due form, i.e., whether the defendant has been duly informed about the initiation of the proceedings and in sufficient time to be able to arrange for defence. Breach of fair trial as a ground for refusal of recognition can also be found in some bilateral treaties (e.g., with the former Yugoslavia).[44]

3.2.4 INFRINGEMENT OF PUBLIC POLICY

Infringement of public policy is one of the traditional grounds for the refusal of recognition of foreign judgments. It is anchored in both Czech national and European private international law.[45] Pursuant to Section 15 para. 1 lit. e) of the Czech PILA foreign judgment shall be denied recognition when contrary to Czech public policy. Public policy is not defined in the statute, but according to the doctrine Czech public policy includes the principles of the social and state system of the Czech Republic and its law that have to be strictly respected. Therefore, not every inconsistency with the Czech legal order hinders recognition. It follows from the case-law of the Constitutional Court of the Czech Republic and the Court of Justice of the European Union that the public policy exception applies when the effects of a foreign judgment breach fundamental rights and freedoms, including the right to a fair trial.[46] The scope of the fair trial protection goes further here than in Section 15 para. 1 lit. b) of the Czech PILA mentioned above. The judgment may be contrary to Czech public policy even in cases when the defendant was heard and was not precluded from raising objections against the claim in the proceedings in the country of origin, but the court of origin refused to consider the defendant's objections on the basis of purely formalistic grounds.[47] Unlike the breach of fair trial pursuant Section 15 para. 1 lit. b) of the Czech PILA which is

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[44] Art. 51 letter c) Treaty between the Czechoslovak Socialist Republic and the Socialist Federative Republic of Yugoslavia on Legal Assistance in Civil, Family and Criminal Matters (No. 207/1964 Coll.).

[45] With some exceptions, the EU regulations on private international law, including the Brussels I bis Regulation [Art. 45/1 lit. a)], allow for non-recognition of a foreign judgment whose effects would be manifestly contrary to the public policy of the requested state.

[46] See e.g., judgments of the Constitutional Court of the Czech Republic II. ÚS 2455/09, I. ÚS 709/05 and judgments of the Court of Justice of the European Union C-7/98, *Krombach v. Bamberski*; C-38/98, *Renault*; C-341/04, *Eurofood IFSC Ltd.*

[47] Judgment of the Constitutional Court of the Czech Republic No. I. ÚS 709/05.

examined only on request, the Czech recognising authority performs the public policy test of its own motion.

Foreign judgments rendered in commercial matters are usually in line with Czech public policy when the test is applied relating to substantive law rules. More frequently this ground for refusal becomes relevant with respect to procedural irregularities in the proceedings in the state of origin. One of the rare cases when Czech courts may apply the public policy refusal ground relating to substantive law involves the enforcement of punitive damages judgments, as this concept does not correspond with the compensatory function of damages in Czech legal doctrine. However, not every foreign judgment ordering the defendant to pay punitive damages is considered contrary to Czech public policy. The Czech Supreme Court held that the recognition of a punitive damages judgment cannot be denied without further analysis, even though the Czech private law does not contain this concept. The mere fact that punitive damages are unknown in Czech law cannot trigger the public policy refusal ground. The assessment has to be done in relation to whether the financial amount awarded is disproportionate with regard to the damage sustained. According to the Czech Supreme Court, recognition can only be refused if the amount of punitive damages is manifestly disproportionate with regard to the damage sustained, representing disproportionate interference with the right to property stipulated in Art. 11 para. 1 of the Charter of Fundamental Rights and Freedoms of the Czech Republic, which constitutes part of the Czech constitutional system.[48]

Public policy reservation as the most traditional ground for refusal of recognition is also anchored in most of the relevant bilateral treaties, but not in all of them. If Czech courts are deciding on the recognition of, e.g., an Uzbek[49] or a Russian[50] court decision in commercial matters, they will not assess whether it complies with the *lex fori* public policy. It brings up the question whether a Czech court would find a legal basis to refuse recognition of an Uzbek or Russian court decision that is manifestly contrary to Czech public policy.

3.2.5 LACK OF RECIPROCITY

The requirement of reciprocity in Section 15 para. 1 lit. f) of the Czech PILA represents another traditional ground for refusal of recognition that is often found in national legislation. Pursuant to this provision the existence of reciprocity, which the recognising authority has to asses of its own motion, is required only in cases when the foreign judgment is aimed against a Czech national or a Czech legal entity. Should the foreign judgment be aimed against a foreigner or a foreign legal entity, the recognising authority does not have to ascertain whether reciprocity is guaranteed between the Czech Republic and the state of origin; lack of reciprocity does not prevent recognition.

If relevant, reciprocity does not have to be guaranteed formally, i.e., neither by an international treaty, nor by a declaration of reciprocity. According to the case-law of

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48 Decision of the Supreme Court of the Czech Republic from August 22, 2014, Case No. 30 Cdo 3157/2013.

49 See Art. 51 Treaty between the Czech Republic and the Republic of Uzbekistan on Legal Assistance and Legal Relationships in Civil and Criminal Matters (No. 133/2003 Coll. of Int. Treaties);

50 Art. 60 Treaty between the Czechoslovak Socialist Republic and the Union of Soviet Socialist Republics on Legal Assistance and Criminal Matters (No. 95/1983 Coll.); the treaty is applied in relation to some of the successor states, the most significant being the Russian Federation.

the Czech Supreme Court material reciprocity is sufficient. Reciprocity is considered as guaranteed if the courts of the state of origin recognise Czech judgments on similar subject-matters under similar conditions. Material reciprocity shall be evidenced by the relevant legal act of the state of origin or by the standing practice of the state authorities.

The question arises as to how to assess reciprocity in cases where the standing practice of foreign state authorities is unknown in the Czech Republic and the law of the state of origin provides only general grounds for the refusal of recognition of foreign judgments. The Czech Supreme Court held that it is sufficient to consider reciprocity as guaranteed if the law of the state of origin allows the recognition of foreign judgments.[51] The Supreme Court thus sided with the opinion of some experts,[52] which, however, is not accepted unanimously in the doctrine.[53] The assessment of whether or not reciprocity is guaranteed is based on the rules on recognition laid down in the law of the state of origin. The Czech Ministry of Justice assists judges when reciprocity has to be ascertained (Section 13 of the Czech PILA), but they are not bound by ministerial communications. Where bilateral treaties on legal assistance apply, the assessment of reciprocity is not necessary, as it is clearly stipulated in their text.[54]

3.3 PROCEDURES FOR ENFORCEMENT OF FOREIGN JUDGMENTS IN COMMERCIAL MATTERS

Should a judgment debtor fail to fulfil an obligation imposed by a foreign judgment in property matters, the judgment creditor may apply for judicial enforcement before a court.[55] Enforcement is always governed by Czech national procedural law, no matter what rules on recognition and enforcement apply. Czech law offers two procedures of enforcement, the judgment creditor can choose and the court is bound by his choice.

In the Czech Republic, judgment creditors may choose between judicial enforcement under the Civil Code of Procedure and enforcement by bailiffs under the Enforcement Code.[56] Judgment creditors usually consider the enforcement by bailiffs as more effective and therefore preferable. Pursuant to the Enforcement Code, judgment creditors are not obliged to specify a concrete method of enforcement and do not have to provide details of the judgment debtor's assets. It is the task of the bailiff to find the assets of the debtor. But the requirements foreign judgments have to meet to be eligible for enforcement by bailiffs are stricter than for judicial enforcement. Enforcement by bailiffs is only admitted where the foreign judgment was, on application of the judgment

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51 Decision of the Supreme Court of the Czech Republic from December 18, 2014, Case No. Cdo 3753/2012.

52 BŘICHÁČEK, T. In: BŘÍZA, P. – BŘICHÁČEK, T. – FIŠEROVÁ, Z. – HORÁK, P. – PTÁČEK, L. – SVOBODA, J. *Zákon o mezinárodním právu soukromém. Komentář*. Praha: C. H. Beck, 2014, p. 107.

53 PAUKNEROVÁ, M. Dvojí exequatur a mezinárodní právo soukromé. In: KYSELOVSKÁ, T. – SEHNÁLEK, D. – ROZEHNALOVÁ, N. (eds.). *In varietate concordia: soubor vědeckých statí k poctě prof. Vladimíra Týče*. Brno: Masarykova univerzita, 2019, Spisy Masarykovy univerzity, Edice Scientia: řada teoretická, 651, (online), p. 258.

54 E.g., Art. 50 para. 1 Treaty between the Czechoslovak Socialist Republic and the Socialist Federative Republic of Yugoslavia on legal assistance in civil, family and criminal matters (No. 207/1964 Coll.).

55 Sections 251–351a Act No. 99/1963 Coll., Civil Code of Procedure.

56 Act No. 120/2001 Coll., on Court Bailiffs and Enforcement Activities (Enforcement Code).

creditor, first recognised in special proceedings on recognition or declared by a Czech court to be enforceable pursuant to a directly applicable EU instrument or international treaty.[57] With respect to foreign judgments given by non-EU courts, pursuant to Section 16 para. 2 of the Czech PILA Czech courts decide in special proceedings on recognition on the application of the judgment creditor, and only then can the foreign judgment be enforced by bailiffs. With respect to foreign judgments given by the courts of non-EU countries, the two enforcement procedures are not equally accessible. If the judgment creditor is not able to specify how the judgment shall be enforced (for example in the case when the judgment creditor has no information on the assets of the judgment debtor in the territory of the Czech Republic),[58] he or she cannot apply directly for enforcement by bailiff but has to apply first for judicial recognition of the judgment. Such recognition procedure may last long enough (several months, perhaps years) to provide the judgment debtor, who has been informed by the court, with the opportunity to discard his or her assets and minimise the judgment creditor's chance of satisfaction of his or her claims.[59]

4. CONCLUSION

In international trade it is essential to have effective enforcement procedures available to enforce judgments abroad. Enforcement is usually the final step judgment creditors take to recover their claims where judgment debtors are reluctant to voluntarily fulfil their obligations. And *vice versa*, the growing relevance and volume of international trade certainly influences the content of legal rules, including rules on recognition and enforcement of foreign judgments rendered in commercial matters. The closer and more intense the trade connections between states or within regional organisations (like the EU or EFTA) are, the simpler, swifter, and more predictable the legal regime of recognition and enforcement of foreign judgments is required and negotiated in supranational legal instruments.

Czech national rules of private international law allow recognition and enforcement of judgments in commercial matters rendered by courts of states which are neither members of the EU (nor EFTA), nor parties to a binding multilateral or bilateral treaty that contains rules on recognition and enforcement of judgments in commercial matters. But the predictability of such a recognition or enforcement is quite limited given the requirements set by the Czech PILA. The lack of reciprocity is likely to be the most frequently applied ground for non-recognition by Czech courts as it is rather difficult for

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57 Section 37 para. 2 lit. b) Enforcement Code.

58 Section 261 para. 1 Civil Code of Procedure.

59 Under the recent case-law of the Czech Supreme Court, the same applies for foreign arbitral awards, despite the fact that they are enforceable under the New York Convention (see judgments Case No. 20 Cdo 1165/2016, Case No. 20 Cdo 5882/2016, Case No. 20 Cdo 1754/2018). In order to facilitate the access to the enforcement of foreign judgments and arbitral awards by bailiffs, the Czech Government has submitted to the Parliament a draft of amendments to the relevant procedural provisions. The proposed amendments allow the filing of a joint application for recognition and for enforcement by a bailiff (draft of amended Section 35 para. 12 Enforcement Code). See the official website of the Chamber of Deputies of the Parliament of the Czech Republic: http://public.psp.cz/en/sqw/historie.sqw?o=8&T=545.

both the courts and the judgment creditors to find out whether Czech judgments were granted recognition in the state of origin under its law or based on the standing practice of its courts.

Removing obstacles to mutual recognition and enforcement of judgments in commercial matters worldwide is certainly a significant challenge in the economically globalized world. The Hague Conference made a big step forward when negotiating the 2005 Choice of Court Agreements Convention and the 2019 Hague Judgments Convention. Now, the ball is in the court of states. By joining these conventions, a global legal basis for mutual recognition and enforcement of judgments would be established, and reciprocity would no longer be a global obstacle to recognition and enforcement. It would become a global principle.

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VARIA

LIMITY NÁSTROJŮ K ŘEŠENÍ KRIZE PODLE SMĚRNICE BRRD A ZÁKONA O OZDRAVNÝCH POSTUPECH A ŘEŠENÍ KRIZE NA FINANČNÍM TRHU

MARTIN ŠERÁK

Abstract: **Limits of Resolution Tools under the BRRD and the Czech Act on Recovery Procedures and the Financial Market Crisis Resolution**

Given the unique position of credit institutions and their systemic importance for the financial stability, their resolution has been traditionally entrusted to supervisory authorities rather than courts. As a result, credit institutions are essentially excluded from the scope of "traditional" insolvency procedure and fall under the resolution regime constituting specific form of administrative proceedings. Directive 2014/59/EU of the European Parliament and of the Council (known as the BRRD) is of a particular consequence here as it harmonized the resolution process at the level of the European Union and the European Economic Area, *inter alia* through the implementation of specific resolution tools. This article deals with conditions for applicability of such resolution tools, their fundamental mechanics as well as legal implications arising thereunder, considering also the Act on Recovery Procedures and the Financial Market Crisis Resolution under which the BRRD has been implemented into Czech law.

