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DISERTAČNÍ PRÁCE

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Petr Juliš

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DISERTAČNÍ PRÁCE

VOLBA ROZHODNÉHO PRÁVA A MÍSTA ŘEŠENÍ SPORU V MEZINÁRODNÍM OBCHDOU

CHOICE OF LAW AND JURISDICTION IN INTERNATIONAL COMMERCE

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V Praze dne 29. května 2009

Petr Juliš

Poděkování

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V Praze dne 29. května 2009 Petr Juliš

CHOICE OF LAW AND JURISDICTION IN INTERNATIONAL COMMERCE

List of Abbreviations and definitions

Brussels Convention	Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters 1968
Brussels I Regulation	Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.
Brussels IIa Regulation	Regulation (EC) No. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters
Code of Civil Procedure	Czech Republic Act No. 99/1963 Sb., Code of Civil Procedure
EC	European Communities
ECJ	The European Court of Justice
Member States	The current European Communities member states
Hague Convention	Hague Convention on Choice of Court Agreements concluded on 30 June 2005
Rome Convention	EC Convention on the Law Applicable to Contractual Obligations (Rome 1980)
Rome I Regulation	Regulation (EC) No. 593/2008 on the Law Applicable to Contractual Obligations
Rome II Regulation	Regulation (EC) No. 864/2007 on the Law Applicable to Non-contractual Obligations
Rome III Regulation	The proposal for a regulation (EC) on Applicable Law and Jurisdiction Matters in Matrimonial Matters, COM(2006)399 of 17 July 2006
ZMPS	The Act Concerning Private International Law and Rules of Procedure Relating Thereto, Act No. 97/1963 Sb., as amended (*Zákon o mezinárodním právu soukromém a procesním*)

CHOICE OF LAW AND JURISDICTION IN INTERNATIONAL COMMERCE

1. INTRODUCTION

The purpose of the agreements on jurisdiction and choice of law is to reflect the wishes of the parties regarding the desired place of litigation and the set of rules that should govern their dispute. The rules on choice of jurisdiction and choice of law, i.e. the right of the parties to chose the place of litigation and set of rules, commonly fall under a part of each law system called the private international law. **Private international law** is the part of law which comes into play when the issue before the court affects some fact, event or transaction that is so closely connected with a foreign system of law as to necessitate recourse to that system[1]. The forms in which this foreign element may appear are numerous, one of them being the choice of jurisdiction or law.

But no paper can even try to include a world wide description of choice of law and jurisdiction without limiting the scope of such topic. It is clear from the subject of this paper that it will only be dealt with situation involving '**international** commerce'. The meaning of 'international' seems to be quite clear. It could be interpreted e.g. in the light of the preamble of the Brussels I Regulation[2] which states that it is only concerned with the international jurisdiction of its Contracting States. The result of the use of 'international' is that domestic situations[3] will not be dealt with. It may also be mentioned that the term 'cross border' is being increasingly used in the European Union for relations between its Member states only, whereas the meaning seems to be the same as that of 'international'[4]. To simplify things, the term 'international' will be used for every non-domestic situation.

The term '**commerce**' will be used as a term a little bit narrower than 'civil and commercial matters' often used in European law instruments. Although no definition of

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[1] North, Peter; Fawcett J.J.: 'Private International Law', 13th edition, Oxford 1999, p. 5.
[2] Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.
[3] E.g. where there is no foreign element or the foreign element involves only another part of the United Kingdom.
[4] Pauknerová, Monika: '*Evropské mezinárodní právo soukromé*', Praha, C.H. Beck 2008, p. 4.

this term is given in e.g. the Brussels I Regulation or the Rome Convention[5] it was held in the ECJ[6] decision in *LTU v Eurocontrol*[7] that a community meaning had to be given to this term. Therefore in this paper, the term 'commerce' will be used in its community meaning as defined by the ECJ's decision such as *Netherlands State v Rüffer*[8] and also by e.g. the Schlosser Report[9].

But even after this first limitation of the scope of this paper it is necessary to further limit its scope before actually addressing jurisdiction and choice of law agreements in international commerce. The reason is again the same; that it would not be possible to write a 'neat' and not too complex paper on jurisdiction and choice of law agreements in the world-wide international commerce. Therefore it will only be dealt with the European, English and Czech regulation of the topic.

As to English and Czech law, these two national set of rules will be very briefly addressed by this paper, each for a different reason. On the one hand, **English law**, traditionally seen as the leading law in international commerce, will be taken as basis for introduction and explanation of notions and theories that form modern European private international law, and on the other hand, Czech law, as a typical example of a system of rules of private international law that belongs to the continental law system, will be contrasted with the other two sets.

But the national regulations of private international law[10] have been recently largely superseded by the **European Communities law**, in case of jurisdiction and choice of law agreements by the Brussels I Regulation and the Rome Convention. Therefore, the main concern of this paper will be to show how these two crucial instruments of the EC law

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[5] EC Convention on the Law Applicable to Contractual Obligations. This will be replaced by a Council Regulation generally referred to as the 'Rome I Regulation' in December 2009.
[6] European Court of Justice.
[7] Case 29/76 LTU v Eurocontrol [1976] ECR 1541.
[8] Case 814/79 Netherlands State v Ruffer. [1980] E.C.R. 3807.
[9] Schlosser Report on Convention and Protocol C 59 1979.
[10] Or, traditionally, Conflict of Laws in Common law terminology. For simplification, the term private international law will be used throughout this paper.

regulate international commerce and the freedom of the parties to choose the set of rules that should govern their possible disputes and the desired place of litigation.

The unification of private international law is, or rather will be when more states ratify it, further deepened by The Hague Convention on Choice of Court Agreements concluded on 30 June 2005 (the "**Hague Convention**"). Therefore the Hague Convention cannot be ignored and will be shown as the most modern and possible most universal of the instruments regulating jurisdiction agreements.

Finally, as with any other agreements, there are specific problems connected with agreements on jurisdiction and choice of law. First of all, the desires of the parties regarding jurisdiction and choice of law may be seen as in conflict with the duty of courts to do justice as between the parties[11]. Furthermore, problems regarding existence of consent of the participating parties to the agreement and questions of existence, validity and the scope of such agreements arise.

It is also necessary to mention that although in some ways similar to jurisdiction and choice of law agreements[12], arbitration agreements will not be dealt with as their main purpose is to remove the adjudication from a court and deprives a person of the right of access to a court[13], whereby the purpose of this paper is to address agreements conferring jurisdiction on courts only and of course the choice of law agreements.

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[11] Tan Yock Lin: *'Choice of Court Agreement: From a Viewpoint of Anglo-Commonwealth Law'*, published in the CDAMS: Legal Dynamics Series 'Evolution of Party Autonomy in International Civil Disputes, 2005, p 41.
[12] In particular in respect to issues arising out of arbitration agreements.
[13] Briggs, Adrian: *'Agreements on Jurisdiction and Choice of Law'*, Oxford 2008, p 473.

2. BACKGROUND

2.1. EUROPEAN PRIVATE INTERNATIONAL LAW AND PRIVATE INTERNATIONAL LAWS OF STATES

As already mentioned, jurisdiction and choice of law agreements are of course regulated by many different national and international law systems usually as a part of something called private international law. In order to be able to be more specific and compare these regulations, three rather different legal systems and their private international law regulations have been chosen. In this paper, it will be shown on these examples, how differently jurisdiction and choice of law agreements can be looked at in two national law orders and how one international law order can try to reconcile these differences.

2.1.1. Direct Effect and Application of European Law

One of the basic principles of European law[14], beside the principles of subsidiarity and proportionality, is the **direct effectiveness** and application of its laws. The fact that European law is directly effective and applicable is crucial for solving the problems of conflict between European and national rules of law.

The doctrines of direct effect and application in EU law were established by the ECJ in the famous *Van Gend en Loos case*[15] in which the court states that the EC Treaty:

"...constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.

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[14] For simplification, the term „European Law" shall be used instead of the term „European Communities Law".
[15] *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1963] ECR 1. In particular in section B.

These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which they treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community."

It is not the purpose of this paper to explain the functioning of European law. Nevertheless, the above mentioned decision, supplemented by the decision in *Flaminio Costa v. ENEL*[16], is the corner stone of the application rules of European law. The result of these decisions is that European law shall have priority over national laws of the Member States. The principle of *lex posterior derogate priori* does not apply here[17]. It needs to be mentioned that the same applies to the decisions of the ECJ[18].

To understand the principle of **direct effect** of European law is crucial for understanding how private international law works in Europe these days. As it will be shown, private international law is one of the most unified branches of law in Europe, whereby, the Brussels Convention, now the Brussels I Regulation, and the Rome Convention, or rather the soon to be effective Rome I Regulation, are seen as a major success of the European Communities and its legislative procedures. Therefore we can now talk about European private international law, a term which was previously used rather carefully[19] and without a clearly defined content.

As already mentioned, the result of these instruments is that large parts of national laws, in particular private international laws, have been superseded by the Europe-wide regulation. Hence, this does not mean that national laws, such as the Czech ZMPS have been cancelled; only its scope of use has been limited or they affect cases that have been started before the effectiveness of the European regulations[20]. What we have to remember is that

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[16] Case 6/64 *Flaminio Costa v. ENEL* [1964] ECR 585.
[17] Pauknerová, Monika: '*Evropské mezinárodní právo soukromé*', Praha, C.H. Beck 2008, p. 68.
[18] See Pauknerová, Monika: '*Evropské mezinárodní právo soukromé*', Praha, C.H. Beck 2008, p. 76 ff for a more detail discussion.
[19] For a discussion on this topic see e.g. the preamble to Pauknerová, Monika: '*Evropské mezinárodní právo soukromé*', Praha, C.H. Beck 2008.
[20] A more detail explenation will be shown in chapters concerning the ZMPS.

in case of a conflict between the European law and national law, European law shall prevail[21].

2.1.2. Czech law

Czech law belongs to the continental law system and has a very long tradition reaching in the case of private international law to 1882 and the establishment of the Czech Law Faculty in Prague[22]. Czech private law includes the standard principles of the European continental legal tradition and has been significantly influenced by Austrian and German laws. Therefore, Czech law is exclusively written law[23], i.e. case law is not a source of law and customary law is only of limited importance, and the legal regulation of private international law is comprehensive and rather detailed and is seen as an independent branch of Czech law.

In the modern Czech Republic, the private international law is defined as a set of special rules of law which are designed to govern private relations which include a foreign element[24]. According to the Czech view, private international law also includes also the so called **international civil procedure** (*mezinárodní právo procesní)* which sets the rules for court proceedings dealing with private relations which include a foreign element, i.e. a part of public law. Czech private international law and international civil procedure is regulated by the Act on Private International Law (*zákon o mezinárodním právu soukromém a procesním*, the "**ZMPS**")[25]. Certain fundamental principles are also provided by the Constitution of the Czech Republic and by the Charter of Fundamental

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[21] Ibid, p. 70
[22] Pauknerová, Monika: '*Czech Republic*', Hague, Kluwer Law International, 2002, p. 13.
[23] Consisting of statutes and laws.
[24] Kučera, Zdeněk: '*Mezinárodní právo soukromé*', 6th edition, Brno, Doplněk 2004, p. 21.
[25] Act No. 97/1963 Sb., on Private International Law, as amended.

Rights and Freedoms[26]. Finally, ss set out in Section 2 of the ZMPS, provisions of international treaties binding the Czech Republic shall take precedence over the ZMPS[27].

Not like in English law which does not distinguish between private and public law, this may be seen as in contradiction with the name of the subject itself, i.e. "private international law". It is submitted that the "core" private international law deals with choice of law issues whereby international civil procedure deals with jurisdiction and recognition of foreign judgements[28].

As already mentioned private international law is seen as a separate branch of Czech law[29]. The basic difference of the Czech law, as a part of the continental law systems, from the common law jurisdictions such as England is that it has a set of fix rules for the choice of law and the use of the chosen foreign law is an obligation of the court, whereby instruments exist which allow the court to **identify the contents of the relevant foreign law**[30]. On the other hand, English courts tend to use English law and if "forced" to use foreign law[31], will assume that foreign law is identical to English law, if not proved otherwise by the parties. Furthermore Czech law seems to adhere to the principle of equality of all legal systems, with some minor exceptions in favour of the *lex fori*[32], which is not the case under English law as already mentioned in this paragraph.

The Czech private international law solutions seem to be concerned above all with **legal certainty**[33]. As already mentioned, European law is trying to find a "third way" between the obligatory use of fixed rules under the continental law systems and the traditional English rules which have been defined by courts throughout centuries and represent a more flexible approach to the problem.

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[26] Constitutional Act No. 1/1993 Sb. and Constitutional Act No. 23/1991.
[27] Meaning that the Czech legal system is founded upon the principle of adaptation rather than transformation of international treaties.
[28] And of course certain other issues, e.g. § 56 ZMPS.
[29] Kučera, Zdeněk: '*Mezinárodní právo soukromé*', 6th edition, Brno, Doplněk 2004, p. 31.
[30] See 53 and 54 ZMPS set a procedure of passing a question on the foreign law by a court to the Czech Ministry of Justice.
[31] Foreign law will be seen as a fact which needs to be evidenced.
[32] Pauknerová, Monika: '*Czech Republic*', Hague, Kluwer Law International, 2002, p. 20.
[33] Kučera, Zdeněk: '*Mezinárodní právo soukromé*', 6th edition, Brno, Doplněk 2004, p. 39.

A huge difference to the modern European private international law, one of its basic principles being the principle of prohibition of discrimination[34], is the fact that the Czech ZMPS is based upon the citizenship of persons and not the domicile[35]. This is due to the fact that this instrument has been in force since the 60's and can be seen as discriminative in certain ways.

Finally, it can be concluded that Czech private international law is generally governed by the **main principles** of equality of all legal systems, the duty to apply foreign law and that foreign law applies as a law and not as a fact which needs to be evidenced, as already mentioned, and also by e.g. the principle of the reasonable settlement of legal relations[36] and equal treatment of foreigners in the sphere of personal and property rights.

We can not go into further detail on these rather theoretical issues regarding the general principles[37]. Therefore it will now shortly be dealt with the basic three practical questions that the private international law is concerned with.

2.1.2.1. Choice of Law

Before going into any detail, it has to be repeated, that Czech private international law on choice of law has been, as of 1.7.2006 largely, but not entirely[38], superseded by European law[39], in particular by the Rome Convention. Nevertheless, it is indeed interesting and very useful for understanding of the subject to shortly introduce the system of choice of law under the ZMPS.

As already mentioned, Czech private international law, in order to assure legal certainty, contains a set of fixed rules for the choice of law[40] which, unlike English law as shown below, do not prefer the law of the forum to other laws. Only in extreme situations, e.g.

