CHARLES UNIVERSITY

Faculty of Law

Heorhi Kolas

Companies in Private International Law

Outline of the Dissertation

Supervisor: Prof. JUDr. Monika Pauknerová, CSc., DSc.

Programme of study: Theoretical Legal Sciences –

Law and Legal Theory in European Context

Dissertation Aims

In an era of cross-border cooperation, where businesses transcend national boundaries, international contracts, payments, and the prevalence of transnational corporations are commonplace. The primary legal challenge in international interactions is the 'conflict of laws', where legal collisions occur between at least two states regarding relations with a foreign element. A regulatory method has been introduced to determine the applicable law in such situations.

Many challenges have arisen on the path to improving private international law; one of them is the problem is determining the law applicable to a company (*lex societatis*). This poses significant risks in corporate relations with foreign elements, which could lead to devastating consequences without a clear understanding of private international law and corporate law concepts. It is crucial for dispute resolution, as it directly impacts a company's legal capacity and legal personality. Disputes arising from a conflict of laws carry legal uncertainty, which hinders cross-border business relationships and poses potential risks for various stakeholders, including the companies themselves, their members, employees, creditors, and states. Modern private international law should carefully consider all these interests, concerns, and expectations.

In the European Union, the formation of new corporate relationships presents a major difficulty for private international law. Despite the existence of freedom of establishment and cross-border conversions, the lack of a unified system of corporate forms and criteria for determining applicable law persists. Extensive work has been done, but further research is necessary to address specific issues, as ineffective regulations hinder international trade and national economic growth.

The Research on companies in private international law provides insights into complex corporate relationships involving foreign elements. This study focuses on determining the applicable law for profit-oriented business organisations with legal personality, based on definitions from the Czech Business Corporations Act and the Treaty on the Functioning of the European Union.

The research aims to identify and analyse current problems in private international law related to determining applicable law and proposing solutions. Comprehensive studies, employing doctrinal analysis and comparative methods, explore theories and approaches in civil, corporate, and private international law. Legal regulations and doctrines from various countries are examined, such as Belarus, Belgium, China, the Czech Republic, Egypt, France, Germany, Italy, Kazakhstan, Madagascar, the Netherlands, Russia, Spain, Switzerland, Tunisia, Turkey, Ukraine, the United Kingdom, and the United States, with an emphasis on the Czech Republic and the European Union.

Dissertation Content

The research comprises twenty-one chapters grouped into five parts: 'The Concept of Private International Law', 'The Concept of Company in Private International Law', 'The Concept of Lex Societatis and its Scope in Private International Law', 'Theories of Determining the Law Applicable to Companies', and 'Cross-border Conversions in European Union Law'.

The first part, 'The Concept of Private International Law', explores the general concepts of private international law. This part consists of the following four chapters: 'Evolution of the Private International Law Doctrine', 'Modern Concept of Private International Law', 'Unification and Harmonisation of Private International Law', and 'The Concept of European Private International Law'. It investigates the historical development of private international law and the fundamental theories upon which it is built. The examination encompasses the notion and scope of private international law, European private international law, and the issues of unification and harmonisation of law. These foundations form the basis crucial for the subsequent parts.

The second part, 'The Concept of Company in Private International Law', addresses the problem of understanding the term 'company' in private international law. This part consists of the following six chapters: 'The Concept of Person', 'The Concept and Theories of Legal Person', 'Legal Person in Corporate and Private International Law', 'Companies in Corporate Law', and 'The Problem of Foreign Companies Recognition', 'European Supranational Business Organisations'.

It conducts a complex analysis of the concepts of a 'person', 'legal person', and 'company', as well as the main theories associated with them. This part also addresses the issue of recognizing companies abroad and explores supranational business organizations governed by European Union law (European Economic Interest Grouping (EEIG), European Company (SE), European Cooperative Society (SCE), Societas Unius Personae (SUP)).

The third part, 'The Concept of Lex Societatis and Its Scope in Private International Law', is dedicated to the key concept of this study, which is the law applicable to the company (*lex societatis*). This part consists of the following three chapters: 'The Concept of Lex Societatis', 'Scope of Lex Societatis', and 'Nationality and Its Difference from Lex Societatis'. It provides an analysis of the concept of *lex societatis* and identifies its scope. The study explores variations that are entrenched in different national legal systems. Additionally, it investigates the distinctions between the concept of '*lex societatis*' and the concept of 'nationality' of the company.