Keywords: resolution tools; credit institutions; insolvency; resolution; financial crisis

Klíčová slova: nástroje k řešení krize; úvěrové instituce; insolvence; rezoluce; finanční krize

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1. ÚVOD

Nástroje k řešení krize podle směrnice BRRD[1] představují specifické instituty určené k řešení insolvence úvěrových institucí a dalších povinných osob, které byly do českého právního řádu implementovány prostřednictvím zákona o ozdravných postupech.[2] Tyto instituty umožňují ojedinělý způsob řešení finančních obtíží úvěrových a dalších finančních institucí v režimu správního (rezolučního) procesu a ze současného

[1] Směrnice Evropského parlamentu a Rady 2014/59/EU ze dne 15. května 2014, kterou se stanoví rámec pro ozdravné postupy a řešení krize úvěrových institucí a investičních podniků a kterou se mění směrnice Rady 82/891/EHS, směrnice Evropského parlamentu a Rady 2001/24/ES, 2002/47/ES, 2004/25/ES, 2005/56/ES, 2007/36/ES, 2011/35/EU, 2012/30/EU a 2013/36/EU a nařízení Evropského parlamentu a Rady (EU) č. 1093/2010 a (EU) č. 648/2012 (dále jen „směrnice BRRD").

[2] Zákon č. 374/2015 Sb., o ozdravných postupech a řešení krize na finančním trhu, ve znění pozdějších předpisů (dále jen „zákon o ozdravných postupech").

pohledu představují nepostradatelnou alternativu k insolvenčnímu řízení vedenému podle příslušných předpisů insolvenčního práva.[3]

Navzdory tomu, že k implementaci nástrojů k řešení krize došlo relativně nedávno, ne všechny lze ale považovat za novum v pravém slova smyslu. Řada z těchto institutů totiž vychází z dosavadních metod užívaných při řešení selhání bank.[4] Pro směrnici BRRD byly významnou inspirací zejména relativně hojné zkušenosti amerického regulatorního orgánu FDIC (*Federal Deposit Insurance Corporation*), jehož oprávnění k řešení insolvence bank podle zákona o federálním pojištění vkladů[5] bylo významně rozšířeno Dodd-Frankovovým zákonem,[6] a to prostřednictvím úpravy rezolučního procesu označovaného jako „*Orderly Liquidation Authority*".

Cílem tohoto příspěvku je zejména přiblížit podmínky uplatnění těchto nástrojů, jejich základní mechaniky, a v kontextu legislativních záměrů směrnice BRRD a zákona o ozdravných postupech poukázat na jejich limity. Nezbytným dovětkem je, že tento článek pojednává o nástrojích k řešení krize pouze ve vztahu k úvěrovým institucím, tedy nikoli ke všem finančním institucím, na které předmětná právní úprava dopadá.

2. LEGISLATIVNÍ POZADÍ A OBECNÉ PŘEDPOKLADY APLIKACE NÁSTROJŮ K ŘEŠENÍ KRIZE

2.1 PŮSOBNOST NÁSTROJŮ K ŘEŠENÍ KRIZE

Navzdory tomu, že nástroje k řešení krize byly implementovány za účelem řešení selhání úvěrových institucí, hned na úvod je nezbytné podotknout, že z hlediska osobní působnosti není jejich aplikace ve skutečnosti limitována pouze na úroveň těchto institucí. V návaznosti na zkušenosti s poslední finanční krizí totiž směrnice BRRD rozšířila okruh osob, vůči kterým lze nástroje a další opatření k řešení krize aplikovat, rovněž o mateřské a další holdingové společnosti úvěrových institucí.[7]

Legislativní pozadí tohoto přístupu nastiňuje preambule směrnice BRRD, a to především v článku článku 43: „Pravomoci orgánů příslušných k řešení krize by se měly

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[3] Nutno podotknout, že zákon o ozdravných postupech nepracuje s pojmem „nástroj k řešení krize", nýbrž pouze s širším termínem „opatření k řešení krize", jehož význam ale není zcela stejný jako v případě „opatření k řešení krize" podle směrnice BRRD. V rámci tohoto článku bude věnována pozornost nástrojům k řešení krize, jak je definuje směrnice BRRD, tj. nástrojům převodu činnosti (*sale of business tool*), překlenovací instituce (*bridge institution tool*), oddělení aktiv (*asset separation tool*) a rekapitalizace z vlastních zdrojů (*bail-in tool*).

[4] Pro více informací ohledně rezolučních technik viz např. LABROSSE, J. – OLIVARES-CAMINAL, R. – SINGH, D. *Financial crisis management and bank resolution*. London: Informa Law. Lloyd's commercial law library. 2009.

[5] Federal Deposit Insurance Act of 1950, Pub.L. 81–797, September 21, 1950.

[6] Dodd–Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, July 21, 2010.

[7] Směrnice BRRD rozřazuje mateřské a další holdingové společnosti do sedmi samostatných kategorií. Konkrétně se jedná o finanční holdingové společnosti, smíšené finanční holdingové společnosti, holdingové společnosti se smíšenou činností, mateřské finanční holdingové společnosti v členském státě, mateřské finanční holdingové společnosti v Unii, mateřské smíšené finanční holdingové společnosti v členském státě a mateřské smíšené finanční holdingové společnosti v Unii. Tato rovina je zákonem o ozdravných postupech reflektována prostřednictvím definice „povinných osob" ve smyslu § 3 tohoto předpisu.

vztahovat i na holdingové společnosti, je-li holdingová společnost i dceřiná instituce, ať už v Unii nebo ve třetí zemi, v selhání nebo je-li jejich selhání pravděpodobné. Bez ohledu na skutečnost, že holdingová společnost nemusí být v selhání nebo její selhání nemusí být pravděpodobné, by se pravomoci orgánů příslušných k řešení krize měly vztahovat také na holdingové společnosti, pokud jedna nebo více dceřiných institucí splňuje podmínky zahájení řešení krize nebo pokud instituce třetí země splňuje podmínky řešení krize v této třetí zemi, je-li použití nástrojů a pravomocí k řešení krize vůči holdingové společnosti nezbytné k řešení krize jednoho nebo více jejích dceřiných podniků nebo k řešení krize celé skupiny."

Je přitom nutno pamatovat na skutečnost, že mateřské a holdingové společnosti stojící na vrcholu korporátních struktur jednotlivých finančních konglomerátů samy mnohdy nedrží příslušné licence k provozování bankovních aktivit a fakticky se tedy ani nejedená o úvěrové instituce. Z tohoto důvodu bylo jejich tržní selhání tradičně řešeno v režimu národních insolvenčních předpisů dopadajících na „běžné" obchodní společnosti. Tento *status quo* byl ovšem změněn právě prostřednictvím směrnice BRRD. V rámci možných způsobů řešení insolvence těchto společností je proto nadále nezbytné zvažovat vedle základní varianty insolvenčního řízení rovněž alternativu rezolučního procesu, který je veden příslušným orgánem pověřeným řešením krize. Jak bylo naznačeno v úvodu, tento rámec unijní regulace má přitom své kořeny v právní úpravě Spojených států amerických, konkrétně pak v Dodd-Frankově zákoně. Ten totiž rozšířil pravomoci FDIC, který byl původně oprávněn k řešení selhání finančních institucí s příslušnými licencemi, zejména pak komerčních bank a spořitelen, nikoli však již mateřských či další holdingových společností (*bank holding companies*) těchto institucí,[8] jejichž insolvence mohla být do té doby řešena pouze v rámci insolvenčního řízení vedeného podle Federálního insolvenčního zákona (*Bankruptcy Code*).[9]

S ohledem na shora uvedené je ale nutné poukázat na rozměr právní nejistoty, který je důsledkem dichotomie současné právní úpravy. Jak věřitelé mateřských a holdingových společností, tak i samy tyto společnosti si totiž nemohou být zcela jisty, podle jakého režimu bude v případě jejich insolvence skutečně postupováno. Mezi oběma variantami je přitom zcela zásadní rozdíl, jelikož zatímco účelem insolvenčního řízení je především maximalizace uspokojení věřitelů, primárním cílem rezolučního procesu je zachování finanční stability, a tedy představuje hrozbu absolutní ztráty kontroly nad dalším osudem dlužnické společnosti, což se směrnice BRRD snaží částečně kompenzovat prostřednictvím principu označovaného jako „*no creditor worse off*", podle kterého by žádný věřitel neměl dopadnout hůře, než kdyby se insolvence úvěrové instituce řešila v rámci „standardního" insolvenčního procesu.[10] K zajištění funkčnosti této zásady je stanovena povinnost k vypracování *ex post* komparativní analýzy, jejímž cílem je ověřit, zda by věřitelé a držitelé účastnických práv nedopadli lépe, pokud by byl úpadek

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[8] GLEESON, S. – RANDALL D. G. *Bank resolution and crisis management: law and practice*. Oxford, United Kingdom: Oxford University Press, 2016, s. 68.

[9] Bankruptcy Code, Pub. L. No. 95-598, November 6, 1978.

[10] Viz článek 34 odst. 1 písm. g) směrnice BRRD a § 76 písm. e) zákona o ozdravných postupech. Pro další informace k uvedenému viz DE SERIÈRE, V. – VAN DER HOUWEN, D. 'No Creditor Worse Off' in Case of Bank Resolution: Food for Litigation. *Journal of International Banking Law and Regulation*, 2016, Issue 7. Dostupné také online na: https://ssrn.com/abstract=2856370.

úvěrové instituce řešen v rámci „běžného“ insolvenčního řízení.[11] Případný rozdíl poté zakládá nárok těchto osob domáhat se náhrady škody ve zjištěné výši.

Subsumpce holdingových společností pod rezoluční proces je rovněž vyjádřením principu centralizované strategie řešení krize (*single point of entry strategy*), podle které by mělo dojít k uplatnění nástrojů k řešení krize a dalších rezolučních mechanismů primárně na úrovni holdingové společnosti.[12] Nutno ale dodat, že tento princip neplatí absolutně. Na úrovni Evropské unie, respektive Evropského hospodářského prostoru, jsou významným limitem především národní zájmy členských států, ve kterých sídlí pobočky a dceřiné společnosti příslušné holdingové společnosti, se kterou je rezoluční proces veden.[13] Pokud totiž tyto státy s jednotným postupem řešení krize na úrovni skupiny nesouhlasí, mohou vůči úvěrovým institucím na svém území přijmout vlastní opatření a odchýlit se tak od jednotného postupu kolegia k řešení krize, tj. kolektivního orgánu, který o řešení insolvence na úrovni skupiny rozhoduje.[14] Takový postup je označován jako decentralizovaná strategie řešení krize (*Multiple Points of Entry*), podle které dochází k souběžnému uplatnění nástrojů k řešení krize dvěma či více orgány pověřenými řešením krize, a to na různých úrovních dané skupiny (byť v režimu vzájemné koordinace).[15] To lze do určité míry rovněž chápat jako paralelu k zahájení vedlejšího, teritoriálního insolvenčního řízení ve smyslu nařízení 2015/848.[16]

2.2 REGULATORNÍ CÍLE NÁSTROJŮ K ŘEŠENÍ KRIZE V KONTEXTU PRINCIPU PROPORCIONALITY

S poukazem na fundamentální regulatorní záměr směrnice BRRD řešit finanční obtíže úvěrových a dalších finančních institucí takovým způsobem, aby náklady jejich selhání nesli především společníci a věřitelé těchto institucí, nikoli však daňoví poplatníci, je nutno vymezit základní cíle nástrojů k řešení krize. Jejich aplikace by měla především (i) zajistit kontinuitu zásadních činností, (ii) zabránit významným nepříznivým důsledkům pro finanční systém, zejména omezením šíření krize a zachováním tržní disciplíny, (iii) minimalizovat objem případné veřejné podpory, (iv) chránit finanční prostředky osob, na které se vztahuje pojištění pohledávek z vkladů, a (v) chránit majetek klientů úvěrových institucí a dalších povinných osob.[17]

Význam daných cílů spočívá především v tom, že slouží jako měřítko pro zjištění, zda je užití opatření k řešení krize ve vztahu k dané úvěrové instituci či jiné povinné

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[11] Viz článek 74 Ssměrnice BRRD a § 177 zákona o ozdravných postupech, podle kterého musí ČNB zajistit případné dorovnání nejpozději do 1 roku od uplatnění opatření (nástrojů) k řešení krize.

[12] Více viz zpráva FSB: Recovery and Resolution Planning for Systemically Important Financial Institutions: Guidance on Developing Effective Resolution Strategies. Dostupné na: https://www.fsb.org/wp-content/uploads/r_130716b.pdf?page_moved=1.

[13] Viz článek 87 písm. f) a g) směrnice BRRD, které jsou v rámci zákona o ozdravných postupech poněkud stručněji vymezeny pod ustanovením § 76 písm. h), které transponuje rovněž obecné zásady k řešení krize podle článku 34 směrnice BRRD, o kterých bude řeč v jedné z následujících kapitol.

[14] Viz články 91 odst. 8 a 92 odst. 4 směrnice BRRD, kterým odpovídá ustanovení § 191 odst. 3 zákona o ozdravných postupech.

[15] Tamtéž.

[16] Nařízení Evropského parlamentu a Rady (EU) 2015/848 ze dne 20. května 2015 o insolvenčním řízení.

[17] Viz článek 31 odst. 2 směrnice BRRD a § 75 zákona o ozdravných postupech.

osobě přiměřené. To je relevantní zejména pro účely determinace, zda je řešení krize ve veřejném zájmu, přičemž veřejný zájem je klíčovou podmínkou aplikace jakéhokoli nástroje k řešení krize, jak bude dále blíže popsáno. Test proporcionality bude přitom obvykle splněn tehdy, pokud by v případě likvidace[18] úvěrové instituce či jiné povinné osoby, respektive v případě řešení úpadku v insolvenčním řízení, nebylo shora uvedených účelů řešení krize dosaženo vůbec, případně nikoli ve stejné míře.[19] Byť mají uvedené cíle *de iure* stejnou důležitost, v mnoha ohledech jsou vůči sobě poněkud paradoxně navzájem kontradiktorní.[20] Například zájem na zachování kontinuity činností nemusí nezbytně podporovat tržní disciplínu, zejména pak za situace, kdy je k řešení insolvence dané instituce užito veřejné podpory. V tomto směru tedy rozhodně není realistické očekávat, že bude možné zajistit kumulativní splnění těchto cílů v každé situaci.