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[34] Art 12 of the Treaty establishing the European Community.
[35] With an exception of e.g. a divorce. See Sec 22 of the ZMPS
[36] Pauknerová, Monika: '*Czech Republic*', Hague, Kluwer Law International, 2002, p. 21.
[37] For a more detail explanation of the subject see Pauknerová, Monika: '*Czech Republic*', Hague, Kluwer Law International, 2002.
[38] See Art 17 of the Rome Convention.
[39] Wholly in private matters whereby certain public choice of law matters are still governed by the ZMPS.
[40] See 9 to 31 ZMPS.

when it is not possible, despite of best efforts, to determine the content of foreign law, will the court use Czech law although foreign law should be used according to the ZMPS. The only possibility for a court to exercise its discretion was the so called reasonable settlement (*rozumné uspořádání*) test under § 10 (1) ZMPS. As in other legal systems, Czech legal theory distinguishes between one- and two-sided conflict rules (*kolizní norma*). One-sided conflict rules are those that indicate that domestic law is applicable whereby two-sided conflict rules state which law is applicable to the given situation[41]. As a relatively modern codification of private international law, the Czech law contains a majority of the two-sided conflict rules.

The legal consequences of the use of the conflict rules is the establishment of a so called applicable law (*rozhodné právo*). The applicable law is determined through the conflict rules by the use of so called connecting factors *(hraniční určovatele)* which could be defined as matters significant for a particular relation, e.g. nationality or citizenship[42], residence, location of the immovable, place of contract etc., if these include a relevant foreign element[43]. Therefore a common conflict rule would be "damages ... shall be governed by the law of the place where the damage occurred..."[44]. What is of great importance to us is that an agreement on choice of law, i.e. the intention of the parties, is also a connecting factor *(hraniční určovatel)*[45].

In general, the contracting parties may choose which law will govern their mutual relations without any limitations, i.e. the parties may choose any law in force, irrespective of whether there is a relevant link between the selected law and the respective case.[46] The choice of law may also be done tacitly, if from the circumstances there is no doubt as to their manifested will.

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[41] Pauknerová, Monika: '*Czech Republic*', Hague, Kluwer Law International, 2002, p. 40.
[42] A great difference to the English and European law system where the domicile is decisive.
[43] Thanks to the notion of a „relevant contact" under the ZMPS the foreign element may not be relevant e.g. in Section 23. But these exemptions relate mainly to family matters and thus are not important for this paper.
[44] See 15 ZMPS.
[45] Kučera, Zdeněk: '*Mezinárodní právo soukromé*', 6th edition, Brno, Doplněk 2004, p. 128.
[46] Pauknerová, Monika: '*Czech Republic*', Hague, Kluwer Law International, 2002, p. 56.

2.1.2.2. Jurisdiction

As with choice of law, the jurisdiction rules of Czech private international law have been largely superseded by European law, i.e. the Brussels I Regulation. But the Brussels I Regulation only applies if one of the parties is domiciled in a Member State and the courts of a Member State are appointed[47]. Therefore, § 37 to § 62 ZPMS, i.e. a part of the so called international procedural law[48] or **international civil procedure**, regulating the jurisdiction questions still apply to e.g. entirely "Non-EU" cases[49].

As already mentioned, the Czech international procedural law applies in case where a foreign element is present, e.g. one of the parties is a foreign citizen. The Czech law order uses two basic terms which are necessary to understand to decide whether at all and if so which Czech court has jurisdiction to hear the case.

Firstly, the term "pravomoc", best translated as **jurisdiction**, means a set of powers that the law gives to courts. This term gives us the answer to the question whether any Czech court can hear the case or not.

Secondly, the term "příslušnost", best translated as **competence**, answers the question which particular type of court will hear the case, i.e. which type of court and where is competent.

The basic rule of the Czech procedural law is that Czech courts have the authority to hear the case if they have the competence according to Czech law[50] or if it is conferred to them in writing by the parties[51]. This is all we need to know at this time.

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[47] Kruger, Thalia: '*Civil jurisdiction rules of the EU and their impact on third states*', Oxford 2008, p. 215.
[48] The other part deals with recognition and the court proceedings itself.
[49] And of course to some EU cases. See Art 17 of the Rome Convention.
[50] See 37 (1) ZMPS.
[51] See 37 (2) ZMPS.

2.1.2.3. Recognition and Enforcement

This paper's purpose is not to describe the recognition and enforcement of foreign judgments. It only needs to be mentioned that a foreign decision in private matters is recognized by Czech court, after complying with some basic requirements, simply taking it into account during the proceedings.

2.1.3. English law

Private international law is in England often referred to as the "The Conflict of Law", whereby the meaning is the same[52]. Therefore, and as the former term is used and better understood throughout the world, this paper will use the term "Private International Law".

English private international law, as a part of the **common law**, seems indeed very different from the Czech one. But if we look closer, although the solutions to particular problems are very different[53], the result will often be the same. A good example would be the "most significant relationship"[54] test under old traditional English rules and the "reasonable settlement (*rozumné uspořádání*)" test under the ZMPS[55]. Whichever set of rules we use, a sales contract would be usually governed by the law of the seat of the seller, if the goods are being handed over to buyer there.

In England, private international law is traditionally seen as that part of English law which comes into operation whenever a court is faced with a claim that contains a foreign element. It has three main goals[56]. Firstly, to set the conditions under which the court is competent to entertain such a claim. Secondly, to determine the particular system of law by reference to which the rights of the parties must be ascertained. And finally, to specify

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[52] North, Peter; Fawcett J.J.: 'Private International Law', 13th edition, Oxford 1999, p. 17.
[53] E.g. the necessity of serving the defendant in England or Wales, permission to serve out of jurisdiction, comity of nations.
[54] North, Peter; Fawcett J.J.: 'Private International Law', 13th edition, Oxford 1999, p. 609.
[55] Sec 10 (1) ZMPS.
[56] Ibid, p. 3.

the circumstances in which a foreign judgment can be recognised and possibly enforced by action in England.

It is submitted in England[57] that the main reason why not invariably apply the law of the forum, i.e. the reason why to have private international law at all, is the fact that the omission of private international law would lead to gross injustice[58]. This argument has been often hidden under the term ***comity of nations*** used by English courts and scholars. In order not to use too much space to describe this notion, it only needs to be said that comity, when used in this context, means solely that no foreign law is applicable in England except with the permission of the sovereign, i.e. the parliament.

Private international law is not seen as a separate branch of law as e.g. the law of contract or of tort, as it is all pervading[59]. This means that it possesses certain **universality** as it deals with the three issues named above in almost every branch of law. It will now again be dealt with the basic three questions that the private international law is concerned with whereby the order of the three will be changed as the rules on jurisdiction are always put first in England.

2.1.3.1. Jurisdiction

To begin, it has to be said that the same applies as already mentioned in Section 2.1.2.2, i.e. English law has been, in certain cases, superseded by the Brussels I Regulation.

Nevertheless, the basic rule at common law is that the English court has no jurisdiction to entertain and action *in personam* unless the defendant has been personally served with a claim in England or Wales. This applies whether the case has a foreign element or not. North[60] mentions three exceptions from this rule. First, there are certain circumstances in which the court is empowered by statute to assume jurisdiction over absent defendants.

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[57] North, Peter; Fawcett J.J.: 'Private International Law', 13th edition, Oxford 1999, p. 4.
[58] An example may typically be a marriage that took place outside of England and does not satisfy the formal requirements of the English law, whereby a party involved in English litigation needs to prove that he/she is married.
[59] North, Peter; Fawcett J.J.: 'Private International Law', 13th edition, Oxford 1999, p. 7.
[60] Ibid, p. 8.

Secondly, there are certain types of action, such as petition for divorce, where the mere presence of the defendant in the country does not render the court jurisdictionally competent. Thirdly there is a separate regime of jurisdiction rules in the case of a defendant domiciled in a Member State of the European community. Finally, under traditional rules, submission to jurisdiction has long been recognised as a way of conferring jurisdiction on a court. It will be dealt with the ways of submission to jurisdiction and law, i.e. also what concern us most, the choice of law and jurisdiction, later in Section 2.2 of this paper.

2.1.3.2. Choice of Law

As in the case of Czech private international law English law governing the choice of law has been superseded by European law. Nevertheless, as the choice of law rules still apply to certain matters e.g. defamation and in order to understand how the traditional common law procedures differ from the continental ones, a short introduction on choice of law under English law is included.

Once an English court decides that it possesses jurisdiction, it must consider which system of law shall govern the case. In each case private international law directs what legal system shall apply to the case, i.e. what is the **applicable law**. The solution shall then be reached by reference to this applicable law. Of course, as in other legal orders, different aspects of a case may be governed by different laws.

To choose the applicable law, the English court must first undergo to stages of classification, firstly it must classify the cause of action and secondly the rule of law. In order not to go too deep into theory, it will be only said that former classification means the allocation of the question raised by the factual situation before the court to its correct legal category, e.g. law of contract or law of tort. The latter means the determination of the choice of law rule which should be applied.

It needs to be mentioned that in order to choose the applicable law, the English courts have developed the doctrine of the "**proper law of the contract**"[61]. According to this doctrine, the choice of law process is broken into three stages. First, the parties might make an express choice of law. At common law, the court will give effect to an express choice of law, as long as it is bona fide, legal and not contrary to public policy[62]. Secondly, in the absence of express choice the proper law of the contract may be the system of law by reference to which the contract was made, i.e. an implied choice of law is allowed. Thirdly, in the absence of an express or implied choice, a contract should be governed by the "objective" proper law, i.e. the law with which the transaction has its closes and most real connection.

As already previously mentioned the common law **system of precedents** may lead to legal uncertainty. The choice of law rules especially the traditional ones are designed as flexible ones, as e.g. the already discussed most significant relationship test, which allow dealing with a lot of different situations of business and everyday life.

It is submitted that the function of private international law is complete when it has chosen the appropriate system of law. As North[63] nicely states private international law resembles the inquiry office at a railway station where a passenger may learn the platform at which his train starts. The last thing with which the private international law deals is the recognition of foreign judgments.

2.1.3.3. Recognition and Enforcement

As already mentioned, this paper's purpose is not to describe the recognition and enforcement of foreign judgments. Therefore, it can be only said that provided that the foreign court had jurisdiction to adjudicate on the case according to English private

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[61] Clarkson, C M V and Hill, Jonathan: Jaffey on the Conflict of Laws, 2nd edition, 2002, p. 198.
[62] E.g. *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277.
[63] North, Peter; Fawcett J.J.: 'Private International Law', 13th edition, Oxford 1999, p. 8.

international law, the English court will generally recognise the foreign judgement as if one of its own and it can be enforced accordingly[64].

2.1.4. European Law

As in case of national private international laws, European private international law can be defined as a set of rules governing private relations which include a foreign element or a so called cross border cases[65]. European private international law is regulated by three groups of rules of law[66]. Firstly, rules of law regulating jurisdiction and co-operation of courts. Secondly, rules of law regulating the choice of law, i.e. the conflict rules. Thirdly and finally, rules of law regulating recognition and enforcement of foreign judgements and other decisions issued in private matters.

Like Czech law in case of the ZMPS, European law starts to include choice of law rules and jurisdiction rules, i.e. part of international procedural law, in one instrument. A good example could be the so called Rome III Regulation, i.e. the Council Regulation on rules concerning applicable law in matrimonial matters[67]. This shows us that although now largely superseded, the ZMPS was, at the time it was made, and still is a good law and may even be inspiration for a European wide regulation of private international law[68].

2.1.4.1. Jurisdiction

In case of jurisdiction rules, the most important European instruments are the, already mentioned, Brussels I Regulation and the Brussels IIa Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters[69]. We will be indeed interested only in the so called Brussels regime which, as defined in Art 1 of the

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[64] Ibid, p 480 et seq.
[65] Regulation (EC) No. 861/2007 Establishing a European Small Claims Procedure.
[66] Pauknerová, Monika: '*Evropské mezinárodní právo soukromé*', Praha, C.H. Beck 2008, p. 10.
[67] EC Regulation proposal for the change of Regulation (EC) No. 2201/2003.
[68] As will be shown later as well in case of the new Rome I Regulation.
[69] Regulation (EC) No. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters.

Brussels I Regulation, extends to civil and commercial matters[70]. Although various matters are excluded from the Brussels regime, it seems to be clear that it covers the scope of this paper, i.e. matters in international commerce.

There are three groups of **bases of jurisdiction** under the Brussels regime[71]. Firstly, general bases of jurisdiction which do not depend on the defendant being domiciled in a Member state, i.e. exclusive jurisdiction under Art 22 of the Brussels I Regulation and prorogation of jurisdiction under Art 22 of the Brussels I Regulation. Secondly, general bases of jurisdiction with regard to the defendant being domiciled in a Member state, i.e. submission to jurisdiction under Art 24 of the Brussels I Regulation, the basic rule under Art 2 and special jurisdiction which are alternative to the domicile rule under Arts 5 to 7. Thirdly, the Brussels regime includes jurisdiction rules in matters relating to insurance, consumer contracts and employment contracts[72].

Generally, regarding the **allocation of jurisdiction** under the Brussels regime, the defendant's domicile is the point on which the jurisdiction rules hinge[73]. A defendant who is domiciled in a Member State may normally be sued in the courts of that state. This means that the Brussels regime does not apply if the defendant is not domiciled in a Member State. In such cases the court may apply its traditional rules on jurisdiction. As already mentioned, circumstances in which a person domiciled in one Member State may be sued in other Member States are specified as well[74]. This is also the case with valid agreements on choice of jurisdiction.

If the Brussels I Regulation does not confer jurisdiction on a Member State court, the court must decline jurisdiction of its own motion[75]. This rule is one of the provisions that are designed to reduce the incidence of conflicting judgments by preventing situations where

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[70] Clarkson, C M V and Hill, Jonathan: Jaffey on the Conflict of Laws, 2nd edition, 2002, p. 65.
[71] Ibid, p. 72.
[72] Art 8 to 21 of the Brussels I Regulation.
[73] Ibid, p. 66.
[74] E.g. Art 22(1) of the Brussels I Regulation.
[75] Art 26(1) of the Brussels I Regulation.

the courts of two or more Member States may exercise jurisdiction in relation to the same or related issues. According to these rules, where parallel proceedings involving the same parties and the same cause of action are brought in more than on Member State (a so called *lis pendens*) any court than the court first seised must stay the proceedings or decline jurisdiction[76]. Where related proceedings are brought in different Member States, a court other than the first seised may, in the exercise of its discretion, stay the proceedings or, if certain conditions are fulfilled, decline jurisdiction[77].

Of the highest importance for this paper, is Article 23 of the Brussels I Regulation on prorogation of jurisdiction. It allows parties, one or more of who is domiciled in a Member State, to confer jurisdiction to settle any disputes between them on a court or courts of a Member State.

2.1.4.2. Choice of Law

In case of choice of law rules, the most important European instruments regulating the matter are the still valid Rome Convention, the new Rome I Regulation[78] adopted on 6th June 2008, which will enter into force on 17 December 2009, the Rome II Regulation on the law applicable to non-contractual obligations[79] and the Rome III Regulation, i.e. a proposal for a regulation on rules concerning applicable law in matrimonial matters. The Rome II Regulation and the Rome III Regulation do not fall under the scope of this paper.

Although it will be in force only for a limited period of time, this paper will discuss the Rome Convention regime and its case law, whereby the main differences which will be brought by the Rome I Regulation will be highlighted. The conclusion of the Rome Convention was motivated by recognition of the fact that the harmonisation achieved by the Brussels regime in relation to jurisdiction and judgments was not sufficient to achieve

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[76] Art 27 of the Brussels I Regulation.
[77] Art 28 of the Brussels I Regulation.
[78] Regulation (EC) No. 593/2008 on the Law Applicable to Contractual Obligations.
[79] Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations.

uniformity in the commercial sphere[80]. The purpose of the Rome Convention was, since the law will be the same wherever trial takes place in the European Community, the inhibition of forum shopping and the increasing of legal certainty and also easier anticipation of the law to be applied[81].

