# REVIEWER'S REPORT

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| Name of the student: | Heorhi Kolas |
| Dissertation topic: | Companies in Private International Law |
| Length of dissertation: | 120 (without list of references and case law) |

## 1. Relevance (novelty) of the topic

The PhD candidate has chosen a topic which is rather technical, but which is of considerable importance from the point of view of international legal practice. Despite differences in the conflict of laws rules applicable to companies in the EU Member States, EU law does not yet contain a uniform conflict of laws rule applicable to companies in the EU, except for the legal entities created by EU law (e.g. the European Company).

The determination of the law applicable to companies also has implications for other areas of law, such as international investment law, where a foreign investor must have the legal capacity to bring an international investment claim against a host State in the first place. The capacity to sue generally follows from the recognition of the legal entity under the *lex societatis* and has already been analysed in the context of investment awards, in particular in the context of jurisdictional challenges raised by the relevant host State against a claimant company that was not a separate legal entity under its *lex societatis* (e.g. *Impreglio S.p.A. v. Pakistan*).

The issue of the conflict of laws rules determining the law applicable to companies is thus a very topical subject in terms of its dynamics and some aspects have already been dealt with in a number of academic and student works, including in the Czech Republic. The choice of the topic can be seen as positive in view of the constant progress of globalisation and the quest for harmonisation of the private international law rules and extensive mobility of companies within the EU. The thesis provides knowledge from sources outside of our usual scope of research, such as Ukraine, Russia, Kazakhstan or China.

## 2. Demands of the topic on the student's theoretical knowledge, the input data and their processing, and methods used

The doctoral candidate had to combine knowledge of private international law, which is partly harmonised at the EU level, with company law and civil law concerning the concept of legal persons and companies, which are predominantly matters of national law in the EU, and EU law on the freedom of establishment. The research question belongs to private international law, but the answers need to be viewed beyond this field of law.

The comparative method is used throughout the thesis, where certain aspects of the topic are compared in different legal systems, both continental and common law. In the introduction, the PhD student identifies 19 countries (including the Czech Republic) whose laws and doctrines will be considered. This is a challenging number of legal frameworks, and the PhD student has made an effort to work with primary sources from these jurisdictions as much as possible. He does not explain the choice of countries, but it can be assumed that language skills and availability of sources were taken into account (for example, references to the legal frameworks of several Latin American states are made through articles written by others instead of primary sources (e.g. p. 59, footnote 222), while Latin America is not one of the regions to be studied). The use of different terminology such as "legal person", "society", "corporation" or "entities other than natural persons" is presented through comparisons of different private international law acts, noting that the nuances

of terminology, which are often neglected, may reveal more complex issues than they appear and the need for harmonisation. Similarly, the scope of the *lex societatis*, i.e. the matters governed by the law applicable to companies, is illustrated by means of private international law instruments from different jurisdictions in Europe and beyond (pp. 52-53). The chosen comparative, historical and evaluative approach is appropriate.

## 3. Formal and systematic structure of the dissertation

The work is logically organized, with its structure aimed at fulfilling the objective outlined in the thesis introduction. The research question is a narrow one, i.e. determining the applicable law to companies (*lex societatis*), however, the research approaches the question from a broad perspective. Chapter One addresses the historical developments of private international law as such and the basic concepts of private international law (such as its subject matter, sources, methods). Chapter Two deals with the notion of "company" in private international law, beginning with a historical excursus on the understanding of and theoretical approaches to the notion of "legal person", noting in general that national laws often lack an explicit definition of a legal person and that there is no consistency of terminology between different laws. The latter poses challenges in the context of private international law, which requires a broad understanding of the concept of "company ". The chapter also includes an analysis of supranational legal entities created by EU law, such as the European Economic Interest Grouping, the European Company, the European Cooperative Society, and the proposal for a single-member private limited liability company.

Chapters Three and Four form the core of the thesis and analyse the doctrinal concept of the *lex societatis* (the law applicable to the legal personality and capacity of legal entities), its scope and the two basic theories for determining the law applicable to companies, namely the seat theory and the incorporation theory. Chapter Three analyses each theory in detail, assessing the advantages and disadvantages of each approach, and noting exceptions that may be found in some national laws. The thesis shows that the theory of incorporation does not necessarily have to be formulated in a pure form, as is the case in the Czech Republic, for example. Other supplementary theories for determining the *lex societatis* or limiting the otherwise applicable law are also discussed, including the control theory, the place of business theory, the autonomy of the will theory and other theories that modify the primary theory of incorporation.

Chapter Five is devoted to the freedom of establishment in the EU and the practice of the Court of Justice, which has placed certain restrictions on the use of the real seat theory and has indirectly influenced the approaches to determining the law applicable to companies and harmonisation in the EU, pointing out the challenges of maintaining the real seat doctrine by Member States vis-à-vis companies incorporated in other Member States. Finally, the thesis also deals with the recent developments on cross-border conversions in EU law and Directive 2019/2021.

The thesis is written in English, in a high quality and readable manner. The text is easy to follow and practice-oriented, highlighting the practical difficulties of cross-border corporate mobility, in particular the transfer of a company's original *lex societatis* to another jurisdiction. As such, the work does not provide an in-depth theoretical discussion, but the nature of the topic correctly underpins the challenges of legal practice and is predominantly descriptive.