The fourth part, 'Theories of Determining the Law Applicable to Companies', covers the analysis of theories used in different legal systems to determine the law applicable to companies.

This part consists of the following four chapters: ‘Basic Concepts of Theories of Determining the Law Applicable to Companies’, ‘Theory of Incorporation’, ‘Real Seat’ Theory’, and ‘Other Theories for Determining Law Applicable’. It explores two main theories: the theory of incorporation and the ‘real seat’ theory. The understanding of each theory, criteria for determining the applicable law, and examples from various national legal systems are analysed, along with their advantages and disadvantages. Besides these two main theories, other alternative and mixed theories are examined, as well as the application of autonomy of the will in determining the applicable law.

The fifth part, ‘Cross-border Conversions in European Union Law’, focuses on the issues of private international law in the European Union context, particularly freedom of establishment. This part consists of the following four chapters: ‘Freedom of Establishment in the European Union’, ‘Court of Justice of the European Union Case Law on Freedom of Establishment’, ‘Cross-border Conversions Under Directive (EU) 2019/2121’, and ‘Transfer of Company’s Seat Under the Law of the Czech Republic’.

This part of the research pays particular attention to the analysis of the practice of the Court of Justice of the European Union, which has a significant impact on the harmonization and unification of European private international law, including the approaches to determining the law applicable to companies. The following key cases of the Court of Justice of the European Union are analyzed: Daily Mail [1988], Centros Ltd vs. Erhvervsog Selskabsstyrelsen (1999), Überseering BV vs. Nordic Construction Company Baumanagement GmbH (NCC) (2002), Inspire Art Ltd (2003), Cartesio [2008], VALE Építési (2012), and Polbud - Wykonawstwo sp. z o.o. (2017). Furthermore, this part of the research deals with cross-border conversions within the European Union, focusing primarily on seat transfer according to the provisions of the recent in-force Directive (EU) 2019/2121 and the legislation of the Czech Republic.

Dissertation Outcomes

The first part of the research, 'The Concept of Private International Law', covered the fundamentals of private international law and provided an overview of the broader context concerning the regulation of companies in private international law. It studied the history of private international law, its foundations, sources, harmonization, unification, and the general framework of European private international law.

Private international law has undergone significant development, evolving from being a law focused on foreigners to one that facilitates the application of foreign laws within national systems, expands party autonomy, and introduces international and supranational uniform rules. This suggests that private international law is steadily moving towards the liberalisation of national legislations and the increasing adoption of international and supranational instruments to regulate private law relations. The historical trajectory of private international law reveals its dynamism and inherent adaptability, where a single global event or researcher can have a significant impact. The perspectives on private international law held in the past and our present-day viewpoint suggest that our contemporary understanding of various concepts of private international law will inevitably become part of the historical continuum in the foreseeable future.

Presently, private international law stands as a distinct branch of law governing private legal relationships involving a foreign element. It employs a specific conflict-of-laws method and encompasses legal rules that regulate three primary areas: the determination of applicable law, the determination of competent jurisdiction, and the procedures associated with the recognition and enforcement of foreign judgments.

The sources of private international law include domestic law, EU law, international treaties, and customary international law. The diverse approaches to private international law across different jurisdictions can be addressed through harmonisation and unification of laws. Harmonisation aims to align laws naturally, while unification involves a deliberate rule-making process to establish uniform principles. Notably, the countries of the European Union have achieved significant success in this regard by using a wide range of instruments, rather than limiting themselves to a single approach.

In the **second part** of the research, 'The Concept of Company in Private International Law', the concepts of 'person', 'legal person', and 'company' were examined. The theoretical foundations related to these concepts, as well as their usage across legal systems, were studied.

It was concluded that the lack of uniformity in defining a 'person', 'legal person', and entities without legal personality across various legal systems necessitates a deep understanding of these concepts to ensure the correct interpretation of foreign law.

A 'person' is a natural person or legal person who possesses a legal personality and capacity, being subject to rights and obligations. A natural person and a legal person are both concepts of the law and do not exist in the real world, as they are legal fictions. However, in the same way that there is an individual that embodies the essence of a natural person in real life, there exists an entity that constitutes the essence of a legal person, taking a legal form.