According to its Art 1(1), the Rome Convention applies, subject to exceptions, to contractual obligations in any situation involving a **choice between laws** of different countries. Contractual obligations are not defined by the Rome Convention and as one Member State[82] may consider an obligation as being contractual in circumstances where another Member State would classify it as being tortuous it is submitted that a broader European approach of the term be adopted[83]. Therefore it is not possible to interpret the term "contractual obligations" according to national laws. Furthermore, certain matters listed in Art 1(2), including contractual obligations, are excluded from the Rome Convention's scope[84].

Although the definition of contractual obligations still causes interpretational problems, for the purpose of this paper, it will be assumed that any relations falling under the term international commerce will automatically fall under the scope of the Rome Convention.

The most important thing about the Rome Convention is its **universal application,** i.e. it applies regardless of whether the contract has any connection with a Contracting State[85]. In particular, there is no need for either party to the contract to be domiciled or resident in a Contracting State. The only thing that matters is that the dispute is tried in a Contracting State to the Rome Convention. This universality is a big difference from the Brussels regime which contributes to a rather simple use of the Rome Convention and avoids the need to distinguish for choice of law purposes between Contracting and non-Contracting

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[80] Clarkson, C M V and Hill, Jonathan: Jaffey on the Conflict of Laws, 2nd edition, 2002, p. 199.
[81] North, Peter; Fawcett J.J.: 'Private International Law', 13th edition, Oxford 1999, p. 536.
[82] Meaning a contracting state to the Rome Convention.
[83] As also mentioned in Art 18 of the Rome Convention itself.
[84] For details see e.g. Clarkson, C M V and Hill, Jonathan: Jaffey on the Conflict of Laws, 2nd edition, 2002, p. 201.
[85] North, Peter; Fawcett J.J.: 'Private International Law', 13th edition, Oxford 1999, p. 551.

States. The consequence of the above mentioned universality is the state, where all choice of law rules of all Contracting States have been superseded by the Rome Convention.

When determining the applicable law, the Rome Convention gives priority to the choice of law made by the parties. The **freedom of choice** is regulated in Art 3 of the Rome Convention. If the parties fail to make a valid and effective choice of law, the applicable law shall be determined according to Art 4 to 13 of the Rome Convention. Article 4 consists of three main parts. First, there is a basic rule that the contract shall be governed by the law of the country with which it is most closely connected[86]. Second, there is a general presumption, based on the concept of characteristic performance, designed to identify the country with which the contract is most closely connected, together with special presumptions for two particular types of contract[87]. Third, there is a provision which states that the presumptions shall be disregarded if it appears that the contract is most closely connected with another country[88].

Again, Art 3 of the Rome Convention, eventually the Rome I Regulation, is of the importance for this paper and it will be dealt with later in Chapter 4 of this paper.

2.1.4.3. Recognition and Enforcement

Recognition and Enforcement of judgments is *inter alia* governed by Brussels I Regulation. Recognition and Enforcement of judgments given by a court of a Member State that fall within the material scope of the Brussels regime and under Art 32 of the Brussels I Regulation, is dealt with by its Arts 32 to 52.

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[86] Art 4(1) of the Rome Convention.
[87] Arts 4(2), (3) and (4) of the Rome Convention.
[88] Art 4(5) of the Rome Convention.

2.2. WAYS OF SUBMISSION TO JURISDICTION AND CHOICE OF LAW

As already mentioned before, it is of great interest for this paper to properly narrow its subject matter, so that specific problems of choice of law and jurisdiction in international commerce can be highlighted. Therefore, agreements, as bi- or multilateral acts which are typical in international commerce, must be distinguished from unilateral submissions, i.e. unilateral acts. Submissions to jurisdiction[89] which are also deemed to be a way of choice of law and jurisdiction but do not play such a major role, as in most of the cases the dispute is whether a valid agreement on choice of law or jurisdiction has been made or not.

2.2.1. Distinguishing Agreements from Unilateral Submissions

Generally, there are two basic ways of submission to jurisdiction. Firstly, a **unilateral submission** is a unilateral act of the defendant by which he, by not challenging the jurisdiction and agreeing with the already started proceedings, consents to an already established jurisdiction, whereby this consent does not effect the decision of the courts regarding the jurisdiction[90]. Unilateral submission is represented by e.g. Art 24 of the Brussels I Regulation.

Secondly, the **contractual submission** is a bi- or multilateral act by which two or more parties agree to choice of jurisdiction regarding future possible disputes among them. This paper deals only with the later example of submission to jurisdiction[91]. Contractual-submission is represented by e.g. Art 23 of the Brussels I Regulation or Sec 37(3) of the Czech ZMPS.

The following difference in understanding of the function of choice of jurisdiction under common law systems and civil systems is worth mentioning. On the one hand, under Czech law and European law, an agreement choice of jurisdiction simply works as an

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[89] It is very hard, or rather impossible, to find a case of submission to a certain law. This may be best done by simply not contesting the courts decision done in accordance with the chosen law.
[90] Tan Yock Lin: '*Choice of Court Agreement: From a Viewpoint of Anglo-Commonwealth Law*', p 45.
[91] Also excluding agreements on jurisdiction made after the dispute has arisen.

instrument directly establishing a courts jurisdiction. On the other hand, under English law, jurisdiction of an English court does not depend on the parties having agreed to it in advance or on whether such an agreement was for an exclusive or non-exclusive jurisdiction[92]. An English court establishes its jurisdiction according to the common law rules and jurisdiction agreements only matter in cases where the English court is asked to exercise a jurisdictional discretion or as defence where it is asked to stay proceedings.

2.2.2. Promissory Agreements and Agreements by Conduct

When referring to jurisdiction agreements, some English scholars distinguish between so called promissory agreements, i.e. **contractual submissions to jurisdiction**, and **agreements by conduct**, i.e. when the defendant appears before the court[93]. This distinction appears to be rather the same as the one already mentioned. Therefore, it will only be dealt with the former.

Having said that, it is clear that the jurisdiction agreements concerned will take the form of a contractual promise, whereby its nature and scope will be determined by the so called 'proper law of the contract'[94] or 'applicable law'[95], i.e. the law which governs the contractual promise. This will be dealt with later in Section 3.8.1 of this paper.

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[92] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 107.
[93] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 108.
[94] In common law terminology.
[95] In the terminology of the Rome Convention on the Law Applicable to Contractual Obligations.

2.3. SPECIFIC ISSUES REGARDING JURISDICTION AND CHOICE OF LAW AGREEMENTS

Before going into any details on jurisdiction and choice of law agreements, it is necessary to discuss some general points which are common for jurisdiction as well as choice of law agreements.

2.3.1. Severability

The question of severability, i.e. whether an agreement on jurisdiction or choice of law is a separate agreement or a part of an agreement in which it is contained, is fundamental in cases where the existence of such a clause or agreement is challenged on the contention that the whole agreement, which contains such agreement, never came into legal existence or has been terminated, rescinded etc.[96]

Therefore, severability is an instrument which protects jurisdiction and choice of law agreements from attacks upon the validity of the whole agreement which contains such clauses. As the applicability and results of the principle of severability varies under different law instruments and also for jurisdiction and choice of law agreements, a more detail analysis is contained in later chapters on each of the agreements.

2.3.2. Contractual Autonomy

It is submitted that contractual autonomy is one of the basic characteristics of a mature legal system[97]. Persons who have legal capacity should be able to make such agreements as they consider to serve their interest, whereby the courts, or e.g. arbitration tribunals, should be prepared to enforce them according to their terms. The law should intrude or override these private agreements only to secure and serve a broader public interest.

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[96] Briggs, Adrian: *'Agreements on Jurisdiction and Choice of Law'*, Oxford 2008, p 11.
[97] Ibid, p 12.

This is the case of jurisdiction and choice of law agreements. On the one hand, business men and huge international corporations experienced in international commerce shall be able to choose jurisdiction and law without almost any limitation. On the other hand, contracting parties which are more economically vulnerable, such as employees and consumers, should be protected. As mentioned by Briggs[98], this may involve reducing or removing the power to make, or to hold the weaker party to, a choice of jurisdiction or law.

Having said that, it might seem that parties may choose any law to govern, or any court to decide, their dispute. But this is not the case. The conflict of laws, or the private international law, is now governed by statutes or international legislation, i.e. a higher authority than the agreement of parties. Therefore, it cannot be said that the principle *pacta sunt servanda* may be applied on its own. On the contrary, contractual autonomy always has to coexist with private international law rules as rules of a public law character.

2.3.3. Consent and Agreement in Private International Law

Consent and agreement play a central and fundamental role in private international law. Whether by consent or by agreement, the party to an international dispute has to somehow express its understanding with the choice of law or jurisdiction. Although, generally it has to be distinguished between consent and agreement, whereby it is submitted that consent is a broader category than an agreement, it is not of importance for this paper as it has already been mentioned that it will only be dealt with agreements.

What is necessary to remember though, it that if the rules which regulate the conflict of jurisdiction and conflict of laws allow the parties to exercise autonomy, there will be two areas in which autonomy provides no answer. Firstly, no agreement or manifestation of

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[98] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 11.

consent may be present. Secondly, the agreement or manifestation of consent may be overridden by certain legal rules such as mandatory rules.[99]

Hence, it is clear that we have to distinguish between matters that fall within the contractual autonomy of parties and those which do not. The choice of law is a good example as two fundamentally different choices of law exist. One is done by the parties and the other by the relevant court. It is clear that the parties may not always choose the law which will govern their dispute; an example being the law that shall govern a marriage[100]. This paper will, of course, deal with this former in more detail.

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[99] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 27.
[100] Although the Rome III envisages such right, subject to limitations.

3. JURISDICTION AGREEMENTS

Questions concerning the scope, validity and enforceability of jurisdiction agreements usually arise early in case of English law or as first in case of European and Czech law as a court in these systems of law must establish its jurisdiction before actually hearing the case, in the litigation[101]. Three situations, related to jurisdiction agreements, may then arise.

Firstly, the parties to the litigation may admit that they are bound by a jurisdiction agreement, but dispute the legal consequences which follow from the fact. In this case, the problem is one more about applying the applicable law than a problem of jurisdiction agreement.

Secondly, the parties may accept that they are contractually bound but dispute whether the contract contained an agreement on jurisdiction. Hence, it is more complex to make a good analysis of the case.

Finally, when one party to the litigation denies being party to a contract at all, the court must resist being drawn into a trial of merits, i.e. a court should not try the question whether there is a contract containing a jurisdiction agreement by which the parties are bound in order to decide whether to exercise jurisdiction[102].

By saying this, it has been shown how complex and difficult situations may arise and need to be solved by the courts. It is clear that jurisdiction agreements may themselves be complex organisms. The principle question is whether they are successful in **prorogation**[103] or **derogation**[104] of jurisdiction. In order to be able to deal with these problems, the following topics need to be introduced.

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[101] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 8.
[102] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 9.
[103] I.e. conferring jurisdiction on a court; usually not the one that would usually hear the case.
[104] I.e. depriving a court that was supposed to hear the case of its jurisdiction.

Fist of all the definition of jurisdiction agreements will be given and questions about the jurisdiction agreements concerned will be answered. The biggest concern will be given on jurisdiction agreements under Art 23 of the Brussels I Regulation. Therefore the test of application of the Brussels I Regulation to choice of jurisdiction clauses will be introduced. Thereafter the ambit of the jurisdiction agreements and requirements for their validity will be examined. Furthermore, the Czech ZMPS and the new Hague Convention will be shortly introduced and the possible over lap between The Hague Convention and the Brussels I Regulation will be highlighted. Finally, the importance of good drafting will be highlighted and the influence of choice of law agreements on jurisdiction agreement will be mentioned.

3.1. WHAT ARE JURISDICTION AGREEMENTS

Before we actually start to deal with jurisdiction agreements under different law systems, it is necessary to try to find a general definition of a jurisdiction agreement and determine the range of jurisdiction agreements that will be dealt with.

The purpose of this paper is not to define what the scope of the jurisdiction agreements is or what the rights and duties of the parties to such agreements are but rather to compare solutions which different law orders have found to solve certain issues regarding jurisdiction agreements. Problems with drafting of these agreements will also be shown and some guidance to drafters will be given as well. This latter goal may be best achieved by analyzing some examples of a jurisdiction clause, which will be done in Section 3.7 of this paper.

But before being able to examine and analyse a particular agreement it is nevertheless necessary to mention some **general principles** relating to the scope of and rights and duties arising out of jurisdiction agreements and their validity by introducing the European regulation and highlighting certain differences from English or, in less cases as the not enough case law is at hand, Czech law. These general principles will be later applied on the given examples.

3.1.1. Definition

Although it is hard to find a single definition of a jurisdiction agreement in international commerce due to its variety, the definition may be e.g. as follows. Parties agree that a certain court will hear a dispute or disputes between them and in this way grant jurisdiction to the court and thereby also deprive other courts than the chosen one of their jurisdiction[105]. As we will see later, this definition is not accurate as there are jurisdiction

[105] Kruger, Thalia: '*Civil jurisdiction rules of the EU and their impact on third states*', Oxford 2008, p. 214.

agreements that e.g. only cause prorogation of jurisdiction but no derogation, such as non-exclusive jurisdiction agreements.

A jurisdiction agreement may be one provision of an agreement or can comprise a contract in its own right. On the one hand, a provision of a contract might simply refer all disputes arising out of it to a certain court for decision. On the other hand, the forum clause, probably together with a choice of law clause, may form a whole dispute resolution agreement.

The given definition is of course a very simple one and is not capable of answering the questions raised at the beginning of this chapter. A more detail look into the problem will, therefore, be part of the next chapters.

3.1.2. Scope of Jurisdiction Agreements

It is submitted that under the common law the scope of a jurisdiction agreement is a **matter of construction** and shall be determined in accordance with the applicable, or in the common law terminology proper, law of that agreement[106]. The jurisdiction agreement will only come to effect if the dispute falls within its scope. Therefore, the scope of the jurisdiction agreement is very important in cases such as when a possible plaintiff tries to escape his obligations under a jurisdiction agreement by suing e.g. in tort or bailment and arguing that such action is outside the scope of the jurisdiction agreement[107].

The main problems with the scope of jurisdiction agreements are caused by the fact that the relationship between the parties is sometimes not limited to a contractual relationship only. Therefore, there may be a **claim in tort** e.g. due to some pre-contractual fault closely linked with the contract that embodies the jurisdiction agreement. The question now is whether the jurisdiction agreement covers this pre-contractual fault as well. When

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[106] See e.g. *The Sindh* [1975] 1 Lloyd's Rep 372.
[107] Tan Yock Lin: '*Choice of Court Agreement: From a Viewpoint of Anglo-Commonwealth Law*', p 54.

addressing this issue, first of all, it has to be examined whether the *lex contractus* allows a jurisdiction agreement to operate in relation to such claims[108]. Secondly, it has to be examined whether the jurisdiction covers the particular claim.