V kontextu ověřování proporcionality aplikace nástrojů k řešení krize je rovněž nutné poukázat na existující rozdíly v regulaci insolvence úvěrových institucí na úrovni jednotlivých členských států. Podíváme-li se na úpravu podle insolvenčního zákona,[21] je evidentní, že úpadek úvěrových institucí lze řešit pouze konkurzem, a to navíc až po zániku licence k provozování příslušných činností.[22] V případě České republiky tedy alternativa insolvenčního procesu automaticky vylučuje minimálně první z výše uvedených cílů, tj. zajištění kontinuity zásadních funkcí úvěrové instituce. Jiná situace ale panuje například v sousedním Německu, a to mimo jiné díky zákonu o reorganizaci úvěrových institucí (*Gesetz zur Reorganisation von Kreditinstituten*).[23] Ten staví vedle sanačního řízení (*Sanierungsverfahren*) především na reorganizačním řízení (*Reorganisationsverfahren*), ve kterém se jednak aktivují tradiční věřitelská oprávnění k zásahům do chodu dotčené instituce, ale také vrchnostenské pravomoci Spolkového orgánu pro finanční dohled (*Bundesanstalt für Finanzdienstleistungsaufsicht)* známého pod zkratkou BaFin.[24]

Je tedy zřejmé, že poměřování proporcionality aplikace nástrojů vůči jednotlivým úvěrovým institucím a dalším povinným osobám se navzdory harmonizaci dosažené směrnicí BRRD bude významně lišit stát od státu. Tato nejednotnost ale může být zdrojem řady konfliktů, a to nejen v rámci vztahu rezolučního orgánu a příslušné povinné

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18 Zde je nutno upozornit na nepřesnost českého překladu směrnice BRRD, jelikož v kontextu českého právního prostředí se zjevně myslí konkurs jako korespondující způsob řešení úpadku finanční instituce (v anglickém znění „*winding up*“). Uvedený nedostatek ale zákon o ozdravných postupech odstranil, jak je zjevné ze znění § 80.

19 Viz článek 32 odst. 5 směrnice BRRD a § 80 zákona o ozdravných postupech.

20 Shodně SCHIAVO, G. *The role of financial stability in EU law and policy*. Alphen aan den Rijn, the Netherlands: Kluwer Law International B. V. European monographs, volume 101, 2017, kapitola 8.03 a násl. Dále viz SJÖBERG, G. Banking Special Resolution Regimes as a Governance Tool. In: RINGE, W. G. – HUBER, P. M. *Legal Challenges in the Global Financial Crisis*: *Bail-Outs, the Euro and Regulation*. Oxford & Portland, Oregon: Hart Publishing, 2014, s. 187.

21 Zákon č. 182/2006 Sb., o úpadku a způsobech jeho řešení, ve znění pozdějších předpisů (dále jen „Insolvenční zákon“).

22 Viz § 367 odst. 1 písm. a) insolvenčního zákona.

23 Gesetz zur Sanierung und Abwicklung von Instituten und Finanzgruppen vom 10. Dezember 2014 (BGBl. I S. 2091).

24 KENADJIAN, P. S. *Too big to fail - brauchen wir ein Sonderinsolvenzrecht für Banken?* Berlin: De Gruyter, 2012, s. 32.

osoby, nýbrž i mezi jednotlivými orgány pověřenými řešením krize navzájem, což platí zejména pro případy rezoluce finančních skupin, které působí ve více členských státech.

2.3 VEŘEJNÝ ZÁJEM A DALŠÍ PODMÍNKY UPLATNĚNÍ NÁSTROJŮ K ŘEŠENÍ KRIZE

Jak již bylo uvedeno shora, zatímco tradiční instituty insolvenčního práva vychází primárně z paradigmatu maximalizace uspokojení věřitelů, nástroje k řešení krize slouží v nejširší rovině k ochraně veřejného zájmu, který je konkretizován zmíněnými účely řešení krize. V tomto směru proto nelze nástroje k řešení krize podřadit pod mechanismy insolvenčního práva v pravém slova smyslu, nýbrž je na ně nutno nahlížet jako na instituty *sui generis* sledující odlišné cíle. Z tohoto důvodu koncipuje směrnice BRRD nástroje k řešení krize principiálně až jako variantu *ultima ratio*, jelikož k odchýlení se od základních východisek insolvenčního procesu má dojít až tehdy, pokud se zájmy věřitelů povinné instituce zjevně neslučují s veřejným zájmem.

Směrnice BRRD, respektive zákon o ozdravných postupech vymezuje domněnku veřejného zájmu následujícím způsobem: „Pro účely tohoto zákona je řešení krize ve veřejném zájmu, je-li uplatnění opatření k řešení krize nezbytné a přiměřené k dosažení jednoho nebo více účelů řešení krize a případná likvidace povinné osoby nebo řešení jejího úpadku v insolvenčním řízení by nevedly k dosažení uvedených účelů řešení krize v téže míře.“[25] Veřejný zájem je tedy poměřován z hlediska přiměřenosti užití nástrojů k řešení krize ve vztahu k vymezeným účelům řešení krize. Nutno ale dodat, že veřejný zájem je pojmem relativně neurčitým a musí být interpretován vždy v kontextu daného předpisu a jeho účelu, jak potvrzuje evropská i česká judikatura.[26]

S poukazem na to, že Insolvenční zákon umožňuje řešit úpadek úvěrové instituce pouze konkurzem, který ze své podstaty neumožňuje zajistit kontinuitu zásadních činností, lze usuzovat, že minimálně v českém právním prostředí nebude podmínku veřejného zájmu příliš obtížné splnit. To platí z logiky věci samozřejmě i pro likvidaci úvěrové instituce či jiné povinné osoby. V tomto směru je tedy veřejný zájem na užití nástrojů k řešení krize v podstatě presumován a lze usuzovat, že v případě selhání českých úvěrových institucí by případné žaloby proti užití nástrojů k řešení krize z titulu tvrzeného nedostatku veřejného zájmu byly s největší pravděpodobností neúspěšné. S ohledem na široké vymezení účelů řešení krize podle zákona o ozdravných postupech, absenci skutečných alternativ k řešení úpadku úvěrových institucí a silné postavení ČNB v pozici hlavního finančního regulátora, si lze totiž jen obtížně představit scénář, ve kterém by se žalobci podařilo zvrátit takto nastavený koncept veřejného zájmu. Zákon o ozdravných postupech v návaznosti na zásadu „*no creditor worse off*“ navíc upravuje vlastní kompenzační mechanismus poškozených věřitelů a akcionářů, který je na aspektu veřejného zájmu zcela nezávislý. V tomto ohledu lze předpokládat, že prag-

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[25] Viz § 80 zákona o ozdravných postupech, který je recepcí článku 32 odst. 5 směrnice BRRD.

[26] Pro základní předpoklady veřejného zájmu v obecné rovině viz např. rozhodnutí Evropského soudu pro lidská práva v rozsudku ve věci *James a ostatní proti Spojenému království* ze dne 21. 2. 1986, série A, č. 98. Pojem veřejného zájmu byl podroben analýze rovněž v řadě rozhodnutí českých soudů, viz např. nález Ústavního soudu ze dne 28. června 2005, sp. zn. Pl. ÚS 24/04.

matickým řešením případných žalob proti rozhodnutí správního orgánu bude s největší pravděpodobností právě odkaz na tuto formu kompenzace.

I z pohledu ČNB (jakožto orgánu pověřeného řešením krize) bude ve vztahu k úvěrovým institucím pravděpodobně dávat větší smysl postup podle zákona o ozdravných postupech, než se spoléhat na ne zcela rovnou alternativu v podobě insolvenčního zákona[27] a riskovat tak ohrožení cílů zákona o ozdravných postupech, a to pouze z důvodu nejasných kontur veřejného zájmu. To samozřejmě ale neznamená, že by úvaha o existenci veřejného zájmu měla být svévolná. V tomto směru lze rovněž odkázat na rozhodnutí Evropského soudu pro lidská práva ve věci Družstevní záložna Pria a další v. Česká republika.[28]

V obecné rovině je ale korektivem výše uvedeného předpokladu skutečnost, že unijní regulace nedopadá pouze na úvěrové instituce, nýbrž i na mateřské a holdingové společnosti těchto institucí. Z titulu dalších možných alternativ k řešení krize podle lokálních insolvenčních právních předpisů je u těchto osob nutné řešit element veřejného zájmu více než u úvěrových institucí *per se*. Lze totiž očekávat, že v případě aplikace nástrojů k řešení krize vůči těmto osobám budou žaloby mnohem frekventovanější. Orgány pověřené řešením krize se totiž budou muset vypořádat s nepoměrně komplexnější interpretací existence veřejného zájmu jako podmínky k uplatnění nástrojů a dalších opatření k řešení krize vůči subjektům, které jednak ani nemusí být finančními institucemi *stricto sensu,* ale navíc se můžou nacházet i v úplně jiné zemi než příslušný orgán, což platí zejména v případě snahy o centralizované strategie řešení krize na úrovni holdingové společnosti finanční skupiny. To samozřejmě dává dotčeným společnostem mnohem více prostoru k argumentaci, že požadavek existence veřejného zájmu splněn nebyl. Stejně tak lze ve vztahu k těmto společnostem očekávat pozitivní kompetenční konflikty orgánů pověřených řešením krize, jelikož holdingové společnosti jsou zpravidla ovládající osobou pro celou řadu úvěrových institucí z různých zemí. Tyto konflikty by sice měly být do značné míry omezeny díky povinnosti k tvorbě plánů k řešení krize,[29] ale nelze je zcela vyloučit. Inklinace k teritoriálnímu uvažování motivovaná ochranou lokálních zájmů se navíc dostává do popředí právě až v období finanční krize. Není proto zcela realistické očekávat, že všechny postupy a dohody předvídané těmito plány budou nakonec opravdu realizovány.

Přestože je veřejný zájem klíčovým předpokladem, který musí být pro účely aplikace opatření k řešení krize splněn, nejedná se o požadavek jediný. Obecně totiž musí úvěrové instituce a další povinné osoby splnit také následující dvě podmínky.[30]

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27 Ve smyslu ustanovení § 368 odst. 3 insolvenčního zákona.

28 Rozhodnutí Evropského soudu pro lidská práva ve věci Družstevní záložna Pria a další v. Česká republika ze dne 31. července 2008, č. 72034/01, bod 93.

29 Více k plánům řešení krize podle směrnice BRRD viz BINDER, J. H. Resolution Planning and Structural Bank Reform within the Banking Union. *SAFE Working Paper*, 2014, No. 81, s. 5.

30 Nutno dodat, že z hlediska požadavku na splnění podmínek k uplatnění nástrojů k řešení krize pramení dodatečná úroveň komplexity ze specifické výjimky z pravidla, že existence veřejného zájmu je podmínka *sine qua non* k uplatnění opatření k řešení krize. Současná právní úprava totiž za určitých okolností umožňuje užít opatření k řešení krize vůči holdingovým společnostem i tehdy, kdy samy nesplňují jinak nezbytné podmínky pro jejich aplikaci. Viz § 81 odst. 4 zákona o ozdravných postupech, který vychází z článku 33 odst. 4 směrnice BRRD.

V první řadě musí být úvěrová instituce či jiná povinná osoba v selhání.[31] Podle zákona o ozdravných postupech je povinná osoba v selhání nebo je její selhání pravděpodobné tehdy, pokud splňuje alespoň jednu z následujících čtyř možností konstruovaných jako alternativní podmínky.[32] Za prvé jde o situace, kdy úvěrové instituce porušují zákonné požadavky nezbytné pro udělení licence, zejména pak ve vztahu k obezřetnostním požadavkům na strukturu a hodnotu drženého kapitálu. Naplnění této skutkové podstaty může tedy zjevně připadat v úvahu pouze u úvěrových institucí, které na rozdíl od dalších povinných osob skutečně drží příslušné bankovní licence. O selhání jde ale rovněž tehdy, pokud je hodnota aktiv příslušné povinné osoby nižší než hodnota jejích závazků. Jedná se tedy o dobře známý rozvahový test insolvence, respektive test předlužení (*balance sheet test*). Třetí možnou podmínkou je stav, kdy daná povinná osoba není schopna splácet své splatné dluhy nebo jiné závazky, tedy tzv. test likvidity (*liquidity test*).[33] Jak bylo již naznačeno, tyto podmínky mohou být považovány za splněné i tehdy, kdy sice ještě nenastaly, ale na místě je důvodný předpoklad, že se tak v dohledné době stane, tedy v podstatě po vzoru koncepce hrozícího úpadku ve smyslu Insolvenčního zákona.[34] Ve vztahu k úvěrovým institucím je tato konstrukce nepochybně více než na místě. S ohledem na strmou křivku poklesu hodnoty jejich aktiv v případě tržního selhání totiž může uspokojivé řešení situace přinést zpravidla pouze neodkladný zásah orgánů pověřených řešením krize. Poslední možnou alternativou, která odůvodňuje závěr, že je povinná osoba v selhání, představují situace, kdy je na místě poskytnutí mimořádné veřejné finanční podpory (vyjma taxativně stanovených forem veřejné podpory).[35]

Nad rámec veřejného zájmu a požadavku selhání (či hrozícího selhání) povinné osoby je poslední podmínkou pro uplatnění opatření k řešení krize předpoklad, že s ohledem na časové možnosti a další relevantní okolnosti neexistuje pravděpodobná vyhlídka na to, že by selhání instituce v přiměřené lhůtě zabránilo jakékoli jiné opatření než opatření k řešení krize.[36] Tato podmínka opět připomíná, že nástroje k řešení krize by principiálně neměly být první variantou, jak finanční obtíže úvěrových institucí a dalších povinných osob řešit. V tomto směru je nutno vyjít zejména z vlastního textu směrnice BRRD. Ta mezi další eventuality řadí vedle opatření včasného zásahu především alternativní opatření soukromého sektoru,[37] jakož i užití ojedinělého institutu odpisu nebo konverze, o kterém bude řeč níže.