The PhD student has consulted relevant academic works, in particular foreign literature and sources beyond European jurisdictions. The PhD student does not neglect Czech sources that are not native to him. It is also clear from the thesis that the doctoral candidate has devoted a great

deal of effort to analysing foreign private international law legal instruments and judgments of the Court of Justice of the European Union.

Given the highly technical nature of the subject, I find the mini-summaries highlighting the key points of each chapter helpful, although more care should be taken not to oversimplify. For example, the conclusion on the scope of the *lex societatis* is somewhat vague in stating that "it should include" certain issues (p. 57). The discussion in subsection 3.2. unfortunately lacks an assessment of the desirable scope of the *lex societatis*, but rather points to the nuances in the terminology and lists of topics recognised in different jurisdictions.

From the formal point of view, the thesis is prepared to a very good standard, with exceptional typing errors (e.g. repetition of sentences at the bottom of page 116). The student has prepared footnotes according to the citation standards and has provided the thesis with a list of literature and sources used. There are minor errors in citing sources and relevant pages (e.g. footnote 34 contains a reference to the correct source but an incorrect page number) and some empirical statements are not supported by sources/data (e.g. the conclusion that Ireland and Estonia have significantly improved their approach to business regulation on pages 85 and 86).

## 4. Opinion on the dissertation

The aim of the thesis is to "identify and conduct a comprehensive and comparative analysis of the current problems of private international law concerning determining the law applicable to companies, as well as to identify and analyse solutions to these specific problems" (p. 2). The thesis is not an in-depth monographic analysis of the narrow issue of the law applicable to companies, but rather provides an overview of the current regulations in the Czech Republic and the EU concerning the determination of the law applicable to companies, based on a comparison of several legal systems, and combines the theory and approaches to the concept of a legal person from the perspective of civil law, company law, private international law and EU law. The added value of the thesis lies in the combination of insights from different legal fields.

The historical perspective on the development of private international law is somewhat redundant, as it focuses more on trade aspects and lacks any analysis of the links to the subject of the thesis, i.e. the law governing the legal status of companies. It wasn't until the 16th century that the first precursors of the modern corporate structure began to appear. The brief introduction to private international law (pp. 10-19) and to the concept of the "legal person" can be seen as a simple descriptive summary that can be found in any textbook on private international law and civil law. However, it should be noted that the student uses these sub-chapters as a background to introduce the topic of the dissertation and to define the scope of his research (pp. 10, 31, 34).

The central part of the thesis (from Part 3 onwards) is the examination of the law applicable to companies, with the focus on EU law and Czech regulations in a comparative perspective. The analysis builds on the examination of the notion of the company in the context of private international law, and logically proceeds to the issues of determining the law applicable to companies (*lex societatis*) by reference to the law of the place of incorporation or the law of the seat, the scope of the *lex socieaties,* which explains the issues usually covered by the company status (personal law), and the different meanings and uses of the nationality of the company. It provides a comprehensive overview of the theories for determining the law applicable to companies, discussing the advantages and disadvantages of each approach, and anticipating possible future developments. It shows that the conflict of laws rules do not necessarily fall strictly within one theory and that, for example, the connecting factor of the state of incorporation may be

supplemented by secondary connecting factors or provide for substantial exceptions. The analysis is practically oriented, but also sheds light on the origins and meaning of private international law approaches to determining the *lex societatis*. Although the PhD student also chose to focus on the EU legal framework, what I find lacking in the text is a debate on the existing EU private international law instruments, such as the Rome I and Rome II Regulations, and the impact of their exclusion clauses on the determination of the *lex societatis* at the level of the EU Member States, in particular the delineation of the scope of the *lex societatis* and other areas of law with distinct connecting factors. There is limited case law on the exclusion from the scope of the Rome I Regulation of the matters relating to "questions governed by the law of companies and other bodies" as set out in Article 1(2)(f) of the Rome I Regulation. The doctoral candidate should be given the opportunity to explain this omission during the defence.

The PhD student is able to generalize the acquired theoretical knowledge, however, more pronounced formulation of one's own opinion on the researched topic throughout the thesis is a shortcoming of the overall level of the thesis, even considering the existence of a relatively rich literature on the chosen topic. On the other hand, it should be acknowledged that the PhD student has managed to present the technical complexity of the subject in a very understandable way.

The dissertation creates a space for an expert debate on the importance of harmonising the conflict of laws rules applicable to companies. The doctoral candidate has provided a complex overview of the legal developments in this area to date. However, the student does not (intentionally?) propose a harmonised approach for the future. The thesis provides a basis for discussion of the development of new approaches, particularly within the EU.

## 5. Comments and questions to be raised during the defence

Overall, the doctoral candidate has fulfilled the objectives set out in the introduction and has covered the researched topics in a balanced manner. In summary, although the submitted thesis repeats to a certain extent the existing scholarship, it provides new insights on the topic from the legal regimes of Eastern Europe and Asia and reflects on new developments in the field. Despite the above shortcomings, the thesis demonstrates the student's interest in the chosen topic and his understanding of its practical implications, which he should be able to demonstrate in the oral defence.

On the basis of the above, I recommend the dissertation for defence before the relevant dissertation defence committee. The PhD student should focus on the following issues:

- The thesis refers to "customary international law" as one of the sources of private international law (p. 12), while suggesting that this source does not have "official legal power" (p. 13). What sources does the student refer to?

- What is the approach to " mailbox companies " in private international law? Should the interests of creditors, minority shareholders or employees be protected?

- Does the EU need a "Rome V Regulation on the law applicable to companies"?

In Prague on 28 April 2024

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