These questions are hard to answer without any specific examples as they will be again dealt with according to the applicable law of the jurisdiction agreement. A rather liberal approach to interpretation of the scope of jurisdiction agreements has been adopted by English courts recently, meaning that the parties to a commercial contract will be presumed to want **coherent, comprehensive and conclusive adjudication**[109]. In words of Allsop J in *Comandate Marine Corp v Pan Australian Shipping Pty Ltd* 'This liberal approach is underpinned by the sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes arising from their transaction being heard in two different places'[110]. On the other hand it is definitely not the function of the judge to improve on the bad drafting of the parties involved. To conclude, it can be said that the court should not limit the scope of the jurisdiction agreement unless it is clear that the intention of the parties was to limit it.

3.1.3. Rights and Duties Arising out of Jurisdiction Agreements

It is of high importance for the parties involved to make their intentions clear about the scope of the agreement. This may be best shown by giving the example of distinction between conferring of exclusive or non-exclusive jurisdiction. A clear provision conferring exclusive jurisdiction on a specified court will give rise to rights and obligations that can be predicted by the parties. Regrettably, the opposite situation seems often to be the case. Therefore, as it will be mentioned below in Section 3.2.1 regarding exclusive and non-exclusive jurisdiction agreements, the question to be asked is rather '**what did the**

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[108] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 127.
[109] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 129.
[110] [2006] 157 FCR 45. p 165. Although this judgment relates to arbitration agreements it is submitted that it can be used in respect to jurisdiction agreements as well.

parties intend?' rather than 'what do the words used mean?'[111] Briggs[112] names four 'canons of construction'[113] from which the meaning of the words will be derived. Among these, beside the question mentioned in the previous sentence, is a presumption in favour of the respective clause being for exclusive jurisdiction[114] and further e.g. that a court is intended to have exclusive jurisdiction where the parties submit 'all disputes' to its jurisdiction[115].

Having said that it is clear that the rights and obligations of the parties will depend on the **interpretation by the relevant court** of the words used by the parties. Hence, if the court e.g. decides that the parties agreed that a court shall have exclusive jurisdiction over a dispute it is a breach of contract if any of the parties starts proceedings in a different court. On the other hand, if the court decides that the parties agreed to a non-exclusive jurisdiction it is submitted that the starting of proceedings in another court than the named one generally does not constitute a breach of the contract[116], although, again, this will depend on the precise construction of the agreement. This may be best shown by giving an example, which may be found e.g. in the case of *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan*[117]. It was held that the Pakistani government was in breach of the contract as it sought an anti-suit injunction preventing the shipyard to make use of a non-exclusive jurisdiction clause in favour of English courts.

As the exact meaning of the words used by the parties in the jurisdiction agreement will be decided upon by the relevant court and is a matter for the law that governs the contract in which it is contained[118], it is more useful to concentrate on the **intention of the parties** than to try to label possible categories of jurisdiction agreements and define rights and obligations arising out of them. Therefore and as already mentioned in the beginning of

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[111] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 112.
[112] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 113.
[113] See e.g. *ET Plus SA v Welter* [2005] EWHC 2155 (Comm).
[114] *Sea Trade Maritime Corp v Hellenic Mutual War Risks Association Ltd* [2006] 1 Lloyd's Rep 280, p 98.
[115] See e.g. *British Aerospace plc v Dee Howard Corp* [1993] 1 Lloyd's Rep 368.
[116] See e.g. *Catlin Syndicate Ltd v Adams Land & Cattle Co* [2006] 2 CLC 425.
[117] *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2003] 2 Lloyd's Report 571.
[118] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 121.

this section, this paper will rather discuss possible words and expressions that can be used while drafting jurisdiction agreement and analyze their influence on the possible outcome in court proceedings.

3.2. JURISDICTION AGREEMENTS CONCERNED

As already mentioned, it is possible to find neither one general unified definition of a jurisdiction agreement nor one general type of it. Different types of jurisdiction agreements exist whereby some of them will be shortly introduced to show the possible variety of ways to confer jurisdiction in international commerce.

3.2.1. Exclusive and Non-exclusive Jurisdiction Agreements

As to exclusivity, there seem to be three kinds of jurisdiction agreements[119]. The first one is an explicitly exclusive one, i.e. bounds both parties. The second one is an explicitly non-exclusive (or optional one), i.e. it only widens the list of possible forums. The last one is a combined version of the previous ones whereby, in a two party situation, it is exclusive for one of the parties and non-exclusive for the other. This paper will deal with the first two types also at a theoretical level, whereby the combined type will be addressed in Section 3.7.3 of this paper as part of an example.

As it will be seen later, there are certain problems with interpretation of jurisdiction agreements in particular in distinguishing between the two basic types of them, i.e. exclusive and non-exclusive. It is submitted that the fact that a particular jurisdiction agreement is one for exclusive or non-exclusive jurisdiction is, in common law, **a matter of construction**[120] and later interpretation[121] of the promise the parties have made and does not just depend on the words used[122]. As both types are commonly used by businessmen, or rather draftsmen often forget to specifically mention whether the jurisdiction shall be an exclusive or non-exclusive one and therefore disputes about rights and obligations under these clauses arise, this paper will deal with both types of jurisdiction agreements and will

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[119] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 163.
[120] See *Insured Financial Structures Ltd v Elektrocieplownia Tychy SA* [2003] QB 1260.
[121] In accordance with the law governing the contract. See *Provimi Ltd v Roche Products Ltd* [2003] 2 All ER (Comm) 683.
[122] Dicey Morris & Collins: '*The Conflict of Laws*', 14th edition, 2006, para 12-092.

try to show how crucial precise drafting is for prevention of future disputes about the nature of the jurisdiction agreements.

As to European and international regulation of this matter, Art 23(1) of the Brussels I Regulation states that 'Such jurisdiction **shall be exclusive unless the parties have agreed otherwise**'. That means that the Regulation covers both types of jurisdiction agreements. This is one of the main differences to the Hague Convention, which covers mainly exclusive choice of court agreements. The fact that both types of agreements are covered, inevitably cause problems with their interpretation if the particular jurisdiction clause has not been drafted well enough to make clear whether it is one for exclusive or non-exclusive jurisdiction.

The reason why the Brussels I Regulation deals with non-exclusive jurisdiction agreement and the Hague Convention not is worth mentioning. It is the difficulty of *lis pendens*, for which the Brussels I Regulation contains a precise rule in its Arts 27 to 30[123]. It is not the purpose of this paper to deal with the ***lis pendens*** problem and therefore only the difficulties with distinction between exclusive and non-exclusive jurisdiction agreements will be covered.

3.2.2. Variations of Jurisdiction Agreements in Common Law

In England under the common law, a jurisdiction agreement may take many forms e.g. the form of a **service of suit clause**[124]. This particular clause changes the classical meaning of the jurisdiction agreements by allowing one party to select the court to sue in rather than specifying such court in advance. This paper will only deal with the 'classical' jurisdiction clauses, i.e. clauses that chose court in advance, as they are the most common forms. The problem of possible variations of jurisdiction agreements under the Brussels I Regulation

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[123] Kruger, Thalia: '*Civil jurisdiction rules of the EU and their impact on third states*', Oxford 2008, page 227.
[124] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 134.

needs to be also dealt with later in Section 3.2.3 whereby Section 3.7.3 of this paper will deal with problems related to drafting of various jurisdiction agreements.

3.2.3. Variations under the Brussels I Regulation

One may indeed think about many possible variations of the jurisdictional scheme of the Brussels I Regulation. The boundaries for the freedom of the parties to vary that scheme have not been clearly set by the ECJ. Therefore, the **result of the possible litigation about these variations is highly unpredictable**. This paper will show two examples of variations that seem to be used by businessmen in Europe more often then the others and will consider their chances of 'surviving' the ECJ's interpretation of Arts 23 and 27 of the Brussels I Regulation together with the broad scheme of its Chapter III which is rather strict.

3.2.3.1. Two Courts at the Same Time

Briggs gives the example of a lender bringing proceedings against a defaulting borrower in two courts at the same time which in his words 'makes economic sense where the borrower may have assets in several places and the lender considers that to secure repayment it may need to bring proceedings in several courts'[125]. This example, although the **economic sense is a powerful reason** for this clause to be respected, is not the luckiest one as it clearly contradicts Art 27 of the Brussels I Regulation and the result will probably be the same as in *Erich Gasser GmbH v Misat srl*[126], i.e. the court second seized will most probably stay proceedings until the jurisdiction of the court first seized is established[127]. The fact advocated by Briggs that the problem of irreconcilable judgments is now addressed by Article 34(4) of the Brussels I Regulation and the argument that the privilege given by Art 27 is one which may be deliberately waived by prior writing agreement are more than arguable. To conclude, a clause in the jurisdiction agreement allowing suing in

[125] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 154.
[126] *Erich Gasser GmbH v Misat srl* C-116/02, [2003] ECR I-14293.
[127] Art 27 of the Brussels I Regulation.

two different courts at the same time has some chances to be respected by the courts and the ECJ but for the sake of certainty its use cannot be recommended.

3.2.3.2. 'Contractual Penalty'

The other example of possible variations of the Brussels I Regulation scheme is one that attracts considerably fewer objections that the previous one. The reason for that being the fact that a contractual promise to pay money in respect of the loss suffered if proceedings are brought in breach of a jurisdiction agreement does not seem to contravene any provision of the Brussels I Regulation. Therefore, from a general point of view, if this promise is not in breach of other laws, such as law on penalties under the Common law, it has a fairly **high chance of being effective** and is therefore recommendable.

3.3. APPLICATION OF THE BRUSSELS SCHEME

It is first necessary to repeat that Art 23 of the Brussels I Regulation applies when one of the parties to the jurisdiction agreement is domiciled in a Member state and the courts of a Member State are appointed[128]. If this is not the case, other instruments shall be applied.

Whether a jurisdiction agreement falls within the scope of the Brussels I Regulation is the subject of a specific rule and is not determined by the general rules in Article 2 and 4[129] whereby Art 4 applies if the defendant is domiciled in a Non-member State. But jurisdiction agreements are excluded from this rule and therefore it is enough, as mentioned above, when one of the parties is domiciled in a Member State and the courts of a Member State are appointed.

The **domicile** of the parties is crucial for the determination whether the Brussels I Regulation applies to a particular jurisdiction agreement. However, parties to the dispute may move after the time of contracting and thereby their domicile differs at the time of the litigation. There are four possible solutions to this problem. Firstly, the domicile might be determined at the time the action is brought. Secondly, the domicile could be determined at the time the jurisdiction agreement was concluded. Thirdly, the two previous solutions may be cumulated to the effect that only if both were met the Brussels would apply. Finally, the first two solutions may be applied alternatively.

The first solution might cause legal uncertainty as none of the parties involved can possibly know where the other party will be domiciled at the time of the dispute. In contrast, the second solution, supported by the wording of Art 23 of the Brussels I Regulation, ensures legal certainty and predictability. But the downside of this solution is that a Member State court may decide a case where none of the parties have any links to the EU any more[130]. It is obvious that the third solution limits the Brussels I Regulation the most, whereby the

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[128] Kruger, Thalia; *'Civil jurisdiction rules of the EU and their impact on third states'*, Oxford 2008, p. 215.
[129] Ibid.
[130] Which can be seen as contrary to Art 4 of the Brussels I Regulation.

fourth broadens its scope as far as possible. A clear solution to this problem has not been found yet but it may be said that the second solution is in accordance with the wording of Art 23 of the Brussels I Regulation and therefore the most probable solution.

It is of high importance to know exactly whether the Brussels I Regulation or the national laws apply, in particular because the conditions for validity might differ[131]. There are more situations which may arise in this context.

3.3.1. Member State Court Chosen, Both Parties Domiciled in that State

The Brussels I Regulation only deals with international relations. Therefore, it does not apply to internal attribution of jurisdiction. It is submitted that the fact that the defendant is a national of a third State does not change the situation[132].

3.3.2. One or Both Parties Domiciled in a Member State or Various Member States, Member State Court Chosen

This is the easiest possible situation. As already mentioned, Art 23 of the Brussels I Regulation states that a Member State court appointed by contracting parties, one of whom is domiciled in a Member State, has exclusive jurisdiction, unless the parties did not wish that jurisdiction to be exclusive.

The difference to the general rule in Art 2 is that one of the parties, not necessary the defendant, must be domiciled in a Member State. This makes much sense as at the time of the conclusion of the jurisdiction agreement, it is not known who will be the plaintiff and who the defendant. Hence, a defendant from a Non-member State may be subject to the application of the Brussels I Regulation. This means that the scope of the Brussels I

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[131] See Section 3.4.2 below.
[132] Cour d'appel of Paris, judgement of 27 March 2987 and in Kruger, Thalia: '*Civil jurisdiction rules of the EU and their impact on third states*', Oxford 2008, p. 217.

Regulation is in fact substantially broaden and raises questions about impact of the Brussels I Regulation on parties from third States. Why was it done so?

The Brussels I could have limited the number of jurisdiction agreements to fall under the Regulation by providing that both parties have to be domiciled in Member States. It is submitted that this would exclude a large number of cases closely linked with Member States from the EU Regulation, which is not desirable[133]. On the other hand, stating that the Brussels I Regulation would apply even if two parties from third states appoint a Member State court would have enlarged the scope to include cases to which the link with the European internal market is too tenuous[134]. It is necessary to mention that the latter solution has been opted for by the Hague Convention. This is due to the fact that The Hague Convention's aim is to become a world wide convention and to aid international trade by encouraging the recognition and enforcement of as many judgements as possible.

3.3.3. No party domiciled in a Member State, Member State Court Chosen

This situation is not directly regulated by the Brussels I Regulation. The only link is given by Art 23(3) which states that "where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their dispute unless the court or courts chosen have declined jurisdiction". This means that the court chosen may take jurisdiction, i.e. the jurisdiction of the chosen court is not mandatory[135].

As already mentioned, the Hague Convention has included such situations under its scope. Therefore, as soon as the EU becomes a party to the Hague Convention, these situations will fall under its scope and not under national laws as now.

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[133] The Brussels I Regulation main purpose is to advance the European internal market and judicial area, and to establish jurisdiction rules that would lead to easy recognition and enforcement of judgements. This cannot be done without covering most of the disputes closely linked with any of the Member States.
[134] Kruger, Thalia: '*Civil jurisdiction rules of the EU and their impact on third states*', Oxford 2008, p. 217.
[135] Hartley, TC: '*Civil Jurisdiction and Judgements*, SWEET & MAXWELL, London 1984, p. 73.

3.3.4. Non-member State Court Chosen

It is submitted that the Brussels I Regulation does not apply to this situation[136]. For example in *Aectra Refining and Marketing Inc v Exmar NV*[137] the Court of Appeal stated obiter that where a forum clause existed in favour of a non-EU State, the English court had discretion 'under its inherent jurisdiction'.

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[136] See the discussion in North, Peter; Fawcett J.J.: 'Private International Law', 13th edition, Oxford 1999, starting at p. 236.
[137] *Aectra Refining and Manufacturing Inc v Exmar NV*, [1994] 1 WLR 1634.