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[31] Viz § 78 zákona o ozdravných postupech a článek 32 směrnice BRRD.

[32] Viz ustanovení § 4 zákona o ozdravných postupech, který vychází z článku 32 odst. 4 směrnice BRRD.

[33] Pro více informací ohledně aktuálních otázek k těmto testům viz SCHELO, S. *Bank recovery and resolution*. Kluwer Law International, 2015, s. 93–95. Ve vztahu k definici úpadku podle § 3 insolvenčního zákona, který s těmito testy rovněž operuje viz např. SCHÖNFELD, J. Ekonomický pohled na definici úpadku korporace. *Bulletin advokacie* (el. forma časopisu), 2017. Dostupné na: http://www.bulletin-advokacie.cz/ekonomicky-pohled-na-definici-upadku-korporace.

[34] Viz § 3 odst. 4 insolvenčního zákona.

[35] Mimořádná veřejná podpora je definovaný pojem ve smyslu článku 2 odst. 1 bod 28 směrnice BRRD, respektive § 2 odst. 1 písm. s) zákona o ozdravných postupech.

[36] Viz § 78 odst. 1 písm. b) zákona o ozdravných postupech, který neúplně transponuje článek 32 odst. 1 písm. b) směrnice BRRD.

[37] Pro další informace viz SCHELO, *op. cit.*, s. 99.

Navzdory nastíněnému konceptu nástrojů k řešení krize jako institutů *ultima ratio* nemusí být jejich aplikace nezbytně ojedinělým jevem. Veřejný zájem lze totiž minimálně v případě zákona o ozdravných postupech v podstatě presumovat a k prokázání opaku by musela osoba namítající jeho neexistenci nejprve unést důkazní břemeno.

To bude ale s poukazem na limity soudního přezkumu značně obtížné.[38] Směrnice BRRD totiž v kontextu soudní revize uplatněných nástrojů k řešení krize vylučuje automatický odkladný účinek a vychází z vyvratitelné právní domněnky, že jakýkoli odklad výkonu přijatých rozhodnutí by byl proti veřejnému zájmu.[39] Případný přezkum provedených opatření je tedy obecně limitován až na *ex post* zhodnocení. Stejný přístup se uplatní i v případě rezolučního režimu podle zákona o ozdravných postupech, a to nehledě na určitá specifika apelačního systému v rámci správního řízení. Ačkoli ČNB není sama o sobě správním orgánem, podle § 1 odst. 3 zákona o České národní bance[40] platí, že v zákonem stanovených případech jsou jí svěřeny kompetence správního úřadu. Z tohoto důvodu má rozhodnutí ČNB (jakožto příslušného orgánu k řešení krize) povahu správního rozhodnutí. Zároveň platí, že ČNB nemá žádný další nadřízený správní orgán, což ji v podstatě staví do role ústředního správního úřadu.[41] Řádným opravným prostředkem je proto rozklad ve smyslu § 152 správního řádu.[42] Zákon o ozdravných postupech sice podání rozkladu v určitých případech vylučuje, ve vztahu k nástrojům k řešení krize tomu tak ale není.[43] Případné přiznání odkladného účinku žalobě proti rozhodnutí ČNB o opatření k řešení krize je po vzoru směrnice BRRD zatíženo vyvratitelnou domněnkou, podle které je odkladný účinek v rozporu s veřejným zájmem.[44] S ohledem na ustanovení § 222 odst. 1 zákona o ozdravných postupech poté platí, že rozhodnutí ČNB o nástrojích k řešení krize je vykonatelné okamžikem oznámení tohoto rozhodnutí účastníkům řízení, není-li výslovně stanoveno jinak. Rozhodnutí lze přitom doručit veřejnou vyhláškou a za doručené se považuje okamžikem uveřejnění na internetových stránkách ČNB, což znamená, že je vykonatelné prakticky ihned.

Rozměr veřejného zájmu by měl v každém případě korelovat s tržním postavením úvěrových institucí a dalších povinných osob, jelikož čím významnějšího postavení finanční instituce bude, tím spíše lze předpokládat jeho existenci. Aktuální případy ovšem poukazují spíše na nejednotný postup orgánů pověřených řešením krize a významné tržní postavení evidentně nemusí znamenat, že k užití nástrojů k řešení krize skutečně dojde.

To lze doložit na případu insolvence šesté největší španělské banky Banco Popular, která byla s poukazem na veřejný zájem řešena kombinací nástroje odpisu a konverze a nástroje převodu činnosti, na základě čehož byla tato instituce následně převedena

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38 Soudní přezkum zajišťuje v obecné rovině ustanovení článku 85 odst. 3 a 4 směrnice BRRD, jehož českým „ekvivalentem“ je § 224 zákona o ozdravných postupech.

39 Viz článek 85 odst. 4 směrnice BRRD.

40 Zákon č. 6/1993 Sb., zákon České národní rady o České národní bance.

41 Viz JEMELKA, L. – PONDĚLÍČKOVÁ, K. – BOHADLO, D. *Správní řád. Komentář.* 6. vydání. Praha: C. H. Beck, 2019, Komentář k § 152 odst. 2.

42 Zákon č. 500/2004 Sb., správní řád.

43 Viz např. § 23 odst. 2 nebo § 224 odst. 2 zákona o ozdravných postupech.

44 Viz § 225 odst. 1 zákona o ozdravných postupech.

španělské bance Banco Santander, což mimochodem přispělo k dalšímu posílení jejího statutu jako tzv. G-SIFI (*Global Systemically Important Financial Institution*). Naopak v případě finančních potíží páté největší italské banky – Monte dei Paschi di Sienna – nebyl shledán veřejný zájem na užití některého z nástrojů k řešení krize, ale na poskytnutí veřejné podpory formou preventivní rekapitalizace (*precautionary recapitalisation*).[45] Schválení této formy veřejné podpory Evropskou komisí bylo s ohledem na okolnosti a politickou sensitivitu případu pravděpodobně nevyhnutelné, nicméně pochopitelně vzbuzuje kontroverzi, a to zejména s ohledem na proklamovaný záměr zabránit dalším vladním subvencím finančního sektoru.[46]

3. NÁSTROJE K ŘEŠENÍ KRIZE

3.1 NÁSTROJ PŘEVODU ČINNOSTI (PŘECHOD ČINNOSTI NA SOUKROMÉHO NABYVATELE)

Směrnice BRRD explicitně identifikuje celkem čtyři nástroje k řešení insolvence finančních institucí, a to sice nástroj převodu činnosti (*sale of business tool*), překlenovací instituce (*bridge institution tool*), oddělení aktiv (*asset separation tool*) a rekapitalizace z vlastních zdrojů (*bail-in tool*).

Nástroj převodu činnosti (*sale of business*) patří spolu s nástrojem překlenovací instituce (*bridge institution*)[47] mezi instituty, které byly s určitými modifikacemi převzaty s ohledem na předchozí zkušenosti s jejich užíváním, zejména pak v rámci Spojených států amerických.[48] Nutno ale dodat, že tyto nástroje do svých právních úprav převzala před transpozicí směrnice BRRD rovněž řada zemí starého kontinentu, zejména pak Velká Británie[49] a Německo.[50] Zákon o ozdravných postupech namísto spojení „převod činnosti", se kterým poněkud nepřesně pracuje český překlad směrnice BRRD, užívá termínu „přechod činnosti". Tím je vyjádřen fakt, že k realizaci transferu nedochází z vlastní vůle úvěrové instituce, nýbrž na základě jiné právní skutečnosti, v tomto pří-

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45 Viz oficiální zpráva Evropské komise. Dostupné na: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1905.

46 Pro další informace HADJIEMMANUIL, CH. Limits on State-Funded Bailouts in the EU Bank Resolution Regime. *European Banking Institute Working Paper Series*, 2017. Dostupné na: https://ssrn.com/abstract=2912165 or http://dx.doi.org/10.2139/ssrn.2912165.

47 V terminologii zákona o ozdravných postupech jde o instituty přechodu činnosti na soukromého nabyvatele a na překlenovací instituci ve smyslu § 96–101 a 102–112.

48 OLSON, G. N. Government Intervention: The Inadequacy of Bank Insolvency Resolution – Lessons from the American Experience. In: LASTRA, R. M. – SCHIFFMAN, H. N. *Bank failures and bank insolvency law in economies in transition*. Boston: Kluwer Law International, 1999, s. 147 a násl.

49 Uvedené nástroje implementuje britský bankovní zákon (*Banking Act*). Více viz DALVINDER, S. U.K. Approach to Financial Crisis Management. *Transnational Law & Contemporary Problems*, 2010, Vol. 19, s. 872.

50 V případě Německa byly tyto nástroje implementovány již v rámci zákona o restrukturalizaci bank (*Gesetz zur Restrukturierung und geordneten Abwicklung von Kreditinstituten, zur Errichtung eines Restrukturierungsfonds für Kreditinstitute und zur Verlängerung der Verjährungsfrist der aktienrechtlichen Organhaftung (Restrukturierungsgesetz)*) z roku 2011, tj. o řadu let dříve, než došlo k implementaci směrnice BRRD. Pro více informací viz CHATTOPADHYAY, R. *Bridge Banks in Deutschland – Abwicklung und Restrukturierung systemrelevanter Banken durch Vermögensübertragung*. Springer, 2015.

padě z titulu rozhodnutí orgánu veřejné moci. V dalším textu bude proto nadále užíváno spojení „přechod činnosti“, vyjma případů, kde bude explicitně odkazováno na směrnici BRRD.

Co se týče nástroje přechodu činnosti, s jistou mírou zjednodušení lze říci, že tento institut není v zásadě ničím jiným než nuceným přechodem podílů nebo závodu či jeho části na třetí stranu (nikoli však na překlenovací instituci). S ohledem na relativně přímočarou povahu nástroje přechodu činnosti lze tento institut jistě označit za nejméně komplikovaný ze všech nástrojů k řešení krize.[51] Předpokladem úspěšné realizace tohoto nástroje je v případě transferu závodu především vyčlenění systémově relevantních funkcí dané instituce a jejich přesun na nového nabyvatele. Tím má být zajištěna kontinuita funkcí i do budoucna, přičemž směrnice BRRD předpokládá, že po realizaci vlastního přechodu zpravidla dojde k likvidaci finanční instituce podle národních insolvenčních předpisů.[52]

Nehledě na to, zda bude mít nástroj přechodu činnosti podobu přechodu podílů nebo závodu, nezbytnou podmínkou zůstává, aby příslušný nabyvatel držel veškerá nezbytná oprávnění k provozu činností dané instituce.[53] Navzdory tomu, že o licenci lze žádat ve spojení se zamýšleným transferem činnosti, s ohledem na časovou tíseň lze usuzovat, že v rámci realizace tohoto nástroje bude v případě úvěrových institucí okruh potenciálních zájemců omezen primárně na další úvěrové instituce s existujícími licencemi. K přechodu by mělo zásadně docházet za tržních podmínek, přičemž výběr budoucího kupujícího podléhá dalším požadavkům, mezi které patří především transparentnost, absence střetu zájmů, zákaz poskytování neoprávněné výhody nabyvateli a pochopitelně také snaha o maximalizaci prodejní ceny.[54] Zároveň ale platí, že za mimořádných okolností lze od požadavku na splnění uvedených podmínek upustit.[55] Stanovení této výjimky je nepochybně na úkor transparentnosti zamýšleného přechodu, ale má své odůvodnění v situacích, kdy je v sázce finanční stabilita a spíše než dodržení veškerých formalit je nutná urychlená reakce.