The prevailing view on the nature of a 'legal person' suggests that it is created by law and exists only within the framework defined by the law. A legal person exhibits various characteristics: (1) its incorporation is sanctioned by law, (2) it possesses a distinctive name, (3) it enjoys legal personality, (4) it has a structure and governing organs, (5) it possesses separate property distinct from its members, (6) it can act as a plaintiff or defendant in legal proceedings, (7) it has the capacity to commit legal wrongs, (8) it has a registered seat or administrative centre, and (9) it is governed by applicable law.

Comparative analysis of corporate law across different jurisdictions reveals that lawmakers often avoid providing an explicit definition of a legal person, presuming it to be self-evident, or instead opt to enumerate criteria that an entity must satisfy. When applying foreign law, it is important to interpret it following the logic and native language of the foreign legislator. Considering that translations are not always precise, a deep understanding of the fundamentals of corporate law is necessary to ensure the correct interpretation of foreign law.

There is no terminological unity regarding legal persons or other entities in the different national legislations on private international laws. Although some of them may appear to regulate similar categories, a closer look reveals that certain forms of entities fall outside the scope of regulation. Consequently, in private international law, the advantageous approach interprets the term 'company' expansively. Under this approach, the term 'company' covers all associations of individuals and assets, irrespective of their legal form or purpose, regardless of whether they are governed by private or public law. That includes all entities regardless of whether they possess legal personality or not.

Another primary challenge in this context lies in the recognition of a company abroad. The issue of recognition is closely connected to state sovereignty. It is the prerogative of each state to recognise the legal personality and legal capacity of a foreign company within its territory. Such recognition entails the determination of the applicable law. The resolution of this matter can be approached through two methods: the establishment of a unified criterion for determining the

applicable law or the adoption of international instruments based on mutual recognition among participating countries.

The issue of recognizing companies and harmonising regulations has led EU law to establish EU supranational business organisations. Currently, three types of organisations can be established under the EU legal framework: European Economic Interest Grouping (EEIG), European Company or Societas Europaea (SE), and European Cooperative Society (SCE). Additionally, there is a proposed regulation for Societas Unius Personae (SUP) aiming to provide a legal framework for a single-member limited liability company.

In the **third part** of the research, 'The Concept of Lex Societatis and Its Scope in Private International Law', an analysis of multiple concepts, including '*lex societatis*', 'nationality', as well as a distinction between the terms '*lex societatis*' and 'nationality' was conducted.

The legal status of companies encompasses various concepts, including *lex societatis*, nationality, or residency. It is important to distinguish the legal nature of these concepts to avoid misinterpretation when applying or introducing laws. *Lex societatis* is the legal order that governs the legal personality and legal capacity of a company in the realm of private law. Determining *lex societatis* involves employing the conflict-of-laws method.

The scope of *lex societatis* should include legal relationships arising from legal personality and legal capacity, formation and dissolution, capital structure, internal relationships of its members, acquisition, as well as the rights, duties, and liabilities of members and executives in the event of a breach.

The nationality of the company, in contrast to *lex societatis*, pertains to the company's connection with the state in the domain of public law (either national or international). It is determined under the substantive rules of law applicable to foreigners. The scope of a company's nationality encompasses legal relationships arising from tax law, investment law, and other public laws regulating the rights and obligations of foreigners, as well as matters related to diplomatic protection, sanctions, and embargoes.

Nevertheless, it's important to understand that the term 'nationality of a company' is not universally agreed upon across different legal systems. For example, French law uses 'nationality' broadly to describe the general connection between a company and a state. However, it is crucial to keep private and public law domains separate, as it is a key aspect in correctly determining which rules apply to companies involved in cross-border activities. Therefore, when studying any foreign legal system, it is essential to have a clear understanding of established terminology in law and doctrine and to comprehend all nuances that may arise in interpreting specific norms of foreign law.

The **fourth part** of the research, 'Theories of Determining the Law Applicable to Companies', was devoted to the theories of determining the applicable law to companies. A comparative analysis of the approaches employed in the legislation of various legal systems and in the doctrine of private international law was carried out, and the main advantages and disadvantages of these approaches were considered.

The results of this part of the research revealed that the two main theories of determining the applicable law to companies – the incorporation theory and the 'real seat' theory – have their advantages and weaknesses.