3.4. JURISDICTION AGREEMENTS UNDER THE BRUSSELS SCHEME

3.4.1. Exclusive or Non-Exclusive

According to the wording of Art 23 of the Brussels I Regulation the first step in determining the type of a particular agreement must be to take a closer look at the **intentions of the parties**. If it is not clear what the parties agreed to, jurisdiction shall be exclusive. Although this rule seems to be quite straightforward and clear, an interesting problem arose in the case of *Bouygues Offshore SA v Caspian Shipping Co*[138]. The problem is one of impact of the Brussels I Regulation (or the Brussels Convention at that time) on third states and if 'exclusivity' covers only the EU Member States. In this case, there was an exclusive jurisdiction clause in favour of a London court but the plaintiff sued in South Africa. By not granting the anti-suit injunction the Court of Appeal silently confirmed the limits of the Brussels I Regulation, i.e. that it does not apply to courts of Non-Member States.

As it was already mentioned, whether the jurisdiction agreement is one for an exclusive or non-exclusive jurisdiction depends, in accordance with the ECJ case law, on **construction of the agreement**[139] and the law governing it[140]. Later in Section 3.7.1 of this paper, the impact of choice of specific words in the jurisdiction agreements on the fact if an agreement is one for exclusive or non-exclusive jurisdiction will be assessed.

3.4.2. Formal Validity

Although no formal requirements exist under the common law[141], i.e. an oral jurisdiction agreement will do as good as a written one, Art 23 of the Brussels I Regulation, which prescribes certain formalities for jurisdiction agreements, now regulates all such

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[138] *Bouygues Offshore SA v Caspian Shipping Co* [1998] 2 Lloyd's Rep 461.
[139] See *Insured Financial Structures Ltd v Elektrocieplownia Tychy* SA [2003] QB 1260.
[140] See *Provimi Ltd v Roche Products Ltd* [2003] 2 All ER (Comm) 683.
[141] Tan Yock Lin: '*Choice of Court Agreement: From a Viewpoint of Anglo-Commonwealth Law*', p 46.

agreements to which at least one person which is domiciled in the EU is a party and based on which the courts of a EU Member States have been chosen. Still, it is submitted that the Brussels I Regulation, is far more liberal than e.g. the ZMPS[142]. Similar formalities are required by the Hague Convention which, although not in effect yet, will in future regulate a large number of these agreements as it will take precedents over the Brussels I Regulation and operate in case of agreements which confer jurisdiction on one or more contracting states' courts[143].

When dealing with formalities of jurisdiction agreements, it is necessary to mention the problem of incorporation which arises especially in cases of incorporation by general words from one contract to another. This particular issue will be dealt with in Sections 3.4.3 and 3.7.2 of this paper.

Art 23 of the Brussels I Regulation states that:

„*Such agreement conferring jurisdiction shall be either*

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned."

It is clear from this provision, that jurisdiction agreements in international commerce will, not only be in writing, but will also often take forms listed under (b) and (c). Therefore, all these requirements of form need to be addressed.

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[142] Pauknerová, Monika: '*Evropské mezinárodní právo soukromé*', Praha, C.H. Beck 2008, p. 154.
[143] Article 3 (a) of the Hague Convention.

3.4.2.1. In Writing

When dealing with this requirement, the question is one about the conclusiveness of writing. The possibility that the written agreement was produced by a trick, duress or by pressure will be left aside.

It is submitted that the purpose of writing is to prove the existence of consensus between the parties[144], whereby 'in writing' also includes electronic means which provide a durable record[145] e.g. email. Therefore an **oral agreement confirmed in writing** and not contested by the parties shall be as good as a written agreement. On the other hand a forum clause contained in the general conditions on the back of a contract shall be only valid if an explicit reference to it is included in the main contract, preferably the front page[146].

When it comes to the question what needs to be in writing Art 23 requires that the **agreement to the jurisdiction not the jurisdiction agreement itself be in writing**. This means that the assent to it of the parties needs to be in writing not the wording of the clause[147]. Therefore a clause printed on the seller's invoice will not bound the buyer without a clear assent to it of the buyer. On the other hand any document signed by both parties shall bound both parties no matter if it was in fact read or unread; this even in the case that the document signed only refers to a provision in a separate document. Finally, it needs to be mentioned that in case of fraud Art 23 of the Brussels I Regulation cannot be satisfied as the assent must be one of the party to be bound, not the forger.

Finally, when it comes to the question whose writing needs to satisfy Art 23 of the Brussels I Regulation, it is submitted that Art 23 requires the undertaking of the party to be

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[144] Kruger, Thalia: '*Civil jurisdiction rules of the EU and their impact on third states*', Oxford 2008, p. 221.
[145] Art 23(2) of the Brussels I Regulation.
[146] For authority see e.g. Case 24/76 *Estasis Salotti di Colzani Aimo et Gianmario Colzani v Ruwa Polsterreimaschinen GmbH* [1976] ECR 1831.
[147] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 250.

bound must be in (his) writing, or evidenced by (his) writing[148]. If it is, no further problem will arise. If not, cases such as *Berghöfer GmbH v ASA SA*[149] show us the way. In this case, the Court observed that:

"Article 17 of the Convention[150] *does not expressly require that the written confirmation of an oral agreement should be given by the party who is to be affected by the agreement."*

This means that formality must allow for exception. As Briggs states, it is common that a jurisdictional term will be written, contained in a contract, and perfectly known about[151]. Hence, it would be absurd if it were still to be denied effect in case that the printed document belonged to only one party. The ECJ has always been sensitive to the problem presented by a seller who proffers a document to the unwary buyer but which has, buried deep in the small print, a jurisdiction agreement. This brings us back to the analysis in the beginning of this Section and the result of *Estasis Salotti di v Ruwa*[152].

To give an example of the exception that has been mentioned in the beginning of this paragraph, the case of *Powell Duffryn plc v Petereit*[153] can be mentioned. In this case, a shareholder member of a company claimed to be unaffected by a jurisdiction agreement contained in the company's articles of association. The shareholder asserted that there was no writing of his own from which his agreement to the jurisdiction agreement could be demonstrated. Although it fits into the wording of Art 23 only with some difficulties, the conclusion that the shareholder knew or ought to have known of the contents of the document to which he had, or should have known that he had, access was sound enough[154].

Hence, Briggs concludes, it may be said that where there is a contract which contains a written jurisdiction agreement, it ought to bind the parties to it unless there are compelling

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[148] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 261.
[149] Case 221/84 *Berghöfer GmbH v ASA SA* [1985] ECR 2699.
[150] The case was decided when the Brussels Convention was in force.
[151] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 263.
[152] Case 24/76 *Estasis Salotti di Colzani Aimo et Gianmario Colzaniv Ruwa Polsterreimaschinen GmbH* [1976] ECR 1831.
[153] Case 214/89 *Powell Duffryn plc v Petereit* [1992] ECR I-1745.
[154] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 264.

reasons why it should not. In the case of written conditions of sale, to which attention has not been directed, there is such a compelling reason.

3.4.2.2. Formal Alternatives to Writing

Where the agreement on jurisdiction is neither in writing or evidenced in writing, alternative routes to formal validity are still available. The formal alternatives to writing contained in letters (b) and (c) above are aimed, as explained in *Transporti Castelletti Spedizioni Inernazionali SpA v Hugo Trumpy SpA*[155], at catering for the specific needs of international trade. These alternatives can relax the requirements of writing[156]. Therefore, if the requirements of either letter (a) or (b) of Art 23(1) of the Brussels I Regulation are satisfied, consensus between the parties as to the jurisdiction agreement is presumed to exist[157]. It will be rare that these alternatives will validate a wholly unwritten jurisdictional term. What they respond to is the problem of a person who asserts that there is nothing in (his) writing which shows that he consented to the jurisdictional term, where it is disreputable for such an argument to be advanced[158].

A typical example of an agreement which is not 'in writing or evidenced in writing' but is still effective under letters (b) or (c) of Art 23(1) could be the following one. Where, for example, the parties orally concluded a contract for the carriage of goods, which is subsequently confirmed in writing when the carrier issues a bill of lading which includes a jurisdiction clause, the requirements of Art 23(1) (b) of the Brussels I Regulation are satisfied, notwithstanding the absence of express written agreement by the shipper, if the carrier and the shipper have a **continuing business relationship** which is governed as a whole by the carrier's general conditions which contain the jurisdiction clause[159].

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[155] Case 159/97 *Transporti Castelletti Spedizioni Inernazionali SpA v Hugo Trumpy SpA* [1999] ECR I-1597 para 18.
[156] Kruger, Thalia: '*Civil jurisdiction rules of the EU and their impact on third states*', Oxford 2008, p. 222.
[157] Case 106/95 *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravieres Rhénanes Sarl* [1997] ECR I-911.
[158] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 271.
[159] See e.g. Case 71/83 *Partenreederei ms Tilly Russ v NV Haven & Vervoerbedrijf* Nova [1984] ECR 2417.

Even in the absence of a continuing trading relationship such a jurisdiction clause may be effective if it conforms to **trade usages**[160]. The usage must be widely known in international trade or commerce and regularly observed by parties to contracts of the type involved in the particular trade or commerce concerned[161]. Therefore, it is not sufficient that, in international trade or commerce, a jurisdiction agreement is only in a form which accords with practices in such trade or commerce of which the parties are or ought to have been aware.

Finally, another alternative has been developed by the ECJ in *Berghöfer GmbH v ASA SA*[162]. The result of the case is that if it would be a breach of good faith for a person, who had not written his agreement, to rely on a lack of writing to deny the jurisdiction agreement, he will fail.

3.4.3. Meaning of 'Agreement' for Purpose of Art 23 and Problems of Incorporation from Other Documents

A lot can be written on this topic. But most of the problems which usually arise under Art 23 of the Brussels I Regulation in connection with the term 'agreement conferring jurisdiction' do not need to be solved in this paper as it is only concerned with written clauses or agreements which are in most case signed by all parties, whereby we, for simplification, assume that the two parties that are litigating about the validity of incorporation of a clause are parties to all contracts signed[163], i.e. the notion of privity of the contract does not come into play.

The main issue that interests us, due to it's often usage in international trade and commerce, is the case of **incorporation from one contract into another**. The usual situation in which this issue arises may be e.g. a joint venture agreement, as a head contract, followed

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[160] Clarkson, C M V and Hill, Jonathan: Jaffey on the Conflict of Laws, 2nd edition, 2002, p. 77.
[161] Case 159/97 *Transporti Castelletti Spedizioni Inernazionali SpA v Hugo Trumpy SpA* [1999] ECR I-1597.
[162] Case 221/84 *Berghöfer GmbH v ASA SA* [1985] ECR 2699.
[163] Although, of course, more complicated cases are used as examples and to explain the issues that arise.

by a facility management agreement, whereby only the head agreement includes a jurisdiction agreement. The problem with this issue is that it is a matter of the law governing the contract[164] and therefore no general 'Europe-wide' conclusion may be made. Under the common law, the assumption is that if the jurisdiction agreement has become a part of the substantive contract, e.g. due to its incorporation, the requirement for an 'agreement' is satisfied[165].

The problems with the meaning of the word 'agreement' and incorporation may be best shown by referring to two English decisions, an earlier one being the case of *Dresser (UK) v Falcongate Freight Management Ltd*[166] and the other recent one *7E Communications Ltd v Vertex Antlennentechnik GmbH*[167]. In the former case the English court held that there needs to be a contractual agreement to the jurisdiction clause between a bailor and a sub-bailee in order for the clause, which was included in a contract between the sub-bailor and the sub-bailee, to be binding for the bailor. Although this decision narrows the meaning of 'agreement' under Art 23 of the Brussels I Regulation to 'contractual meaning' it seems to have been followed in the latter case which was a case about incorporation of a jurisdiction clause from an insurance contract into a reinsurance contract. When reading the latter case it seems clear that there does not need to be another contract between the insurance company and the re-insured but there must be enough notification of and assent to the jurisdiction agreement. An example of the problem of **lack of notification and clear words about incorporation** of a jurisdiction clause is shown in Section 3.7.2 of this paper.

A clear guideline that may help us to understand what needs to be done for a jurisdiction clause to be incorporated into a sub-contract is given in the law of the carriage of goods by sea by numerous cases[168] These cases mainly deal with terms of a charterparty that are to

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[164] E.g. *Boils Distilleries BV v Superior Yacht Services Ltd* [2007] 1 WLR 12.
[165] Briggs, Adrian: *'Agreements on Jurisdiction and Choice of Law'*, Oxford 2008, p 254.
[166] *Dresser (UK) v Falcongate Freight Management Ltd* [1992] QB 502 (CA).
[167] *7E Communications Ltd v Vertex Antlennentechnik GmbH* [2007] EWCA Civ 140.
[168] Among the most important of them *Miramar Maritime Corporation v Holborn Oil Trading Ltd* [1984] 2 Lloyd's Rep. 129, *The Federal Bulker* [1989] 1 Lloyd's Rep 103 (CA) at 105 and *The Varenna* [1983] 2 Lloyd's Rep. 592. Although the contracts in these

be incorporated into bills of lading. As a result of these cases, **three basic conditions that need to be fulfilled in order for the incorporation to be effective have been identified.** Firstly, the words of incorporation need to be in the document that is to include the jurisdiction clause itself. Secondly, the words of incorporation must be apt to describe the clause that should be incorporated, whereby it is submitted that terms such as 'all conditions and exceptions to be incorporated' do not cover jurisdiction clauses[169]. Thirdly, the clause to be incorporated has to be consistent with the rest of the contract to which it is to be incorporated, i.e. if it conflicts with any of the terms of the 'sub-contract', the terms of that contract shall prevail.

To conclude, whether Art 23 of the Brussels I Regulation applies in cases of incorporation, i.e. the jurisdiction agreement has been successfully incorporated, is not about proving that the parties involved have concluded a contractually binding jurisdiction agreement but rather whether the **requirements of notification and assent have been complied with and the formalities satisfied.** Once again, this will be best shown by giving an example in Section 3.7.2 of this paper.

3.4.4. Substantive Validity

The Brussels I Regulation contains nothing on the question raised by fraud, mistake, duress, misrepresentation, incapacity etc[170]. Different solutions to this problem are possible. Firstly, it can be referred to the law of the forum. Secondly, the law of the chosen court can be referred to. Thirdly, the governing law can be used. Finally, the ECJ can autonomously determine the substantial validity of the agreement.

The law of the forum is obviously the simplest solution for the court seised. However, applying the law of the forum does not seem totally equitable. It allows for the possibility

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cases have not been subject to the Brussels I Regulation they may be used as the incorporation is matter of the law governing the contract.

[169] *The Varenna* [1983] 2 Lloyd's Rep. 595, col. 2.

[170] Kruger, Thalia: '*Civil jurisdiction rules of the EU and their impact on third states*', Oxford 2008, p. 223.

of forum shopping as the party would be aware of which court to go to in order to e.g. get the clause declared invalid.

The law of the chosen court will often be the same as the law of the forum. Nevertheless, the law of the chosen court seems to be an equitable solution as it is not as random as the law of the forum[171]. More on this issue will be said in Section 3.7.1.3 of this paper by applying the general rules on a given example.

3.4.5. Principle of Severability and Illegality

When it comes to problems of substantive validity of jurisdiction agreements two main issues arise. Firstly, jurisdiction agreements mostly take form of clauses that are part of a main contract governing relations between parties to that contract. This means that possible invalidity or nullity of the substantive contract must in some way influence the validity of the jurisdiction agreement or a principle must exist that copes with this issue. That principle is the **principle of severability**. Secondly, questions about validity of jurisdiction agreements arise in particular because parties to an agreement, by signing it, usually opt out of a statute or e.g. the Brussels I Regulation and therefore must either comply with rules included in these instruments or face the consequences of their breach.