S ohledem na nucenou povahu tohoto nástroje nepodléhá přechod činnosti souhlasu společníků dané instituce či jiných třetích stran a neuplatní se ani jakékoli další procesní požadavky plynoucí z národních předpisů, zejména pak těch upravující fungování obchodních korporací.[56] Tento přístup vychází mimo jiné ze závěrů Basilejského výboru pro bankovní dohled,[57] a to vzhledem ke zkušenostem s řešením selhání finanční skupiny Fortis v období poslední finanční krize, konkrétně pak s ohledem na rozhodnutí belgického soudu ve věci *Fortis* z roku 2008.[58] Pro přiblížení okolností tohoto případu postačí uvést, že v návaznosti na insolvenci finančního konglomerátu Fortis působícího především v Beneluxu poskytly Nizozemí, Belgie a Lucembursko příslušným společ-

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51 SCHIAVO, *op. cit.*, kapitola 8.03, bod 5.
52 Viz ustanovení článku 37 odst. 6 ve spojení s článkem 60 preambule směrnice BRRD.
53 Viz ustanovení článku 38 odst. 7 směrnice BRRD a § 98 odst. 1 zákona o ozdravných postupech.
54 Viz ustanovení článku 39 odst. 2 směrnice BRRD a § 97 odst. 1 zákona o ozdravných postupech.
55 Viz ustanovení článku 39 odst. 3 směrnice BRRD a § 97 odst. 3 zákona o ozdravných postupech.
56 Viz ustanovení článku 38 odst. 1 směrnice BRRD a § 96 odst. 5 zákona o ozdravných postupech.
57 Viz body 28–33 zprávy „Report and Recommendations of the Cross-border Bank Resolution Group“ Basilejského výboru pro bankovní dohled. Dostupné na: https://www.bis.org/publ/bcbs169.pdf.
58 Rozhodnutí odvolacího soudu v Bruselu ve věci *Fortis* ze dne 12. prosince 2008, 2008/KR350.

nostem této skupiny značné státní subvence za účelem jejich záchrany. Tyto subvence měly mimo jiné podobu konvertibilních dluhopisů, na základě kterých měly zmíněné státy získat majetkovou účast v daných společnostech koncernu Fortis,[59] a to se záměrem následné restrukturalizace skupiny a jejího prodeje finanční skupině BNP Paribas. Tento plán ovšem zhatil belgický soud, který vzhledem k absenci souhlasů valných hromad předmětných společností pozastavil účinnost zamýšlených transakcí.[60] Směrnice BRRD proto za účelem zajištění „exekutivní povahy" nástroje převodu činnosti od požadavku předchozích souhlasů a dalších procesních náležitostí upouští. V tomto směru tedy představuje institut přechodu činnosti *lex specialis* k obecné úpravě podmínek převodu obchodního podílu a závodu.[61]

Na tomto místě stojí za povšimnutí jistý rozpor mezi jednou z obecných zásad řešení krize, podle které ztráty instituce v krizi nesou jako první její akcionáři.[62] V kontextu této zásady totiž působí poněkud překvapivě pravidlo, podle kterého se má jakékoli protiplnění získané za přechod podílů (akcií) na nového nabyvatele použít ve prospěch společníků a vlastníků jiných nástrojů účasti řešené instituce v krizi, vyjma případného započtení výdajů vynaložených orgánem k řešení krize v souvislosti s realizací toho nástroje.[63] Vyjdeme-li totiž z premisy, že hodnota akcií a dalších nástrojů majetkové účasti v úvěrové instituci koreluje s panující ekonomickou situací (a tím pádem může mít v období krize minimální či nulovou hodnotu), mohou si akcionáři v případě včasného zásahu ze strany orgánů pověřených řešením krize oproti postupu v rámci „běžného" úpadkového řízení paradoxně polepšit. To vychází z pravidla, že společníci relevantní instituce stojí ve „frontě na majetek" (jak tento stav výstižně pojmenovává T. Richter)[64] až na posledním místě za nezajištěnými věřiteli,[65] jejichž uspokojení je ale většinou z důvodu nedostačující majetkové podstaty minimální nebo vůbec žádné. Při včasném přechodu podílů nebo závodu na nového nabyvatele je naopak myslitelná varianta, kdy dojde k transferu za protiplnění, na které budou mít naopak společníci prioritní nárok.

S ohledem na základní cíl směrnice BRRD, že akcionáři mají nést ztráty na prvním místě, lze ale jen stěží nalézt ospravedlnění pro takto nastavené pravidlo. Legitimitu této kritiky lze vyvodit i z aspektu nepřímé zodpovědnosti společníků za stav společnosti s ohledem na jejich právo rozhodovat o složení statutárních a dozorčích orgánů odpovědných (respektive spoluodpovědných) za obchodní vedení, a tím pádem i za stav dané úvěrové instituce. I pokud bychom přijali argument, že je kupní cena či jiné protiplnění v podstatě náhradou za faktickou expropriaci vlastnického práva akcionářů, v kontextu shora uvedených zásad by i tak měla být výplata protiplnění proporční k uspokojení

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[59] Jednalo se především o úvěrové instituce skupiny, tj. Fortis Bank Netherlands, Fortis Bank Belgium a Fortis Banque Luxembourg.

[60] Pro více informací o případu viz SCHILLIG, M. *Resolution and insolvency of banks and financial institutions*. Oxford, United Kingdom: Oxford University Press, 2016, s. 252.

[61] Uvedené vyplývá z § 96 odst. 5 zákona o ozdravných postupech, a to nehledě na poněkud nesystémovou absenci jakékoli zmínky o této výjimce v rámci § 249–251a zákona o ozdravných postupech, které řeší vztah tohoto zákona k dalším právním předpisům, zákon č. 90/2012 Sb., zákon o obchodních korporacích, nevyjímaje.

[62] Viz článek 34 odst. 1 písm. a) směrnice BRRD a § 76 písm. d) zákona o ozdravných postupech.

[63] Viz článek 38 odst. 4 směrnice BRRD.

[64] RICHTER, T. *Insolvenční právo.* Praha: ASPI, Wolters Kluwer, 2008, s. 11.

[65] Viz například ustanovení § 172 odst. 3 insolvenčního zákona.

věřitelů dané instituce. Toho by šlo docílit například tím, že by úhrada daného plnění byla podmíněná následnými výsledky aplikace tohoto nástroje, a tím byla fakticky „zatížena“ odloženou splatností.

Vzhledem k dosavadním zkušenostem s aplikací nástrojů k řešení krize lze ale usuzovat, že nastíněný problém s preferenčním postavením společníků bude spíše raritní. Na místě je totiž předpoklad, že orgány k řešení krize souběžně přistoupí k užití dalších opatření k řešení krize, zejména pak k institutu odpisu a konverze, který umožňuje redukovat či přímo eliminovat pohledávky společníků vyplývající z jejich účasti ve společnosti. Stejně tak se lze domnívat, že jen málokterý zásah dohledových orgánů bude natolik promptní, aby dokázal zamezit výraznému poklesu hodnoty akcií, ke kterému nepochybně dojde. Oba tyto předpoklady navíc potvrzuje již zmiňovaný případ španělské banky Banco Popular, jejíž insolvence byla řešena právě kombinací nástrojů odpisu a konverze ve spojení s nástrojem přechodu činnosti. Vlastní transfer Banco Popular na Banco Santander pak proběhl za symbolické 1 Euro, což vskutku neumožňuje učinit závěr, že by společníci Banco Popular obdrželi preferenční zacházení.

3.2 NÁSTROJ PŘEKLENOVACÍ INSTITUCE (PŘECHOD ČINNOSTI NA PŘEKLENOVACÍ INSTITUCI)

Ani nástroj překlenovací instituce (*bridge institution tool*) není v rámci Evropské unie zcela novým institutem a bylo ho užito již v řadě případů předcházejících implementaci směrnice BRRD, například v rámci insolvence Dunfermline Building Society v Anglii.[66] Jak podotýká důvodová zpráva k zákonu o ozdravných postupech, obdobný, byť velmi povšechně upravený institut byl v českém právním řádu rovněž zakotven před transpozicí směrnice BRRD. Stalo se tak prostřednictvím § 16 odst. 5 zákona o bankách[67] ve znění předcházejícím přijetí zákona o ozdravných postupech,[68] který ovšem namísto termínu překlenovací instituce užíval legislativního pojmu „banka zvláštního určení“.

Institut překlenovací instituce je z hlediska právních mechanik v podstatě totožný s nástrojem přechodu činnosti. Rozdílem ovšem je, že nedochází k přechodu podílu či závodu úvěrové instituce či jiné povinné osoby ve finančních obtížích na nabyvatele ze soukromého sektoru, nýbrž k transferu na novou, účelově založenou společnost, přičemž k dalšímu transferu na třetí osobu může dojít až posléze. Směrnice BRRD jednak požaduje, aby byly podíly v překlenovací instituci v částečném nebo úplném držení veřejných orgánů, ale rovněž i to, aby byla překlenovací instituce spravována orgánem pro řešení krize.[69] Zákon o ozdravných postupech tento přístup reflektuje prostřednictvím ustanovení § 102 a násl., podle kterého má být nejvyšším orgánem překlenovací instituce Česká republika, za kterou jedná Ministerstvo financí. V tomto případě tedy

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66 Pro více informací o případu viz COLIN, J. – COWE, S. – TREVILLION, E. *Property boom and banking bust: the role of commercial lending in the bankruptcy of banks.* Hoboken: Wiley-Blackwell, 2017, s. 131 a násl.

67 Zákon č. 21/1992 Sb., zákon o bankách, ve znění pozdějších předpisů.

68 Viz důvodová zpráva k § 102–112 zákona o ozdravných postupech.

69 Viz článek 40 odst. 2 směrnice BRRD.

dochází k určitému štěpení pravomocí mezi ČNB, v pozici orgánu pověřeného řešením krize, a státem, který jedná právě prostřednictvím Ministerstva financí.

V obecné rovině má nástroj překlenovací instituce uplatnění zejména tehdy, pokud se zavčasu nedaří najít kupujícího ze soukromého sektoru, například z důvodu tržního významu finanční instituce nebo skupiny v krizi, který limituje okruh dostupných nabyvatelů. Z uvedeného zároveň plyne i dočasná povaha překlenovací instituce. Jejím účelem je totiž zachování kritických funkcí původní instituce pouze po přechodné období, zpravidla než se podaří nalézt jednoho či více nabyvatelů. K ukončení provozu překlenovací instituce by mělo v zásadě dojít v rámci dvou let, nicméně, nedojde-li v této době k převodu činnosti překlenovací instituce na nového kupujícího (ať již formou fúze, rozdělením nebo prostřednictvím přechodu závodu), je možné dodatečné prodloužení.[70]

I přestože současná právní úprava umožňuje přechod akcií či jiných nástrojů účasti příslušné instituce v krizi na překlenovací instituci (která se tak stává holdingovou společností), lze se přiklonit k názoru, že v praxi bude pravděpodobně převládat spíše přechod vybraných aktiv a závazků (tj. přechod závodu, respektive jeho části).[71] Uvedené se odvíjí od smyslu překlenovací instituce, která má převzít pouze systémově relevantní činnosti instituce v krizi, zatímco v případě přechodu podílů dochází ke kompletní akvizici dané instituce, tedy včetně veškerých jejích aktiv a závazků. Transfer závodu má navíc tu výhodu, že zjednodušuje proces snižování provozních nákladů. Příkladem mohou být náklady na zaměstnance, protože v rámci přechodu činnosti by měla přejít pouze část zaměstnanců původní instituce v krizi, tj. zaměstnanců přidružených k převáděným aktivitám.[72] Překlenovací instituce má rovněž lepší vyjednávací pozici v rámci renegociace dodavatelských a dalších smluv, jelikož instituce v krizi v návaznosti na aplikaci nástroje přechodu činnosti pravděpodobně zcela pozbyde další provozuschopnosti.[73] Smluvní strany původní instituce tak budou s největší pravděpodobností ochotny akceptovat i horší podmínky nabídnuté překlenovací institucí, aby si zajistily budoucí příjmy z obdobného smluvního vztahu.

Valná část ustanovení týkajících se nástroje překlenovací instituce v zásadě odráží právní úpravu nástroje přechodu činnosti. To lze doložit například tím, že ani nástroj překlenovací instituce nevyžaduje ke své realizaci souhlasu společníků či jakýchkoli jiných stran.[74] Identifikovat lze ale i rozdíly, jako je například požadavek, aby při přechodu na překlenovací instituci byla zaručena pozitivní bilance převáděných aktiv a závazků.[75]

Zároveň je ale nutno poukázat na to, že nástroj překlenovací instituce má stejně jako nástroj přechodu činnosti své limity, jelikož tyto nástroje jsou ve své ryzí podobě

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70 Prodloužení činností by sice v souladu s článkem 41 odst. 5 a 6 směrnice BRRD (§ 110 odst. 1 a 2 zákona o ozdravných postupech) nemělo přesáhnout období jednoho roku, nicméně opakované prodloužení není vyloučeno, pokud to okolnosti případu odůvodňují.

71 SCHELO, *op. cit.*, s. 142.

72 Ve smyslu ustanovení § 338 a násl. zákona č. 262/2006 Sb., zákoníku práce.

73 Srov. bod 60 preambule směrnice BRRD.

74 Viz ustanovení článku 40 odst. 1 směrnice BRRD a § 104 zákona o ozdravných postupech. Pro další informace ve vztahu k absenci souhlasů podle příslušných předpisů týkajících se obchodních společností viz STEPHAN, M. *Bank Failure and Pre-Emptive Planning: The Special Requirements of a Bank Resolution and a Default Resolution Option*, 2013, s. 61 a násl. Dostupné na: https://ssrn.com/abstract=2277452.

75 Viz článek 40 odst. 3 směrnice BRRD a § 103 odst. 4 zákona o ozdravných postupech.

vhodné spíše pro účely rezoluce úvěrových institucí menšího či středního významu. V případě institucí z kategorie SIFI (*Systemically Important Financial Institution*) totiž spočívá problém právě v hledání vhodného nabyvatele, kterým může být zpravidla pouze jiná systémově významná instituce. To ale přispívá k bludnému kruhu, kdy dochází k vytváření stále větších finančních konglomerátů, jejichž případná insolvence ohrožuje stabilitu finančních trhů. Tím se ale bohužel vytváří další důvody, proč k záchraně takových institucí užít finanční prostředky veřejnosti.[76] Stejně tak lze očekávat, že v případě aplikace obou diskutovaných nástrojů ve vztahu k systémově významným finančním institucím bude obtížené dosáhnout řešení, které by bylo uskutečnitelné bez současného poskytnutí veřejné podpory. Na místě je totiž předpoklad, že potenciální nabyvatel bude po státech vlastnících překlenovací instituci požadovat záruky za převzetí jmění, které s největší pravděpodobností nebude mít možnost kompletně zanalyzovat v rámci předchozí právní prověrky.[77] V tomto případě pak aplikace obou popsaných nástrojů může vést k paradoxní situaci, kdy nástroje k řešení krize, které byly implementovány primárně za účelem řádného řešení insolvence úvěrových institucí a dalších povinných osob bez nutnosti státních subvencí, ve skutečnosti samy vytváří prostor k jejich poskytnutí.