According to the theory of incorporation, the connecting factors are the law of the place of incorporation and the law of the place of the statutory seat. The 'real seat' theory relies on the law of the place of the actual administrative seat. Incorporation theory has a number of advantages, including predictability, simplicity, and consistent application, which protect the interests of the company's stakeholders. However, it also carries the risk of potential abuse of creditors' rights, and the host state in which the company operates is in a vulnerable position, as the law of that country could be disregarded.

On the other hand, the theory of the 'real seat' addresses the challenge of applying the law based on the company's actual administrative and operational centre, rather than its formal registration. This approach safeguards the interests of creditors and the host state by applying their domestic law. Nevertheless, the determination of the real seat can be complex and unpredictable, raising concerns about potential negative consequences, including the loss of the company's legal personality.

In addition, the modified theories attract attention to their potential to address the specific issues associated with defining a uniform criterion for determining the applicable law; however, their practical implementation remains a subject of scepticism.

If a choice has to be made in favour of the most effective theory, it can be concluded that the incorporation theory is better suited to be used as the only unified approach. Regarding the connecting factor, the use of the statutory seat proves to be preferable, as it aligns with current trends and the increasing prevalence of company transfers with changes in the statutory seat. This criterion is not only as simple and predictable as the incorporation criterion but also shows a degree of adaptability.

The **fifth part** of the study, 'Cross-border Conversions in European Union Law', focused on freedom of establishment in the European Union, particularly in the area of cross-border conversions. The case law of the Court of Justice of the European Union, Directive (EU)

2019/2121, and Czech legislation were studied on this issue. Based on the study, the following conclusions can be drawn.

The European Union is founded on four fundamental principles, collectively known as the four freedoms: the freedom of movement of goods, the freedom of movement of persons, the freedom of movement of services, and the freedom of movement of capital. A crucial aspect arising from the freedom of movement of persons is the freedom of establishment, which covers both primary and secondary establishments.

A significant challenge in implementing the freedom of establishment has been the longstanding issue of cross-border conversions, crucial to the proper functioning of the European Union's single market. Over time, the EU law's responses in this realm have been predominantly reactive, with the Court of Justice of the European Union delivering judgments to tackle evolving challenges. For example, in the Überseering BV case (C-208/00), it was established that EU member states cannot employ the 'real seat' doctrine to determine the law applicable to companies incorporated in other member states. Furthermore, cases like Inspire Art Ltd (C-167/01), VALE (C-378/10), and Polbud (C-106/16) have addressed state intervention issues in imposing restrictions on cross-border conversions, establishing criteria limiting the extent to which national laws restrict the freedom of establishment.

Directive (EU) 2019/2121, amending Directive (EU) 2017/1132, represents a significant development in harmonising regulations for cross-border conversions within the EU. However, its effectiveness heavily relies on member states adopting its provisions, which may pose practical challenges due to the complexity of implementing the directive in twenty-seven legal systems. A year after the deadline for all member states to implement this directive, it is evident that the implementation process faces difficulties and exhibits a mosaic character.

While Directive (EU) 2019/2121 has not yet been incorporated into Czech law, the current Czech legislation concerning cross-border seat transfers allows the procedure. It incorporates all the basic procedures outlined in the directive, enabling a foreign company to transfer its seat to the Czech Republic and a Czech company to transfer its seat within the EU.

However, the content of these procedures does not fully align with the directive's requirements. The draft of the implementation law, aiming to bring Czech legislation into compliance with the directive, is currently under consideration.

In conclusion, as the world becomes more interconnected, the role of private international law in regulating cross-border business activities becomes increasingly important, necessitating innovative and comprehensive solutions to these complex problems. Through the exploration of the complexities surrounding *lex societatis*, theories related to determining applicable laws, and

European Union instruments concerning cross-border conversions, the adaptation of effective and consistent regulations to the constantly evolving international trade landscape can be achieved.

Policymakers, legal scholars, and practitioners should collaborate to adopt legal regulations that encourage international business operations, safeguard stakeholders' interests, and stimulate both national and global economic growth. The pursuit of harmonisation and unification of law remains paramount in achieving these objectives.

This research could serve as a foundation for further studies in this area. The findings of this research contribute to the development of new theories and approaches to address the issues of private international law in corporate relations involving a foreign element.

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Ukraine

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