3.4.5.1. Principle of Severability

The question of severability of a jurisdiction agreements and the substantive contract in which it is included is again one about the intentions of the parties and the construction of the contract, in particular whether one contract or two have been made and hence **whether the discharge of one means discharge of both**[172].

This question shall be, once again, answered by the *lex contractus* whereby it is submitted that until it is established that there are two separated contracts only one law can be applied

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[171] Kruger, Thalia: '*Civil jurisdiction rules of the EU and their impact on third states*', Oxford 2008, p. 223.
[172] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 66.

as ***lex contractus***. If two separate agreements exist, the validity or enforceability of the jurisdiction agreement will be assessed according to the law that governs it and not the *lex contractus*[173]. More about which law governs the jurisdiction agreement and the influence of choice of law agreements will be discussed in Chapter 3.8 of this paper. Nevertheless, it can be generally said that if a choice of law is made, the chosen law will govern the jurisdiction agreement and also e.g. its validity[174].

As it is not the purpose of this paper to explain and analyse the principle of severability it is only necessary to mentions that according to the case law[175], it seems that the English courts are in **favour of finding the jurisdiction to be severable**. Of course, if the English law does not apply its presumptions cannot be used and the matter will be more about proof of foreign law.

The basic approach under English law is that if the jurisdiction agreement is **severable from the substantive contract it will survive the termination of the substantive contract** or where it is alleged that this contract has been rescinded[176] or illegal[177]. The result might be different if there have never been any contract at all. In order to solve this problem, there has been judicial support at first instance in favour of applying the principle of severability to jurisdiction agreements as it is applied to arbitration agreements[178]. Joseph names several reasons why this should be so[179]. If we accept it then the answer may be found in the case of *Harbour Assurance Co. (UK) Ltd v Kansa General International Insurance Co. Ltd and others*[180] which, although concerned with arbitration agreements, solves these problems. The judgment said that severability is an essential

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[173] Which will govern the matters such as formal validity or the capacity of the parties.
[174] Briggs, Adrian: *'Agreements on Jurisdiction and Choice of Law'*, Oxford 2008, p 70.
[175] For discussion on that see e.g. *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association* [1998] Lloyd's Report IR 24 (NSW) and more generally about whether two separate contracts were made *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] 1 AC 25.
[176] Briggs, Adrian: *'Agreements on Jurisdiction and Choice of Law'*, Oxford 2008, p 67.
[177] *Mackender v Feldia A.G.* [1967] 2 Q.B. 590.
[178] Joseph, David: *'Jurisdiction and arbitration agreements and their enforcement'*, 2005, p 107.
[179] Ibid.
[180] *Harbour Assurance Co. (UK) Ltd v Kansa General International Insurance Co. Ltd and others* [1993] 1 Lloyd's Rep. 455.

adjunct to giving effect to the parties 'freedom to provide for the resolution of disputes'[181]. The main results of this case are two questions that have to be asked in each case in order to be able to judge whether the arbitration or jurisdiction agreement is effective or not. The first question is whether the clause is wide enough to embrace the dispute in question and the second whether the issues raised impeach the separate arbitration or jurisdiction agreement[182]. If the first question is answered in the affirmative and the second in the negative, the jurisdiction agreement shall survive. This result is even more valuable and useful as the same result is arrived at under the Brussels I Regulation (as shown below).

To partially conclude, if the jurisdiction agreement is found to be severable, the ground for rescission of the substantive contract and/or the jurisdiction agreement must **challenge the jurisdiction agreement specifically**[183] in order to invalidate the jurisdiction agreement itself. .

Lastly, it has to be mentioned that the Brussels I Regulation seems to reflect the principle of severability as the validity of the jurisdiction agreement shall be only **judged according to the formal requirement of Article 23**[184]. This prevents the national courts from examination of the merits of the dispute before deciding on their jurisdiction. Joseph[185] summarizes the effect of the Brussels I Regulation as follows: 'a jurisdiction agreement should be seen as an independent and collateral bargain and is either established or not in accordance with the autonomous requirements of Art 23', i.e. the existence of a contract between parties is established by reference to the governing law and the existence of the jurisdiction clause is established only by reference to the requirements of Art 23 of the Brussels I Regulation.

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[181] First instance decision, Mr Justice Steyn, *Harbour Assurance Co. (UK) Ltd v Kansa General International Insurance Co. Ltd and others* [1992] 1 Lloyd's Rep. 81, at page 91-92.
[182] Joseph, David: *'Jurisdiction and arbitration agreements and their enforcement'*, 2005, p 105.
[183] See the detail discussion in *Fiona Trust & Holding Corp v Privalov* [2008] 1 Lloyd's Rep. 254.
[184] *Benincasa v Dentalkit srl* C-269/95, [1997] ECR I-3767.
[185] Joseph, David: *'Jurisdiction and arbitration agreements and their enforcement'*, 2005, p 109.

3.4.5.2. Illegality

It is also possible to be confronted with the situation when a jurisdiction agreement is in **breach of a mandatory provision of the law that governs it**. In such case, the logical consequence seems to be that the jurisdiction agreement is not effective or even void. It should not be forgotten that the principle of severability applies here as well, i.e. when severable the reason for the agreement being void must apply specifically to the jurisdiction agreement. An example of a possibly ineffective jurisdiction agreement will be shown in Section 3.7 of this paper.

3.5. CZECH LAW – SECTION 37 OF THE ZMPS

The provisions governing private international procedural law or international civil procedure in the Czech Republic are included in the ZPMS in particular in Section 37 and following. Furthermore the topic is regulated by numerous international conventions whereby, as already mentioned, the ZMPS applies only if an international treaty binding the Czech Republic does no provide otherwise[186].

As this paper is concerned with only international commerce in European dimensions, the use of the ZMPS will be only rare as already mentioned[187]. Therefore regarding general Czech procedural law it is only necessary to say that Czech law shall be applied in procedural matters, i.e. the **principle of the *lex fori*** applies[188]. This principle has only a few exceptions such as in the case of the capacity of a foreigner to sue and be sued or the use of foreign public documents as evidence[189].

What concerns us most is **Section 37** of the ZMPS. It states that choice of forum agreements are permitted in property disputes. As already mentioned in Section 2.1.2.2 of this paper the basic criterion for establishing the jurisdiction of Czech courts is the competence in the respective matter, i.e. whether a Czech court has local competence under the provisions of the Czech Code of Civil Procedure. Jurisdiction agreements under the Czech ZMPS must be in writing and must not alter the original competence of Czech courts[190]. Finally, under Section 37(3) of the ZMPS Czech legal entities may agree in writing to the competence of o foreign court in property disputes, i.e. prorogation of jurisdiction is possible. Indeed it is up to the foreign state whether it accepts such basis of jurisdiction or not as Czech law cannot regulate jurisdiction of foreign courts.

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[186] Section 2 of the ZMPS.
[187] Meaning only in case where the Brussels I Regulation does not apply which will be rare in European cases (of course only in international commerce).
[188] Pauknerová, Monika: '*Czech Republic*', Hague, Kluwer Law International, 2002, p. 144.
[189] Section 52 of the ZMPS foreign public documents are considered to be public documents in the Czech Republic as well.
[190] Pauknerová, Monika: '*Czech Republic*', Hague, Kluwer Law International, 2002, p. 147.

3.6. HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

The Hague Convention shall only apply in **international cases to exclusive jurisdiction agreements concluded in civil and commercial matters**[191]. Having said that and leaving beside the process how the Hague Convention specifically works, it is clear that the main question at hand is the delimitation between the Brussels I Regulation and the Hague Convention, i.e. what are the factors that will decide whether the particular jurisdiction agreement shall be governed by either of these instruments.

The Hague Convention applies to cases where the courts of one Contracting State[192] or **one or more specific courts of one Contracting State have been designated**[193]. The application of the Hague Convention in the EU is limited by its Art. 26.6(a); meaning that it engages only if one party is domiciled in a non-Member State, not if both parties are EU-domiciled. This means that where both parties are EU-domiciled the Brussels I Regulation regime applies and therefore the outcome of cases such as *Gasser v Missat srl*[194] would be no different[195], i.e. one of the biggest dissatisfaction of the Brussels I Regulation will not be overcome.

The problems of delimitation can be best shown by giving an example. Fentiman[196] gives an example of X domiciled in New York and Y domiciled in France who agree to submit any disputes arising between them to the exclusive jurisdiction of the English courts. X sues Y in France first, but Y then sues in England. Is the English court obliged to stay proceedings in accordance with Art 27 of the Brussels I Regulation? The probable solution is that in such case the English court may, thanks to Art 5(2) of the Hague Convention which provides that the contractual forum 'shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State', simply continue its

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[191] Art 1 of the Hague Convention.
[192] Meaning a Contracting State of The Hague Convention.
[193] Art 3(a) of the Hague Convention.
[194] It is not purpose of this paper to repeat what have been written many times before. Therefore, the reader is advice to consult e.g. Joseph, David: '*Jurisdiction and arbitration agreements and their enforcement*', page 36 for the case analysis.
[195] Fentiman, Richard: '*Parallel Proceedings and Jurisdiction Agreement in Europe*', page 47.
[196] Fentiman, Richard: '*Parallel Proceedings and Jurisdiction Agreement in Europe*', page 48.

proceedings whereby the pre-emptive strike becomes redundant. But this result is uncertain as it is to be decided whether the Hague Convention regulates the issue in *Gasser*, i.e. the case where two courts are asked to determine whether a jurisdiction agreement is enforceable at all. Fentiman comes to a conclusion that this is not the case and that the **Hague Convention**, by preserving Art 27 of the Brussels I Regulation, **offers no clear solution to the *Gasser* problem**. The shown example may be further complicated by exchanging France for Switzerland and assuming that the Hague Convention is already in force in the US and in England but not yet in Switzerland. Kruger[197] comes to a conclusion in this case that, as the Hague Convention in its Art 26(3) gives precedence to the Lugano Convention, the English court would have to adhere to the Lugano Convention and therefore follow the decision in *Gasser* i.e. stay proceedings.

By showing this rather theoretical issues that arise out of the relation between the Brussels I Regulation and the Hague Convention, it has be shown that **even parties to a very precisely and well drafted jurisdiction agreement may face difficulties**, for which they cannot be blamed but need to be aware of.

[197] Kruger, Thalia: '*Civil jurisdiction rules of the EU and their impact on third states*', Oxford 2008, page 232.

3.7. DRAFTING OF JURISDICTION AGREEMENTS

Knowledge about general issues of jurisdiction agreements is not enough to save ones problems with jurisdiction agreements in the real world of international commerce. It is obvious that drafting of the agreements on jurisdiction and choice of law is of the essence for addressing and in certain cases even solving the above mentioned problems and issues. It is more than clear that good drafting is a rather cheap and easy way how to avoid future expensive and time consuming litigation.

Therefore, this Chapter will try to show ways of drafting of jurisdiction agreements and ways how to avoid future problems arising out of these agreements. This will be mainly done by reflecting on available English case law, which has a long tradition of dealing with these issues, and trying to critically evaluate practical solutions used by drafters of such agreements. The agreements on the choice of law will be only considered to the extent they influence the jurisdiction agreements. Furthermore, this paper is only concerned with these agreements regarding **contractual obligations arising out of civil and commercial matters**[198] and how they would be dealt with before English courts with some examples from other countries to pin-point possible differences between the common law and civil law systems.

When it comes to drafting of jurisdiction agreements in practice, the drafter faces various problems that are less or more hard to overcome. Among these are problems already mentioned in this paper as e.g. scope of the agreements, their exclusivity etc. Furthermore practical problems as which forum to choose or whether to choose arbitration proceedings or a court for solving of the possible disputes arise. Solving of these problems often depends more on the **bargaining power of the parties** than on theoretical law issues and therefore the process of creating and drafting of jurisdiction agreements itself will be ignored and it will be only dealt with its results and impacts on possible litigation.

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[198] Therefore agreements on jurisdiction and choice of law in tort related matters will not be dealt with.

Instead of trying to elaborate a 'perfect' jurisdiction clause, which has already been done by numerous books and scholars[199], and in order to be able to show how difficult the proper drafting is, four examples of jurisdiction agreements or rather clauses that have been used in practice will be introduced and their validity and possible impact will be analysed. In particular the **general rules** regarding the ambit of jurisdiction clauses that have been shortly introduced in Chapter 2 of this paper and the remarks on the Brussels I Regulation from Section 3.3 of this paper **will now be applied on the given examples.**

3.7.1. Drafting by Specimen – Simple Jurisdiction Clauses

The basic way of drafting[200] of jurisdiction agreements is drafting by specimen, i.e. including in a contract of a clause that concerns jurisdiction of public courts.

3.7.1.1. Example

The following rather simple example is a typical example of a jurisdiction clause and was originally included in a **sale of goods agreement** between a Czech seller and an English buyer.

> *'All disputes arising in connection with this agreement or its validity shall be settled by the Regional Court in Ostrava, the Czech Republic'* (hereinafter Example 1).

As it can be seen from this example the words used are very general and **no definitions are given** therefore problems with interpretation will inevitably arise. Let us assume that English law applies to the substantive contract and to the jurisdiction agreement as well.

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[199] E.g. Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 158.
[200] Or rather including of these clauses.

3.7.1.2. Applying General Rules – Scope of the Agreement

Firstly, the words **'this agreement or its validity'** will draw attention. It is obvious that the intention of the parties, as they used the wording 'this agreement', was to refer to the whole contract between them and not only the jurisdiction agreement. The problem now is that this would suggest that the jurisdiction agreement is not severable from the substantive contract. The question now is whether the jurisdiction clause from Example 1 would be operating if the whole contract was not valid or if the whole agreement should be invalid or void from its beginning, i.e. there is no agreement at all. The answer may be found in the principle of severability and the interpretation of the used words 'or its validity'.

According to an Australian case on a jurisdiction clause, *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association*[201], where the words 'in any event' have been used, a contract which was held to have been void *ab initio* did not necessarily preclude the efficacy of the jurisdiction clauses. An English authority, although on arbitration clauses, ***Fiona Trust & Holding Corporation and others v Privalov and others***[202], where the words 'Any dispute arising under this charter' have been used, decided that 'The arbitration agreement had to be treated as a distinct agreement and could be void or voidable only on a ground which related directly to the arbitration agreement and was not merely a consequence of the main agreement'[203]. It seems to be probable from the mentioned decisions that although not very well drafted the clause in Example 1 would be found severable from the rest of the contract and therefore survive attacks on the substantive contract unless the grounds for these attacks would relate directly to the jurisdiction clause.