Pokud bylo odkazováno na vnitřní rozpornost mezi obecnou zásadou řešení krize, podle které mají akcionáři nést ztráty na prvním místě, a ustanoveními, které akcionářům garantují protiplnění za přechod podílů, je nutno dodat, že v případě aplikace nástroje přechodu činnosti na překlenovací instituci je tato kontradikce dále umocněna tím, že překlenovací instituce je minimálně v částečném vlastnictví státu. V takovém případě je totiž protiplnění za přechod podílů fakticky hrazeno z veřejných prostředků, což je vedle uvedené zásady rozporné rovněž s obecným regulatorním záměrem současné právní úpravy, podle které má být užívání veřejných financí v rámci řešení insolvence povinných osob v maximální možné míře limitováno.[78] Uvedený problém je alespoň částečně redukován tím, že k převodu akcií či jiných účastnických nástrojů by mělo docházet spíše zřídka, jakož i tím, že orgány pověřené řešením krize mohou opatření k řešení krize kombinovat, což do určité míry umožňuje tyto nedostatky kompenzovat.[79]

Odborná literatura je k nástroji překlenovací instituce skeptická i vzhledem k obavě, zda příslušný orgán pověřený řešením krize dokáže správně identifikovat systémově relevantní činnosti, které mají být na překlenovací instituci převedeny, což je poplatné zejména v případech komplikovaných korporátních struktur.[80] Určité pochybnosti lze mít dále o tom, do jaké míry budou přechody vybraných aktiv a závazků opravdu uznány příslušnými orgány v dalších státech.

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[76] Pro další analýzu viz např. ARMOUR, J. Making Bank Resolution Credible. In: MOLONEY, N. – FERRAN, N. E. – PAYNE, J. *The Oxford handbook of financial regulation*. Oxford, United Kingdom: Oxford University Press, 2015, s. 455.

[77] SJÖBERG, G. Banking Special Resolution Regimes as a Governance Tool. In: RINGE, W. G. – HUBER, P. M. *Legal Challenges in the Global Financial Crisis: Bail-Outs, the Euro and Regulation*. Oxford & Portland, Oregon: Hart Publishing, 2014, s. 191.

[78] Viz ustanovení bodu 45 preambule směrnice BRRD.

[79] Možná kombinace nástrojů je výslovně povolena článkem 37 odst. 4 směrnice BRRD

[80] SCHELO, *op. cit.*, s. 144.

3.3 NÁSTROJ ODDĚLENÍ AKTIV (PŘECHOD ČINNOSTI NA OSOBU PRO SPRÁVU AKTIV)

Třetím a předposledním nástrojem k řešení krize je nástroj oddělení aktiv (*asset separation tool*). Nutno podotknout, že tento nástroj byl v diskuzích ohledně představení nového právního rámce pro řešení insolvence finančních institucí poněkud upozaděn. Kupříkladu zpráva Basilejského výboru pro bankovní dohled[81] jej vůbec nezmiňuje a v případě zprávy Rady pro finanční stabilitu[82] je ve smyslu tohoto nástroje pouze letmo odkázáno na společnost pro správu aktiv (*asset management company*)[83] jako na jeden z možných nástrojů pro účely řešení krize finančních institucí. Nehledě na uvedené byl nicméně tento nástroj *avant la lettre* v praxi již mnohokrát užit. Jako relativně recentní příklad lze uvést Německo, kde byla takto v roce 2009 založena společnost pro správu aktiv *Erste Abwicklungsanstalt* pod dohledem Federální agentury pro stabilizaci finančních trhů (*Bundesanstalt für Finanzmarktstabilisierung*), a to v souvislosti s insolvencí West LB (*Westfälisch-Lippischer Sparkassen und Giroverband*).[84] Své zkušenosti se společnostmi pro správu aktiv mají ale mimo jiné i severské státy díky skandinávské bankovní krizi z konce osmdesátých a počátku devadesátých let dvacátého století.[85]

Podstatou nástroje oddělení aktiv je přechod aktiv, práv a závazků z instituce v krizi nebo překlenovací instituce na společnost pro správu aktiv se záměrem maximalizace jejich hodnoty prostřednictvím následného prodeje nebo likvidace.[86] Oproti nástroji překlenovací instituce, který slouží k vyčlenění provozuschopných a systémově důležitých činností z instituce v krizi, je cílem nástroje oddělení aktiv naopak vyjmutí nevýnosných či „toxických aktiv" (*toxic assets*)[87] z účetnictví instituce v krizi či překlenovací instituce a jejich transfer na některou z účelově založených společností pro správu aktiv, kterým se z důvodu skladby jejich portfolia rovněž přezdívá „*bad banks*".[88] Společnost pro správu aktiv musí být shodně jako překlenovací instituce částečně či úplně vlastněna veřejnými orgány a ovládána orgánem pro řešení krize.[89] V tomto směru institut

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81 Zpráva „Report and Recommendations of the Cross-border Bank Resolution Group" Basilejského výboru pro bankovní dohled. Dostupné na: https://www.bis.org/publ/bcbs169.pdf.

82 Viz bod 3.2 (viii) zprávy Rady pro finanční stabilitu „Key Attributes of Effective Resolution Regimes for Financial Institutions" z roku 2011. Dostupné na: http://www.fsb.org/what-we-do/policy-development/effective-resolution-regimes-and-policies/key-attributes-of-effective-resolution-regimes-for-financial-institutions.

83 Užitečnou analýzu potenciálu společností pro správu aktiv nabízí STUTTS, W. F. Of Herring and Sausage: Nordic Responses to Banking Crises as Examples for the United States. *Texas International Law Journal*, 2009, Issue 44.

84 Pro více informací o tomto případu v kontextu státní podpory viz rozhodnutí Tribunálu (prvního rozšířeného senátu) ve věci *Westfälisch-Lippischer Sparkassen und Giroverband v. Commision* ze dne 17. července 2014, T-457/09.

85 Pro podrobnosti viz např. BINDER, J. H. Institutionalisierte Krisenbewältigung bei Kreditinstituten. *Zeitschrift für Bankrecht und Bankwirtschaft*, 2009, s. 27 a násl.

86 Viz ustanovení článku 42 odst. 3 směrnice BRRD a § 115 odst. 1 zákona o ozdravných postupech.

87 Pro více informací o „toxických aktivech" v kontextu hospodářské krize z let 2007–2009 viz BLINDER, A. S. *After the music stopped: the financial crisis, the response, and the work ahead*. New York: Penguin Press, 2013, s. 194 a násl.

88 Viz např. MITCHELL, Ch. *Saving the market from itself: the politics of financial intervention*. Cambridge: Cambridge University Press, 2016, s. 14 a násl.

89 Viz ustanovení článku 42 odst. 2 směrnice BRRD.

přechodu činnosti na osobu pro správu aktiv sleduje úpravu shora popsaného nástroje překlenovací instituce. V případě České republiky tedy opět dochází k rozdělení většiny rozhodovacích oprávnění mezi nejvyšší orgán, kterým je stát, zastoupený Ministerstvem financí, a ČNB v postavení orgánu k řešení krize.[90]

Z důvodu účasti veřejných orgánů ve společnosti pro správu aktiv je ovšem i tento nástroj spojen s možností veřejného financování, jak dává tušit sama směrnice BRRD.[91] Užití veřejných prostředků přitom bude ve většině případů nevyhnutelnou variantou, jelikož bez zajištění dostatečných zdrojů financí mohou tyto „špatné banky" jen obtížně plnit svou roli.[92] Kritické je v tomto ohledu zejména počáteční období, ve kterém osoba pro správu aktiv vykonává svou činnost. Je totiž nutné velmi rychle identifikovat a klasifikovat odlišné druhy nevýkonných aktiv a vypracovat pro ně odpovídající strategie. Mezi ty může patřit například sekuritizace aktiv za účelem snížení jejich rizikovosti, vzdání se určitých práv banky za účelem motivování dlužníků k předčasnému splacení úvěrů, restrukturalizace dluhového portfolia problémových klientů, prodej vybraných aktiv pod tržní cenou a řada dalších strategií. Vzhledem ke struktuře spravovaných aktiv je nutno počítat s tím, že tyto společnosti nejsou v počátcích nezbytně výdělečné a jejich výsledky lze zpravidla posuzovat až ve střednědobém horizontu.

Institut přechodu činnosti na osobu pro správu aktiv může být ale užit pouze spolu s některým z dalších dostupných nástrojů k řešení krize.[93] Důvodem je především skutečnost, že možnost vyčlenění nevýkonných či toxických aktiv z účetnictví úvěrové instituce je doprovázeno negativní externalitou v podobě podpory morálního hazardu.[94]

3.4 NÁSTROJE REKAPITALIZACE Z VNITŘNÍCH ZDROJŮ (ODPIS NEBO KONVERZE ODEPISOVATELNÝCH ZÁVAZKŮ)

Posledním a zároveň nejkomplexnějším nástrojem k řešení krize je nástroj rekapitalizace z vnitřních zdrojů,[95] v literatuře častěji označovaný jako tzv. „*bail-in*" (naznačující, že se má jednat o protipól k poskytování státních subvencí, tzv. „*bail out*"). Tento nástroj je úzce propojen s institutem „odepisování a konverze kapitálových nástrojů a způsobilých závazků"[96], který sice z materiálního pohledu rovněž představuje *de facto* nástroj k řešení krize a někteří autoři ho označují jako „malý bail-in" (*kleiner*

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90 Viz § 114 zákona o ozdravných postupech.

91 Viz článek 42 odst. 6 směrnice BRRD.

92 Více viz DONG, H. – INGVES, S. – SEELIG, S. *Issues in the Establishment of Asset Management Companies*. International Monetary Fund, 2006, s. 23 a násl. Dostupné na: https://www.researchgate.net/publication/304636044_Issues_in_the_Establishment_of_Asset_Management_Companies.

93 Viz článek 37 odst. 5 směrnice BRRD a § 113 odst. 2 zákona o ozdravných postupech.

94 AVGOULEAS, E. *Governance of Global Financial Markets*. Cambridge University Press, 2012, s. 418.

95 Nástroj rekapitalizace z vnitřních zdrojů (opatření odpisu nebo konverze odepisovatelných závazků) je bezpochyby nejpodrobněji upraveným institutem Směrnice BRRD v rámci článků 43–55, respektive zákonem o ozdravných postupech v rámci ustanovení § 120–156. Nutno dodat, že nástroj rekapitalizace je rovněž předmětem obsáhlé novelizace (zejména co do úpravy absorpčních ztrát), a to na základě směrnice Evropského parlamentu a Rady (EU) 2019/879 ze dne 20. května 2019, kterou by měly členské státy transponovat do 28. prosince 2020.

96 Viz články 59–62 směrnice BRRD a § 59–74b zákona o ozdravných postupech.

bail-in),[97] nicméně z hlediska systematického uspořádání mezi nástroje k řešení krize zařazen není.[98] Zákon o ozdravných postupech poté pro nástroj rekapitalizace užívá pojmu „odpis nebo konverze odepisovatelných závazků" a pro „malý bail-in" pro změnu „odpis a konverze kapitálových nástrojů", což poněkud komplikuje orientaci v tomto předpisu. Důvodem rozlišení těchto institutů je v každém případě především to, že k odepisování nebo konverzi kapitálových nástrojů může dojít nezávisle na užití opatření (nástrojů) k řešení krize, hypoteticky tedy i v rámci předběžné intervence ze strany orgánu příslušného k řešení krize.[99] Zároveň ale platí, že podmínky pro uplatnění odpisu a konverze kapitálových nástrojů jsou širší než podmínky pro uplatnění nástrojů k řešení krize. Jinak řečeno, platná úprava stanoví rovněž další, alternativní podmínky, jejichž splnění umožňuje rozhodnout o odepisování nebo konverzi kapitálových nástrojů, aniž by muselo dojít k naplnění podmínek k řešení krize popsaných v předchozích kapitolách. Mezi ně patří především takový stav povinné osoby, který vyžaduje poskytnutí mimořádné veřejné podpory.[100]

S ohledem na svou podstatu se institut rekapitalizace z vnitřních zdrojů v kombinaci s konverzí či odpisem kapitálových nástrojů jeví, alespoň v teoretické rovině, jako ideální instrument k řešení insolvence finančních institucí z kategorie SIFI a G-SIFI a některými autory je považován za nejvýznamnější regulatorní úspěch v rámci snah o vyřešení problému „*too big to fail*".[101] Tato možná až příliš optimistická vize ale naráží na řadu problémů, které v souvislosti s aplikací těchto opatření vyvstávají.

Rekapitalizace z vnitřních zdrojů je v obecné rovině umožněna především tím, že úvěrové a další finanční instituce jsou s ohledem na povahu svých aktivit stále nuceny držet poměrně značnou úroveň regulatorního kapitálu.[102] Ten se v podstatě skládá z vrstev vlastního kapitálu, hybridních kapitálových nástrojů a podřízeného dluhu,[103] které mají v případě finančních obtíží dané instituce sloužit k absorbování ztrát. Ve vztahu ke společníkům a věřitelům je výchozí myšlenkou těchto opatření napodobit pravidla „klasického" insolvenčního procesu. V insolvenčním řízení totiž stojí společníci obvykle až na posledním místě a jejich pohledávky z titulu majetkové účasti ve společnosti mohou být uspokojeny až po pohledávkách nezajištěných věřitelů (k čemuž ovšem z důvodů nedostatečné majetkové podstaty prakticky nedochází).[104] Stejně tak i třída nezajištěných věřitelů musí akceptovat výrazně nižší míru svého uspokojení (v tom lepším případě), jelikož stojí až za zajištěnými a jinými prioritními věřiteli. Z pohledu ztrát dochází k částečné replikaci této hierarchie prostřednictvím ustanovení o posloupnosti

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[97] HÜBNER, L. – LEUNERT, S. Sanierung und Abwicklung von Banken nach SAG und SRMVO. *Zeitschrift für Wirtschaftsrecht*, 2015, Issue 47, s. 2263.

[98] Srov. kapitolu V směrnice BRRD a část pátou zákona o ozdravných postupech.

[99] Viz článek 59 odst. 1 směrnice BRRD a § 59 odst. 1 zákona o ozdravných postupech.