Secondly, the **scope of such a jurisdiction clause** may cause problems as the used words 'in connection with this agreement' leave a lot of space for different interpretations. It is

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[201] *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association* [1998] Lloyd's Report IR 24 (NSW).
[202] *Fiona Trust & Holding Corp v Privalov* [2008] 1 Lloyd's Rep. 254.
[203] *Fiona Trust & Holding Corp v Privalov* [2008] 1 Lloyd's Rep. 254.

clear that there are also non-contractual claims (or in the words of the clause disputes) that may arise out of a contract as it was shown in the case *Through Transport Mutual Assurance Association (Eurasia) Ltd v New India Assurance Co Ltd*[204]. The case is one about whether insurers were bound by an arbitration clause in an agreement between carriers and a P&I Club. The insurers brought in court a direct claim against the P&I Club based on a statute although the respective agreement called for all disputes which arose 'out of or in connection with' the agreement to be solved in arbitration. It was held that the insurers were bound by the arbitration agreement. Hence, it is submitted that a claim in tort would also fall under the scope of the jurisdiction clause[205]. Therefore the jurisdiction clause in Example 1 that refers to 'All disputes arising in connection with this agreement' embraces possible claims in tort or direct statutory claims.

There is another possible issue related which is the interpretation of the words **'in connection'** and the difference between these words and other expressions e.g. 'under' or 'from'[206]. But as *Briggs*[207] states, this issue has been solved by the decision in *Fiona Trust & Holding Corp v Privalov*[208] according to which the choice of these propositions is not conscious and should not limit the scope of the jurisdiction agreement unless clear intention of the parties can be shown[209]. Hence, it is submitted that the jurisdiction agreement in Example 1 will also apply to disputes which arise from things such as pre-contractual misrepresentation or non-disclosure.

Finally, a note regarding English law, in particular **interim relieves**, has to be made about. Exclusive or non-exclusive, the question is whether the jurisdiction agreement applies to application for interim relief. As only little authority exists on this point, it may be argued both ways. Although no general rules seem to exist, the inclusion of specific wording on

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[204] *Through Transport Mutual Assurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2004] 1 Lloyd's Rep 67.
[205] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 151.
[206] See Example 3 and Example 4 for examples of use of such words.
[207] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 152.
[208] *Fiona Trust & Holding Corp v Privalov* [2008] 1 Lloyd's Rep. 254.
[209] See Section 2.1 for more detail analysis of this issue.

this matter into the jurisdiction agreement may of course effect the courts decision on the issuance of an interim relief.

3.7.1.3. Applying General Rules – Substantial Validity

The words 'settled by the Regional Court in Ostrava, the Czech Republic', in particular the choice of a specific court, draw ones attention as well. It seems to be clear that there is no principal problem with the clause under the Brussels I Regulation that would mean that the clause is ineffective. But what if there is **something in the national law**, i.e. the Czech law, **preventing the chosen court from deciding cases** in some specific matters[210]? Or the court chosen may only deal for example with labour matters but the proceedings should be one about sale of goods. The parties might have not known this when they concluded the jurisdiction agreement.

The basic point is that the **Brussels I Regulation does not contain any provisions dealing with questions of substantive validity** such as questions raised by fraud, mistake, incapacity or illegality. When dealing with these problems, different solutions are possible. Firstly, the problems may be solved by referring to the law of the court first seised, which does not necessarily have to be the chosen court. Secondly, the law applicable to the substantive contract may be used. Thirdly, the law of the chosen court may be referred to even if another court is seised first. And finally there is a possibility that the ECJ will autonomously determine the principles on substantial validity of jurisdiction agreement[211].

As already briefly mentioned, the law of the court first seised does not seem to be the right solution because it would lead to uncertainty as the parties may start the proceedings at any Member State courts. Applying the law of the forum may also lead to forum shopping which is undesirable. The problem with the law applicable to the contract is obvious; if the

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[210] The issues of private international law are governed in the Czech Republic by Act No 97/1963 Sb., Act on Private International and Procedural Law.
[211] For a more detail discussion see Kruger, Thalia: '*Civil jurisdiction rules of the EU and their impact on third states*', Oxford 2008, page 223.

agreement is null and void, there is no law to regulate it. Therefore, the best solution seems to be **the law of the chosen court**, which was also advocated in the case of *Elefanten Schuh*[212]. The other reason for advocating this approach may be found in Art 5(1) of the Hague Convention, which allows the chosen court to use its own law to decline jurisdiction[213].

Let us assume that the situation in Example 1 is similar. The chosen Czech court, even if it wanted to hear the case, could be prevented from doing that by national law[214]. There are now two possibilities for the Czech court.

Firstly, a narrow interpretation of the jurisdiction agreement may be adopted and the chosen court would simply decide that it has no jurisdiction, i.e. the jurisdiction clause would be ineffective and the parties would have to seek justice elsewhere according to general jurisdiction rules of the Brussels I Regulation. The second possible approach is a wider interpretation of the intentions of the parties. By choosing a Czech court the parties' intention was, most probably, to have their disputes solved in the Czech Republic. By assuming that the parties did not intend the agreement that they have made to be invalid, **the court could use its national law to deal with the problem**. That would in case of the Czech court mean passing the law suit to the competent court or passing it to a higher court for decision on the competent court[215]. The problem with this solution is that it interferes with the parties' autonomy.

So what would the best solution be? Fawcett, Harris and Bridge[216] advocate the view that the formation of the contract should be determined by a reference to the applicable national law. The other view is that, although it would probably take a long time and it would make things even more complex, the establishing of an autonomous test by the ECJ might be the

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[212] Case C-150/80 *Elefanten Schuh GmbH v Pierre Jacqmain* [1981] ECR 1697.
[213] The Hague Convention seems to have, in its Art 5, 6 and 9 a system that deals with the problem.
[214] See Paras 9(1) and 11 of Act No. 99/1963 Sb., Czech Code of Civil Procedure.
[215] Paras 104 and 105 of Act No. 99/1963 Sb., Czech Code of Civil Procedure.
[216] JJ Fawcett, JM Harris & M Bridge: '*International Sale of Goods in the Conflict of Laws*', Oxford 2005, p. 37.

preferable solution. This solution would decrease uncertainty of the parties and the undesirable possibility of forum shopping.

3.7.1.4. The Problem of Exclusive or Non-exclusive Jurisdiction

Imagine that Example 1 would read as follows:

'Disputes arising in connection with this agreement or its validity shall be settled by the Courts of the Czech Republic' (hereinafter Example 2).

The question now is what would be the impact of the omission of the words 'all' and the specific court.

The court which would be faced with such a jurisdiction agreement would have to try to **reveal the intentions of the parties**. Let us suppose that the court has at hand two agreements that have been concluded between the parties, one including a jurisdiction clause similar to the one in Example 1, the other similar to the one in Example 2. Could the difference have any influence on the decision of the court about the clause being one for exclusive or non-exclusive jurisdiction?

In the case of *British Aerospace plc v Dee Howard Corp*[217], it has been decided that the words 'any action in respect hereof' and the fact that the parties submitted all disputes to courts of one country meant that the **parties intended to confer exclusive jurisdiction**. The meaning of the word 'shall' has also contributed to the decision of the court that the clause was one for exclusive jurisdiction. In the light of this decision it seems to be clear that the clause in Example 1 is one for exclusive jurisdiction. The nature of the clause in Example 2 may cause more problems as they may be more courts in the Czech Republic that may be able to solve the issue. Nevertheless, due to the submission of all disputes to Czech courts, it seems that even the clause in Example 2 is one for exclusive jurisdiction as the clause would otherwise be unnecessary.

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[217] *British Aerospace plc v Dee Howard Corp* [1993] 1 Lloyd's Rep 368.

If we were seeking for a change that would turn the clause in Example 2 into a non-exclusive clause, an English case *British Aerospace plc v Dee Howard Corp* suggests that the result might be different if the word 'shall' would be omitted (and exchanged for e.g. 'may') or if the **parties simply submitted themselves to the chosen jurisdiction.**

3.7.2. Incorporation from other Documents

It is quite common for parties to agree to incorporation of certain terms into a contract between them. There are **three basic common types of such incorporation**. Firstly, incorporation of industry-standard terms, secondly, incorporation of standard terms and conditions of one of the parties and thirdly incorporation of clauses from one contract into another[218].

Joseph states that where the **industry-standard terms** contain a jurisdiction clause, then the parties, by incorporating these terms into their contract by general words only, will have bound themselves to the terms of the jurisdiction clause included in these standard terms, even if the parties had not read the clause or were not aware of it[219]. This view is supported by many cases such as *The St Raphael*[220] or *Feedmills Sdn Bhd v Comfez*[221]. The reason for this is that the standard terms could not exist independently as a contract and their purpose is mainly to supplement the contract into which they are incorporated, i.e. they may be incorporated as whole and there is no need to expressly specify which provision of the standard terms is to be incorporated. The other reason is that the standard terms are usually easily available for the parties. As for the Brussels I Regulation, it requires that it is expressly referred to the standard terms and they can be checked by any person exercising reasonable care[222].

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[218] Joseph, David: *'Jurisdiction and arbitration agreements and their enforcement'*, 2005, p 137.
[219] Ibid.
[220] *The St Raphael* [1985] 1 Lloyd's Rep 403.
[221] *Feedmills Sdn Bhd v Comfez* [1988] 2 Lloyd's Rep 18.
[222] Therewith satisfying the criteria set by the ECJ in the famous case of *Salotti v RUWA* - Case C-26/76 [1976] E.C.R. 1831.

When it comes to incorporation of **standard terms and conditions** of one of the parties the requirement of 'express reference' was held to be established by the ECJ in *Salloti*[223] and by the Court of Appeal in *Credit Suisse Financial Products v Societe General d'Entreprises*[224]. This requirement means, as in the case of industry-standard terms, that the parties have to make express reference to the general conditions whereby these conditions can be checked by any party exercising reasonable care. Similarly to industry-standard terms the express reference to the standard terms and conditions will incorporate them into the contract even if one of the parties has not seen or read them.

Opposite to the examples of industry-standard terms and general conditions and terms, if the parties seek to **incorporate terms from one contract into another**, it is necessary to work out which of the terms the parties intended to incorporate[225]. Therefore an 'express reference' is not enough. This issue will now be dealt with in more detail.

3.7.2.1. Example

The example given below is taken from a complex **banking documentation regarding financing of an Initial Public Offering** (IPO) at the London Stock Exchange. The clause was included in the head agreement of the documentation (Head Contract) and was not repeated in all of the related documents, e.g. mandate agreements, confidentiality agreement etc (Related Documents). The Related Documents were listed in the Head Agreement. The wording was:

> *'The Documents shall be governed by, and construed in accordance with, the laws of England and Wales. The parties hereto submit to the non-exclusive jurisdiction of the English courts or at our option arbitration in London under the rules of the London Court of International Arbitration. The parties hereto waive any defence of inconvenient forum, which may be available'* (hereinafter Example 3).

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[223] Case C-26/76 *Salotti v RUWA* [1976] E.C.R. 1831.
[224] *Credit Suisse Financial Products v Societe General d'Entreprises* [1997] C.L.C. 168.
[225] Joseph, David: *'Jurisdiction and arbitration agreements and their enforcement'*, 2005, p 139.

The obvious question now is whether the clause in Example 3 **could possible have any effect on the Related Documents** in case they do not refer to the Head Contract at all. It will be also dealt with the situation were the Related Documents refer to the head agreement in general terms and in specific terms.

Finally, it is necessary to mention that it will not be again dealt with the issues that have been covered in Section 3.7.1, e.g. the scope of the jurisdiction agreement, in order to be able to focus on other interesting issues. Nevertheless, a small but important **note on non-exclusive jurisdiction will be added**. Some other issues arising, such as jurisdiction agreement for benefit of one party only will be dealt with later in Section 3.7.3 of this paper.

3.7.2.2. Applying General Rules – No Reference to Head Contract

This is the easiest situation that will be dealt with. Although the idea of having the Head Agreement covering a whole transaction and including a jurisdiction agreement common for all the Related Documents seems to be **reasonable from the business point of view**, e.g. in order to prevent any possible discrepancies between jurisdiction agreements in each of the Related documents, it seems not to find any support in the case law.

To partially conclude, there is much case law on the necessity of general or specific reference to the jurisdiction agreement in another agreement but **nothing to suggest that no reference at all would do as well**. This also due to the fact that the English courts have followed the principle of construing contracts in accordance with the parties' presumed intentions, which means that the courts would only be concerned with the words in the Related Documents and not in the Head Contract.[226] Therefore, the clause in Example 3 would not have any effect without reference to it in the Related Documents.

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[226] See e.g. *The Merak* [1965] P.223 at 259 or the *The Varenna* [1983] 2 Lloyd's Rep. 592 at 599.

3.7.2.3. Applying General Rules – General Reference to Head Contract

Let us assume that the Related Documents include the following provision:

> *'All the terms, conditions, clauses and exceptions contained in the Head Contract apply to this contract and are deemed incorporated herein'.*

It is clear that this is a general reference to the Head Contract. Not like in the case of industry-standard terms and general conditions and terms, it is submitted that the general rule is that a **specific reference to the jurisdiction agreement is required**[227]. The result will be the same under Art 23 of the Brussels I Regulation as it will not be possible to demonstrate that the parties intended to incorporate the separate jurisdiction agreement clause from the Head Contract into the Related Contracts[228] without a specific reference.

The question now is, as every general rule has its exceptions, what is necessary for the general words to be sufficient to incorporate any jurisdiction agreement into the Related Contracts?

The English courts, in cases such as *Hamilton & Co. v Mackie & Sons*[229], have consistently interpreted the general words of incorporation as not incorporating any ancillary dispute resolution provisions. Nevertheless as Joseph [230] states, there might be **specific circumstances**, e.g. course of dealing, or a usage in a particular trade, or the parties may make their intentions sufficiently clear in a different way, which allow the court to depart from the general rule.

Another possibility to depart from the general rule was shown in *The Merak*[231], whereby the incorporation clause above is similar. In that case, the Court of Appeal concluded that such a clause did effectively incorporate a charterparty arbitration clause into a bill of

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[227] E.g. *Federal Bulker* [1989] 1 Lloyd's Rep 103 (CA) at 105 and *The Varenna* [1983] 2 Lloyd's Rep. 592.
[228] Joseph, David: *'Jurisdiction and arbitration agreements and their enforcement'*, 2005, p 139.
[229] *Hamilton & Co. v Mackie & Sons* (1889) 5 T.L.R. 677.
[230] Joseph, David: *'Jurisdiction and arbitration agreements and their enforcement'*, 2005, p 142.
[231] *The Merak* [1965] P.223.

lading, whilst stretching the meaning of the word 'clauses'. But this is **rare example** that has been rather criticized and in other cases, as *The Federal Bulker,*[232] the hundred years of authority have been followed, i.e. general words were held not to be apt to incorporate a jurisdiction clause.

Hence, it seems to be clear that without any special circumstances, such as usage in a particular trade, and even though emphasis on expressions such as 'all terms whatsoever'[233] may be added, **the general rule will be followed.**

Finally, it is worth mentioning that certain common law countries, such as **Canada and Honk Kong** does not apply the strict general rule of express reference and consider it sufficient if general words of incorporation are used[234].

3.7.2.4. Applying General Rules – Specific Reference to Head Contract

Having introduced the above arguments on general references, it seems to be clear that only a specific reference to the Head Contract's jurisdiction clause is apt to incorporate it into the Related Documents. But there are still **some conditions to be fulfilled** in order for the jurisdiction clause to be effective.