[100] Viz článek 59 odst. 3 směrnice BRRD a § 60 zákona o ozdravných postupech.

[101] RINGE, W. G. Bail-in between liquidity and solvency. *University of Oxford Legal Research Paper Series*, 2016, No. 33, s. 3.

[102] Tím se rovněž odlišují od většiny „běžných" obchodních společností, zejména pak ve vztahu k minimálním nárokům na hodnoty základního kapitálu.

[103] Pro více informací ohledně struktury a významu jednotlivých položek regulatorního kapitálu v kontextu úvěrových institucí viz např. DIAMOND, D. W. – RAJAN, R. G. A theory of bank capital. *The Journal of Finance*, 2000, Issue 55, s. 2431–2465.

[104] Viz např. ustanovení § 172 odst. 3 insolvenčního zákona.

odepisování a konverze.[105] Ztráty tedy mají nést (vždy až do úplného vyčerpání aktiv) nejprve (i) držitelé nástrojů kmenového kapitálu tier 1[106] (tedy především akcionáři a další vlastníci účastnických nástrojů dané instituce), (ii) držitelé vedlejšího kapitálu tier 1, (iii) držitelé nástrojů dodatkového kapitálu tier 2, (iv) držitelé dalších podřízených pohledávek nespadajících do předchozí kategorie, a (v) držitelé zbývajících způsobilých pohledávek.[107]

Ve vztahu k akcionářům úvěrové instituce tedy odpis povede minimálně k výraznému „naředění" jejich akcií, v některých případech až k jejich úplnému zániku, ať už snížením nominální hodnoty nebo prostřednictvím jejich transferu na věřitele instituce dotčené rekapitalizací.[108] Je ale nutno pamatovat na to, že možnost kompletního zrušení akcií podle směrnice BRRD v řadě případů naráží na limity příslušné právní úpravy obchodních společností, například co do požadavků na kontinuální existenci akcionářů či na minimální výši základního kapitálu.[109]

Věřitelé se na sanaci ztrát finanční instituce podílejí v souladu se shora uvedenou posloupností tím, že buďto dojde ke konverzi jejich pohledávek za finanční institucí na kmenový kapitál tier 1 nebo k jejich částečnému či kompletnímu odpisu. Stanovení poměru konverze či odpisu je v pravomoci příslušného orgánu pověřeného řešením krize, přičemž konverzní koeficienty se liší v závislosti na druhu konkrétního kapitálového nástroje.[110] Ztráty vzniklé konverzí či odpisem by měli věřitelé stejné třídy nést *pro rata*,[111] nicméně nemusí tomu tak být vždy. Příslušný orgán k řešení krize je totiž oprávněn vedle pohledávek (závazků), které jsou z možnosti konverze či odpisu podle článku 44 odst. 2 směrnice BRRD vyjmuty automaticky (jde například o pojištěné vklady do částky 100 000 EUR, zajištěné závazky, závazky za zaměstnanci atd.), rozhodnout o vyjmutí dalších závazků. I přestože k vyjmutí dalších závazků by mělo docházet spíše výjimečně a pouze za splnění příslušných podmínek, ve skutečnosti je diskreční pravomoc orgánů k řešení krize poměrně široká, což v důsledku umožňuje odlišné zacházení s věřiteli a na úkor právní jistoty zároveň narušení uvedené posloupnosti, v jaké by k odpisu či konverzi mělo dojít.[112] S ohledem na určité vyčlenění institutu odpisu a konverze mimo nástroje k řešení krize není rovněž zcela jasné, zda se v případě jeho užití uplatní zásada, že se žádný věřitel nesmí dostat do méně výhodného postavení (*no*

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[105] Viz ustanovení článku 48 a 60 směrnice BRRD a příslušná ustanovení hlavy III části páté zákona o ozdravných postupech ve spojení s § 138 a 140 tohoto předpisu.

[106] Pro více informací GLEESON, S. – GUYNN, R. *Bank resolution and crisis management*. Oxford: Oxford University Press, 2016, s. 216–221.

[107] Důležité je odkázat na článek 108 směrnice BRRD, který harmonizuje klasifikaci pohledávek do příslušných skupin a upravuje jejich prioritu v rámci insolvenční hierarchie.

[108] Viz rovněž článek 47 odst. 1 směrnice BRRD.

[109] Vedle českého právního řádu lze pro účely komparace odkázat například na nizozemskou právní úpravu, kde musí mít akciové společnosti společníky vždy, tj. nelze zcela zrušit akcie, aniž by byly souběžně vydávány nové. Viz zpráva nizozemské centrální banky (*De Nederlandsche Bank*): Operation of the bail-in tool in the Netherlands, English consultation version, 2016, s. 9. Dostupné na: https://www.dnb.nl/en/binaries/Communication%20regarding%20the%20operation%20of%20the%20bail-in%20tool_tcm47-370119.pdf. Pro další analýzu nástroje bail in viz např. JANSSEN, L. Bail-in from an Insolvency Law Perspective. *Norton Journal of Bankruptcy Law and Practice*, 2017, č. 5.

[110] Viz článek 50 směrnice BRRD.

[111] Viz článek 48 odst. 2 směrnice BRRD.

[112] SCHELO, *op. cit.*, s. 125–131.

creditor worse off). S ohledem na materiální pojetí tohoto institutu jako *de facto* nástroje k řešení krize se ale domnívám, že by tomu tak vskutku mělo být.[113] To má význam zejména ve vztahu k možnosti domáhat se následného odškodnění.

Výše uvedené shrnutí hlavních principů těchto nástrojů tedy implikuje, že jejich aplikace v optimálním případě vede k napodobení situace jako v běžném insolvenčním řízení – podíly společníků jsou (téměř) vymazány a pohledávky věřitelů jsou pokráceny v závislosti na jejich klasifikaci a prioritě. Záruku, že postavení společníků a věřitelů nebude horší, než jako by tomu bylo v případě „běžného" insolvenčního řízení, má představovat již zmiňované oprávnění dotčených subjektů domáhat se kompenzace na základě *ex post* valuace výsledků procesu aplikace nástrojů k řešení krize. S poukazem na to, že směrnice BRRD ve skutečnosti ne vždy zcela reflektuje postavení věřitelů, které by jim bylo přiznáno v případě „běžného" insolvenčního procesu,[114] jakož i na skutečnost, že obecné insolvenční právo není na evropské úrovni prakticky harmonizováno (tj. hrozí nesoulad mezi očekáváním věřitelů z jednotlivých zemí a postupem orgánu pověřeného řešením krize), bude toto ustanovení v případě aplikace opatření odpisů a konverzí dotčenými věřiteli nepochybně hojně využíváno.

Příslušné orgány k řešení krize jsou oprávněny užít nástroje „bail in" v zásadě dvěma způsoby. Jednak je to za účelem rekapitalizace finanční instituce tak, aby splňovala příslušné regulatorní požadavky a mohla pokračovat ve své činnosti a zároveň byla obnovena důvěra trhu v její podstavení (tzv. *open bank bail in*). Druhou možností je aplikace tohoto institutu ve spojení s dalšími nástroji (opatřeními) k řešení krize, které byly popsány shora (tzv. *closed bank bail in*).[115] Podmínkou užití tohoto institutu v případě prvního z uvedených scénářů je, aby došlo k reorganizaci příslušné úvěrové instituce v souladu s plánem reorganizace vypracovaným pro danou instituci či skupinu. V tomto směru tedy představuje nástroj rekapitalizace z vnitřních zdrojů v podstatě jediný nástroj, který *a priori* cílí na sanační metodu řešení insolvence úvěrových institucí. Tím z pohledu řady států (Českou republiku nevyjímaje) posouvá dostupné možnosti na novou úroveň, jelikož alternativní postup podle „klasických" insolvenčních předpisů cílí primárně na likvidaci insolventních úvěrových institucí a nikoli na jejich reorganizaci. V tomto směru navíc směrnice BRRD představuje vyspělejší variantu řešení selhání úvěrových institucí v porovnání s Dodd-Frankovým zákonem, který připouští užití americké obdoby tohoto nástroje pouze spolu s nástrojem převodu činnosti na překlenovací instituci (tj. pouze formou tzv. „*bridge-bail in*"), čímž je možná reorganizaci dotčené instituce zcela vyloučena.[116]

Je ale nutné brát v potaz, že nástroje k řešení krize jsou instituty správního práva, které ze své povahy nepředpokládají spolurozhodování věřitelů. To se v případě zamýšlené reorganizace projevuje především tím, že reorganizační plány schvalují z vrchnostenské pozice pouze orgány pověřené řešením krize, tedy bez jakékoli spoluúčasti

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[113] Shodně WOJCIK, K. P. Bail-in in the Banking Union. *Common Market Law Review*, 2016, Vol. 53, s. 91–138.

[114] SCHILLIG, M. The EU resolution toolbox. In: HAENTJENS, M. – WESSELS, B. *Research Handbook on Crisis Management in the Banking Sector*. Cheltenham/Northampton: Edward Elgar Publishing, 2015, s. 97.

[115] Viz článek 43 odst. 2 směrnice BRRD.

[116] GLEESON – GUYNN, *op. cit.*, s. 71.

věřitelů.[117] Tento přístup ale nepochybně povede k nárůstu soudních sporů iniciovaných dotčenými věřiteli a z tohoto pohledu lze jistou míru začlenění věřitelské obce do rozhodování o výsledné podobě reorganizačního plánu považovat za žádoucí. Z hlediska úvah *de lege ferenda* by tomu mohlo být například formou námitek, jimiž by orgán k řešení krize sice nebyl vázán, ale které by musel zohlednit, a to minimálně pro účely zmapování potenciální expozice věřitelským žalobám o náhradu škody.

S ohledem na povahu institutu rekapitalizace (odpisu) je rovněž zjevné, že může plnit svou roli pouze tehdy, pokud daná instituce vedle kmenového kapitálu drží rovněž dostatečné množství konvertibilních a odepsatelných pasiv. Úvěrové instituce jsou proto povinny držet minimální hodnoty kapitálu a způsobilých závazků (*minimum requirements of eligible liabilities*) zkráceně též „MREL", které jsou pro relevantní finanční instituce stanovovány příslušnými regulatorními orgány.[118]

I přes nepopiratelný potenciál, který pro účely řešení finančních obtíží systémově důležitých bank nástroj „*bail in*" představuje, doprovází jeho užití celá řada komplikací, jež jeho skutečný přínos do značné míry relativizují. Zejména oprávnění k odpisu způsobilých závazků může být paradoxně zdrojem dalšího systémového rizika a v podobě dominového efektu vést k finančním obtížím dalších finančních institucí. Uvedené hrozí za situace, kdy budou odpisem postiženy pohledávky finančních institucí za institucí v krizi. To může negativně ovlivnit strukturu jejich aktiv, což může vést k značnému oslabení jejich pozice na trhu, ztrátě důvěry investorů, odlivu kapitálu a nakonec i vlastním potížím s likviditou. Tomuto problému „nákazy" je částečně zamezeno prostřednictvím ustanovení, která vylučují aplikaci konverze či odpisu na likvidní závazky se splatností kratší než sedm dní,[119] jakož i implementací specifického „moratoria".[120] Faktem ale je, že již samotná možnost aplikace tohoto nástroje v návaznosti na první zvěsti o finančních obtížích dané instituce může posloužit jako dostatečný stimul k tomu, aby příslušní věřitelé raději ukončili svou expozici vůči dané úvěrové instituci, a to mimo jiné s ohledem na nejistotu ohledně výsledné podoby aplikace odpisu či konverze na jejich pohledávky.[121] Pokud má tedy tento nástroj k řešení krize přinést kýžené výsledky, což v případě jeho sanační formy (tj. *open bank bail-in*) znamená zachování obchodních

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[117] Viz článek 52 odst. 7 směrnice BRRD a § 150 odst. 1 zákona o ozdravných postupech.

[118] Viz článek 45 směrnice BRRD a § 127 a násl. zákona o ozdravných postupech. Původní a v zásadě dost stručnou regulaci výchozího rámce pro stanovení MREL představoval článek 45 směrnice BRRD, který po své novelizaci prostřednictvím článků 45a až 45m, s účinností příslušných ustanovení od 1. ledna 2022, případně 1. ledna 2024, představuje již velmi zevrubnou právní úpravu pro účely stanovení MREL.

[119] Viz článek 44 odst. 2 písm. e) a f) směrnice BRRD a § 122 písm. d) zákona o ozdravných postupech.

[120] Viz články 68–71 směrnice BRRD a § 168 zákona o ozdravných postupech. Přestože „moratorium" ve smyslu směrnice BRRD představuje velmi důležitý nástroj, který dává orgánům k řešení krize cenný čas pro rezoluci instituce v krizi, moratorium může být paradoxně opět zdrojem dalšího systémového rizika. Viz stanovisko ISDA: ISDA Position Paper Challenges with Expanding BRRD Moratoria Powers, 2017, s. 17. Dostupné na: https://www.isda.org/a/IkiDE/brrd-position-paper-final.pdf.

[121] WIHLBORG, C. Bail-ins: Issues of Credibility and Contagion. *SUERF Policy Note*, 2017, Issue No. 10. Dostupné na: https://www.suerf.org/policynotes/883/bail-ins-issues-of-credibility-and-contagion/html. Dále HAVEMANN, R. Can Creditor Bail-in Trigger Contagion? The Experience of an Emerging Market. *Review of Finance*, 2019, 23 (6), s. 1155–1180.

aktivit dané úvěrové instituce (*going concern*), musí orgány pověřené řešením krize cílit rovněž na okamžitou obnovu důvěry trhu v tuto instituci.[122]

Opomenout nelze ani fakt, že technické aspekty užití nástrojů rekapitalizace, konverze a odpisu jsou ze své podstaty poměrně komplikované a jejich správná aplikace vůči systémově významným finančním institucím a skupinám může narážet na časové a personální limity příslušných orgánů k řešení krize, zejména s ohledem na nutnost vzájemné koordinace. I přes povinnost k tvorbě plánů k řešení krize, které nepochybně tento problém částečně eliminují, není v kontextu řešení krize systémově důležitých institucí činných v řadě evropských zemí nerealistické očekávat protichůdná stanoviska jednotlivých orgánů v rámci příslušných kolegií k řešení krize. K těmto názorovým konfliktům bude s největší pravděpodobností docházet při rozhodování o otázkách, jaké instituce skupiny nástrojům odpisu a konverze podrobit, respektive do jaké míry.

Ve vztahu ke třetím státům lze mít rovněž pochybnosti o míře, v jaké dojde k uznávání rozhodnutí spojených s aplikací nástrojů k řešení krize, a to nejen v kontextu konverze a odpisu, ale i v obecné rovině. Nutno podotknout, že směrnice BRRD se tomuto aspektu snaží čelit prostřednictvím článku 55.[123] Podle něj mají finanční instituce z členských států povinnost začlenit do svých smluvních závazků řízených neunijním právem specifické ustanovení, podle kterého příslušná smluvní strana akceptuje, že její relevantní pohledávky mohou být postiženy odpisem či konverzí. Uvedená povinnost je sice z hlediska postavení a právní jistoty dotčených věřitelů chvályhodná, nicméně ne zcela domyšlená, jelikož na oprávnění orgánů k řešení krize postihnout pohledávky těchto věřitelů konverzí či odpisem se nic nemění ani v případě, že k začlenění uvedeného ustanovení do smlouvy nedojde.[124]

V neposlední řadě jsou nástroje rekapitalizace, odpisu a konverze spojovány s poskytováním (mimořádné) veřejné podpory, což je poněkud paradoxně v kontradikci k jednomu z klíčových regulatorních cílů, které měla směrnice BRRD řešit. Nutno podotknout, že v kontextu veřejné podpory je nutno rozlišovat scénáře regionálních, kontinentálních a globálních krizí. Obava z poskytování státních subvencí není *a priori* na místě v případě relativně izolovaných případů, nicméně v případě globální krize se scénář státních subvencí jeví stále jako více než pravděpodobný, a to zejména s poukazem na vzájemnou provázanost obchodních aktivit úvěrových a dalších finančních institucí.[125]

Pro úplnost je nutno podotknout, že z ústavněprávního hlediska v užití nástroje „bail-in" (respektive tzv. „*burden sharing*", což je v podstatě označení pro „*bail-in*", ke kterému musí dojít za účelem obdržení státní podpory)[126] neshledal Soudní dvůr Evropské unie rozpor s právem na ochranu legitimních očekávání a právem na vlastnictví,

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[122] Shodně SOMMER, J. H. Why Bail-in? And How? Federal Reserve Bank of New York. *Economic Policy Review*, 2014, Vol. 20, Special Issue: Large and Complex Banks. In: GOODHART, Ch. – AVGOULEAS, E. A *Critical Evaluation of Bail-Ins as Bank Recapitalisation Mechanisms*, 2014, s. 21. Dostupné na: https://ssrn.com/abstract=2478647.

[123] Srov § 74 zákona o ozdravných postupech.

[124] Viz ustanovení článku 55 odst. 2 směrnice BRRD.

[125] Pro další informace k veřejné podpoře viz např. NEUBAUER, J. Veřejná podpora bankám ve světle směrnice o ozdravných postupech a řešení krize na finančním trhu? *Obchodněprávní revue*, 2018, č. 3, s. 73.

[126] Pro více podrobností ohledně aspektu sídlení nákladů (*burden sharing*) v souvislosti s článkem 107 odst. 3 písm. b) SFEU a sdělení Komise o použití pravidel pro poskytování státní podpory viz VOJTEK, R. Sláb

jak plyne z jeho rozhodnutí ve věci *Tadej Kotnik and Others v Državni zbor Republike Slovenije*.[127]

4. NÁSTROJE K ŘEŠENÍ KRIZE V KONTEXTU INSOLVENCE ÚVĚROVÝCH INSTITUCÍ S MEZINÁRODNÍM PRVKEM

Vzhledem k nadnárodním aktivitám úvěrových institucí nelze v kontextu aplikace nástrojů k řešení krize opomíjet ani problematiku spojenou s přítomností mezinárodního prvku. Základní právním předpisem unijního práva je směrnice 2001/24/ES,[128] která byla do českého práva transponována na základě příslušných ustanovení zákona o mezinárodním právu soukromém.[129] Na úrovni Evropské unie a Evropského hospodářského prostoru je s ohledem na režim jednotné licence obecným pravidlem, že k uplatnění reorganizačních opatření či likvidačních řízení vůči úvěrovým institucím a jejich pobočkám jsou oprávněny pouze správní nebo soudní orgány domovského členského státu (tj. státu, který dané instituci danou licenci udělil), a to podle právního řádu takového státu v souladu se zásadou *lex domi*.[130]

Ve vztahu k nástrojům k řešení krize má význam právě pojem „reorganizační opatření" podle článku 2 směrnice 2001/24/ES, který byl směrnicí BRRD novelizován v tom směru, že mezi reorganizační opatření se řadí rovněž nástroje k řešení krize a výkon dalších pravomocí podle směrnice BRRD (což mimochodem zákon o mezinárodním právu soukromém stále explicitně nereflektuje). V souladu s článkem 3 odst. 2 směrnice 2001/24/ES jsou přitom reorganizační opatření účinná v dalších členských státech od okamžiku, kdy nabyla účinnosti v členském státě, kde byla přijata.

Byť by se tedy mohlo zdát, že přeshraniční účinky aplikace nástrojů k řešení krize v rámci Evropské unie a Evropského hospodářského prostoru nenabízí mnoho prostoru pro různé interpretace, dosavadní případy poukazují, že opak je pravdou. To dokazuje například rozsudek anglického soudu ve věci *Goldman Sachs International v Novo Banco S.A.* z roku 2018,[131] který v rámci vzájemné provázanosti směrnice 2001/24/ES a směrnice BRRD rovněž poukazuje na limity volby práva v kontextu úvěrového financování.

V daném případě došlo k užití nástroje překlenovací instituce v návaznosti na finanční potíže portugalské banky Banco Espírito Santo SA.[132] Portugalský orgán pověřený řešením krize, tj. tamější centrální banka (Banco de Portugal) rozhodl o řešení situace

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jen ten, kdo (ne)ztratil v řešení finanční krize víru aneb selhání banky, resoluce a veřejná podpora? *Obchodněprávní revue*, č. 11–12, s. 320 a násl.

[127] Rozhodnutí Soudního dvora Evropské unie ve věci *Tadej Kotnik and Others v Državni zbor Republike Slovenije* ze dne 19. července 2016, C526/14, bod 115.

[128] Směrnice Evropského parlamentu a Rady 2001/24/ES ze dne 4. dubna 2001 o reorganizaci a likvidaci úvěrových institucí (dále jen „směrnice 2001/24/ES").

[129] Zákon č. 91/2012 Sb., o mezinárodním právu soukromém, ve znění pozdějších předpisů (dále jen „zákon o mezinárodním právu soukromém").

[130] Viz článek 3 a článek 9 směrnice 2001/24/EC.

[131] Rozhodnutí Nejvyššího soudu Spojeného království (*Supreme Court of the United Kingdom*) ve věci *Goldman Sachs International v Novo Banco S.A.* ze dne 4. července 2018, UKSC 34.

[132] Banco Espírito Santo SA dále jen „BES".

BES prostřednictvím transferu vybraných aktiv a pasiv na nově založenou překlenovací instituci – Novo Banco SA.

Předmětem tohoto sporu se staly prostředky v hodnotě zhruba 835 milionů dolarů, které BES obdržela na základě úvěrové smlouvy podřízené anglickému právu od společnosti Oak Finance Luxemburg SA.

Z rozhodnutí portugalské centrální banky ze dne 3. srpna 2014 byly tyto závazky nejprve zahrnuty do závazků způsobilých k přechodu na Novo Banco SA. Poté ovšem následovala řada dalších rozhodnutí upřesňujících strukturu převáděných aktiv a pasiv, až nakonec centrální banka dne 22. prosince 2014 dospěla k verdiktu, že závazky ze zmíněné úvěrové smlouvy na překlenovací instituci přecházet nemají. Tomu odporovala mimo jiné společnost Goldman Sachs (údajný aranžér předmětného financování a zároveň vlastník přibližně 2% podílu na BES), jejíž aktivní procesní legitimace byla založena postoupením práv Oak Finance Luxemburg SA z úvěrové smlouvy. Jelikož Goldman Sachs se svým požadavkem na přechod závazků z úvěrové smlouvy na překlenovací instituci u portugalských autorit neuspěli, obrátili se s žalobou na zaplacení pohledávek z úvěrové smlouvy vůči Novo Banco SA na anglický soud, a to s ohledem na tvrzenou příslušnost anglických soudů vzhledem k volbě práva a příslušnosti soudů podle úvěrové smlouvy.

Anglický soud prvního stupně (*High Court of Justice*), navzdory zmíněné úpravě podle směrnice 2001/24/ES, poněkud obskurním způsobem dovodil, že pro účely stanovení příslušnosti anglických soudů je nutno vycházet pouze ze srpnového rozhodnutí portugalské centrální banky, na základě kterého měly přejít závazky BES z úvěrové smlouvy na Novo Banco. Z toho důvodu se měla Novo Banco tacitně podřídit i prorogační doložce zakládající příslušnost anglických soudů, a to rovněž ohledně sporu mezi Novo Banco a Goldman Sachs co do účinků prosincového rozhodnutí portugalské centrální banky.

Odvolací soud (*Court of Appeal*) se ovšem s právním názorem prvoinstančního soudu (zcela správně) neztotožnil. Soudu první instance jednak vytkl, že v rámci svého rozhodnutí zcela nepochopitelně „izoloval" srpnové a prosincové rozhodnutí. V návaznosti na rozhodnutí Soudního dvora ve věci *LBI hf v Kepler Capital Markets SA*[133] a *Tadej Kotnik and Others v Državni zbor Republike Slovenije*[134] poté uvedl, že daný spor měl být posouzen především s poukazem na článek 3 směrnice 2001/24/ES, která mezi reorganizační opatření explicitně řadí také opatření k řešení krize ve smyslu směrnice BRRD. Jelikož srpnové i prosincové rozhodnutí byly reorganizačními opatřeními podle směrnice 2001/24/ES, anglické soudy byly povinny je automaticky uznat. Tento závěr s ohledem na cíle unijní úpravy následně potvrdil i anglický Nejvyšší soud (*Supreme Court of the United Kingdom*).

Uvedený případ je poměrně jasným důkazem, že v případech přeshraničních insolvencí úvěrových institucí (vedle řady nevyjasněných otázek spojených s určováním rozhodného práva a mezinárodní příslušnosti národních orgánů) stále přetrvává jistá míra neochoty podřídit se účinkům cizího právního řádu, který nebyl určen předchozí volbou

[133] Rozhodnutí Soudního dvora ve věci *LBI hf v Kepler Capital Markets SA* ze dne 24. října 2013, C85/12.
[134] Rozhodnutí Soudního dvora ve věci *Tadej Kotnik and Others v Državni zbor Republike Slovenije* ze dne 19. července 2016, C526/14.

práva smluvními stranami. V kontextu kolizní úpravy insolvencí úvěrových institucí s mezinárodním prvkem je proto otázka, zda již nenadešel čas k nahrazení směrnice 2001/24/ES novým předpisem ve formě nařízení, který by po vzoru nařízení 2015/848 upravil tuto oblast obsáhlejším způsobem a postavil najisto vzájemný vztah směrnice BRRD a směrnice 2001/24/ES. Tím by zároveň došlo odstranění řady nejasností, které mnohdy vyplývají z nedostatečné transpozice směrnic do národních právních předpisů, což lze dobře demonstrovat i na případě transpozice vybraných ustanovení směrnice 2001/24/ES do zákona o mezinárodním právu soukromém. Do té doby je na místě obava, že smysluplná aplikace nástrojů k řešení krize bude podrývána rovněž řadou následných žalob.

5. ZÁVĚR

Implementací nástrojů k řešení krize podle směrnice BRRD došlo na úrovni jednotlivých členských států k harmonizaci specifických institutů určených k řešení krize úvěrových institucí a dalších povinných osob. Recentní případy selhání úvěrových institucí ovšem ukazují, že navzdory těmto nástrojům zůstanou ambiciózní cíle směrnice BRRD, zejména pak záměr omezit financování krize finančního sektoru z veřejných zdrojů, nejspíše nedosaženy. Stejně tak lze usuzovat, že ani nástroje k řešení krize nepředstavují bez dalšího cestu ven z bludného kruhu selhání systémově významných úvěrových institucí, jelikož v naprosté většině případů zůstává nejzazším řešením jejich insolvence prodej dalšímu soutěžiteli, kterým ale zpravidla nemůže být nikdo jiný než další systémově významná instituce, jak potvrzuje i případ rezoluce španělské Banco Popular. Aplikační meze nástrojů k řešení krize se přitom odvíjí rovněž od přetrvávajícího problému nejednotné úpravy vlastního insolvenčního procesu na úrovni jednotlivých členských států. Dokud se tento *status quo* nepodaří překlenout, skutečný potenciál nástrojů k řešení krize a souvisejících rezolučních strategií zůstane pravděpodobně nenaplněn.

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RECENZENTI ACTA
UNIVERSITATIS CAROLINAE IURIDICA
V ROCE 2020

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prof. JUDr. Dalibor Jílek, CSc.
prof. JUDr. Naděžda Rozehnalová, CSc.
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