Firstly, the wording of the jurisdiction clause in the Head Contract must be **drafted to permit incorporation**. What would the solution be if the clause in Example 3 referred only to disputes under the Head Contract and not the Related Documents in which it is incorporated? English cases such as *The Delos*[235] or *The Nerarno*[236] have proofed the willingness of English courts to overcome this problem by manipulating the respective words of the jurisdiction clause in order to give effect to the parties' intentions to litigate disputes in a chosen forum. In our case, it seems that the court would have no problem

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[232] *Federal Bulker* [1989] 1 Lloyd's Rep 103 (CA).
[233] As it has been shown in the case of *Siboti K/S v BP France* [2003] 2 Lloyd's Rep 364.
[234] Joseph, David: '*Jurisdiction and arbitration agreements and their enforcement*', 2005, p 144.
[235] *The Delos* [2001] 1 Lloyd's Rep 703.
[236] *The Nerarno* [1996] 1 Lloyd's Rep 1.

with giving effect to the jurisdiction clause in the Head Contract as the party submitted themselves to non-exclusive jurisdiction of English courts.

Secondly, **problems with identification of the contract referred to may arise**. This situation typically arises in chain sales or other chain dealings where lots of contracts of the same type are included. Therefore the incorporated contract is to be referred to at least by the date of its conclusion, i.e. must be identifiable[237]. So if the Related Documents included a specific enough identification of the Head Contract no problems would arise.

Finally, there can be a **clash between express and incorporated terms** in which case the general rule is that the express terms shall prevail. This would be the case if e.g. any of the Related Documents included a jurisdiction clause but still incorporated the jurisdiction clause contained in the Head Contract.

3.7.2.5. Note on Non-Exclusive Jurisdiction

One major problem might arise with the simple wording of the non-exclusive jurisdiction clause in Example 3 above. It only widens the parties' choice of possible forums, i.e. beside the forums allowed by the Brussels I Regulation the parties may start proceedings in England as well. **But does it mean that if one of the parties starts proceedings in England, the other party is bound to defend there**? Or is it allowed to start proceedings elsewhere? If the parties wish to prevent these situations, in order not to allow any confusion, Briggs [238] advocates that they include wording into the non-exclusive jurisdiction agreement to the effect that once one of the parties have exercised the option, no other court than the chosen court shall have jurisdiction.

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[237] E.g. see *The San Nicholas* [1976] 1 Lloyd's Rep 8.
[238] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', p 167.

3.7.3. Variations of Brussels I Regulation Scheme in Practice

As it has already been shown in Section 3.2.3 of this paper, the Brussels I Regulation scheme is often subject to **variations by businessmen and their drafters around Europe** who try to appropriate it to their commercial needs. This may of course cause problems.

The example given is a rather **complex combined jurisdiction-arbitration agreement**, not very well drafted and well-arranged, which should be ideal for showing the main issues arising when drafters deviate from the basic and simple two types of jurisdiction agreements, explicitly exclusive or non-exclusive. Once again, previously mentioned issues that might arise also in connection with the example below will not be repeatedly addressed.

3.7.3.1. Example

The following example was included in a Joint Venture Agreement between two parties domiciled in the EU, but not England[239].

> *'For the Benefit of A, B hereby submits to the exclusive jurisdiction of the English courts. At the option of A, A has the right to bring proceeding in arbitration in London under the rules of the London Court of International Arbitration. The parties hereto waive any defence of inconvenient forum, which may be available, and shall not issue process in respect of any claims under this contract in any other Country than England. If B breaches his obligations under this clause it shall pay to A its loss caused by B's breach of this clause'* (hereinafter Example 4).

3.7.3.2. Applying General Rules – Jurisdictional Agreement for Benefit of one Party

It may be of course very desirable, from the commercial point of view, to allow one party to bring proceedings elsewhere than at the forum exclusive for the other party, e.g. as the

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[239] And was probably concluded without consulting a good England solicitor.

circumstances may have significantly changed since the agreement. Hence, such benefit may be decisive in the possible dispute.

But it is first necessary to examine **if a jurisdiction agreement may actually give advantage to one party to the contract**. Contrary to the case of the Brussels Convention[240], which in its Art 17(5) explicitly allowed the parties to conclude a jurisdiction agreement for benefit of one party, the Brussels I Regulation does not include such a specific provision. Nevertheless, it is submitted that the absence of the specific provision in the Brussels I Regulation does not make the first two sentence of Example 4 ineffective[241].

The situation gets more complicated when we consider that A shall, at its discretion, be entitled to bring proceedings in arbitration. The arbitration agreements are now regulated by the Arbitration Act 1996. It is not the purpose of this paper to describe formal requirements and other aspects of arbitration agreements. Let us therefore assume that the jurisdiction part of the clause is valid and effective. The question now is **what the effect of the clause in Example 4 is.**

Briggs[242], when giving an example that gives similar advantage for one party but to start proceedings in any other court not to start arbitration proceeding, sees **no reason why such a clause should be ineffective.** Joseph[243] states that when parties conclude both an arbitration and jurisdiction agreement they give rise to separable contractual obligations for the dispute resolution, i.e. these agreements operate independently, are governed by their own governing laws and in each case the final determination of disputes will be enforceable and/or give rise to an estoppel.

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[240] Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters 1968. The same situation is under the Lugano Convention, i.e. if there is, even nowadays, a possibility of litigation in Iceland, Norway or Switzerland, this has to be taken into account.
[241] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', p 164.
[242] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', p 171.
[243] Joseph, David: '*Jurisdiction and arbitration agreements and their enforcement*', 2005, p 99.

These two statements may bring us to the conclusion that such clause is possible and will work in practice. Let us now examine the available case law authority. It is submitted that an arbitration **agreement can confer a right upon one party only to refer disputes to arbitration**[244]. Furthermore, following the English case of *The Messiniaki Bergen*[245], it is submitted that the courts will give effect to such an option to arbitrate as it will amount to an arbitration agreement for the purpose of Section 6 of the Arbitration Act 1996. Other authorities, such as *The Amazona*[246], give us further guiding. According to these authorities, the clause in example 4 will be treaded as a choice of court agreement prior to the exercise of the option to solve disputes in arbitration[247], whereby it is submitted that it is not necessary for the party benefiting from the clause (A in our case) to exercise the option prior to the commencement of court proceedings by the counterparty (B in our case).

Having said that, it is clear that the jurisdiction agreement for benefit of one party only may be commercially very reasonable and may serve as an effective tool for getting significant advantage in the future litigation.

3.7.3.3. Applying General Rules – Personal Undertakings

The third sentence of Example 4 represents two obligations (personal undertakings) of the parties. Firstly, the parties agreed that they will not plea that the court is a *forum non conveniens*. Secondly, the parties tried to strengthen the exclusive jurisdiction clause by the obligation not to start proceedings in another than the chosen forum.

The former obligation seems to be meaningless in the light of the decision in *UBS AG v Omni Holding AG*[248]. It has been decided that one of the parties cannot be prevented by agreement from challenging the jurisdiction on the ground of *forum non conveniens*, i.e. the application for stay of proceedings on the ground of *forum non conveniens* may not be

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[244] E.g. *Pittalis v Sherefetin* [1986] Q.B. 868.
[245] *The Messiniaki Bergen* [1983] 1 Lloyd's Rep 424.
[246] *The Amazona* [1989] 2 Lloyd's Rep 130.
[247] Joseph, David: '*Jurisdiction and arbitration agreements and their enforcement*', 2005, p 102.
[248] *UBS AG v Omni Holding AG* [2000] 1 WLR 916.

halted by showing that the party contracted not to do so[249]. As Briggs[250] also states, the only meaning of this obligation is to increase the chance of dismissal of such an application.

The latter obligation seems on its face to be meaningless as well. The parties have already conferred exclusive jurisdiction on English courts, whereby this agreement is valid and effective due to and in accordance with the Brussels I Regulation. Another purely contractual obligation removing jurisdiction from any other courts than the English one does not seem to find any support under the Brussels I Regulation scheme or elsewhere in the case law. Especially the civil law systems would have problem with such a contractual obligation as jurisdiction is generally seen as a matter of public law, i.e. can not be changed by private undertakings. Nevertheless, the obvious problem of exclusive jurisdiction agreements under the Brussels I Regulation scheme after *Gasser v Misat*[251] is that they are not as fully enforceable as under the common law[252]. Hence, the meaning of such an obligation may be in the possible strengthening of the exclusive jurisdiction clause as such contractual promise may be enforced by injunction or an action for damages.

3.7.3.4. Applying General Rules – Obligation to pay Damages

As already mentioned in Section 3.1.3, there are certain difficulties connected with usage of these provisions but it is generally submitted that they should be enforceable if not in breach of e.g. law on penalties[253].

It is worth mentioning here, that the position under civil law systems[254] would be different or rather much easier and clearer. If we take e.g. the Czech legal system, which has been significantly influenced by the German legal system, contractual penalty is a legal instrument commonly used by lawyers and businessmen and is regulated by the main

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[249] *UBS AG v Omni Holding AG* [2000] 1 WLR 916.
[250] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', p 169.
[251] Case C-116/02 *Erich Gasser GmbH v Misat srl* [2003] ECR I-4693.
[252] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', p 168.
[253] Ibid, p 175.
[254] In particular those influenced by German and Austrian legal theories.

Czech codes, i.e. the Czech Civil Code[255] and the Czech Commercial Code[256]. Therefore, the provision in Example 4 would be, if not concluded against the general principle of good faith[257], enforceable.

Having said that, it seems to be reasonable to include such an obligation into any exclusive jurisdiction clause no matter if the law governing the jurisdiction agreement will be the English law or a different law that belongs to the group of civil law systems.

[255] Para 544 and ff of Act No. 40/1964 Sb., Civil Code (Czech Republic).
[256] Para 300 and ff of Act No. 513/1991 Sb., Commercial Code (Czech Republic).
[257] A contractual penalty is against good faith if it e.g. amounts to fifty times the price of the goods in a sale contract. Of course this has to be judged individually in accordance with the circumstance of each case.

3.8. INFLUENCE OF AGREEMENTS ON CHOICE OF LAW ON JURISDICTION AGREEMENTS

The drafter of a jurisdiction agreement will inevitably be required to consider the choice of law questions as these will always strongly influence the effect and enforceability of the jurisdiction agreement. It has been mentioned many times in this paper, that the solving of the there mentioned problems depends on the applicable law of the particular jurisdiction agreement.

Therefore, and regardless of the fact that it is not related to drafting of agreements on jurisdiction, it necessary to look closer at the **principles that determine the governing law** of a jurisdiction agreement. This will be done for **English law only** as it, once again, provides enough case law to deal with the matters at hand.

3.8.1. Applicable Law in Case of Jurisdiction Agreements

The Rome Convention[258], in its Art 1(2) (d), provides that its rules shall not apply to 'arbitration agreements and agreements on the choice of court'. Therefore, national rules, e.g. in Case of England the **common law principles or** in case of the Czech Republic the **ZMPS** and other Czech rules of private international law, **will apply**. As to English law, Joseph[259] rightly mentions, at common law there is a strong ling between the governing substantive law and the governing law of the arbitration agreement. Hence the Rome Convention cannot be ignored.

3.8.1.1. Express Choice of Law

At common law the law of a jurisdiction agreement is determined **primarily by the parties' express choice**. Only in case of absence of an express choice other rules, such as inferred intentions of the parties and the law of the country with which the contract has its

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[258] EC Convention on the Law Applicable to Contractual Obligation 1980.
[259] Joseph, David: *'Jurisdiction and arbitration agreements and their enforcement'*, 2005, p 164.

closest connection[260], come to play. There are three basic situations of express choice of law which can occur.

Firstly, as long as the parties have **expressly chosen a law to govern the jurisdiction agreement**, effect will be given to that choice[261]. As no special wording has to be used, basically any wording of the choice of law clause that expressly refers to the jurisdiction agreement and makes the parties' intentions sufficiently clear will be enough[262].

Secondly, the parties might have chosen the law to govern the substantial contract between them but **not mentioned the jurisdiction agreement specifically**. According to Dicey Morris & Collins[263], the jurisdiction agreement will generally be governed by the same law as the substantive contract. It is submitted that the deviation from the general rule will be possible only in exceptional cases[264].

Thirdly, the parties may also chose the **law of one country to govern their agreement but choose for disputes to be solved in another country**. It is submitted in such case, as in the previous situation, that the law governing the substantive contract shall govern the jurisdiction agreement as well[265]. According to the case law[266], this is the case even though the jurisdiction agreement is seen as separable from the substantive contract.

To conclude, the same law will, in most cases, govern both the jurisdiction agreement and the substantive contract unless an express choice of law to the contrary is made by the parties. As Joseph[267] notes, the contrary result would be unsatisfactory as the validity or existence of the substantive contract and its separable part, the jurisdiction agreement, would be answered by reference to two different laws.

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[260] Dicey Morris & Collins: '*The Conflict of Laws*', 14th edition, 2006, paras 32-003-32-005.
[261] Joseph, David: '*Jurisdiction and arbitration agreements and their enforcement*', 2005, p 164.
[262] E.g. *The Mariannina* [1983] 1 Lloyd's Rep 12.
[263] Dicey Morris & Collins: '*The Conflict of Laws*', 14th edition, 2006, para 12-077.
[264] *Channel Tunnel Group v Balfour Beatty Limited* [1993] A.C. 335.
[265] Dicey Morris & Collins: '*The Conflict of Laws*', 14th edition, 2006, para 16-015.
[266] E.g. *Union of India v McDonnell Douglas* [1993] 2 Lloyd's Rep 48.
[267] Joseph, David: '*Jurisdiction and arbitration agreements and their enforcement*', 2005, p 166.

3.8.1.2. No Express Choice of Law

A further possible situation is that the parties have not made any express choice of law as to the substantive contract or the jurisdiction agreement. In such case the law of the forum will be normally held to be the law governing the jurisdiction agreement. In some specific cases, the law governing the jurisdiction agreement might follow the parties' inferred choice of the law governing the substantial contract[268].

[268] Dicey Morris & Collins: '*The Conflict of Laws*', 14th edition, 2006, para 12-07.

4. CHOICE OF LAW AGREEMENTS

After a court solves the question of jurisdiction, i.e. establishes its jurisdiction, the next step is to deal with the **law applicable** to the subject matter of the dispute. Thereafter, as with jurisdiction agreement, questions regarding the scope, validity and enforceability of jurisdiction agreements arise.

It is clear that the determination of the applicable law is crucial for deciding any case. Where the parties choose the law that should govern their agreement or one party declares that such choice has been made three situations may arise.

Firstly, the parties to the litigation **may admit that they are bound by a choice of law agreement** and according to that law such agreement on choice of law is valid. In such case, any problems which could arise are rather minor. Nevertheless, certain limitations to the freedom of choice apply.

For example at common law, the basic rule is that the parties are free to choose the proper law of the contract subject to certain limitations to the freedom to choose the law. Hence, the only areas of contractual liability which were not governed by the proper law of the contract, i.e. also the chosen law, were those where the parties' freedom to choose was not conceptually appropriate'. In *Vita Food Products Inc v Unus Shipping Co Ltd*[269] the Privy Council[270] suggested that an expressed choice of law could be denied effect on the ground that it was not 'bona fide and legal'. Another example could be that contractual capacity is not governed by the proper law if the proper law has been chosen to create a capacity which the contracting parties otherwise lacked[271]. Furthermore, mandatory rules of the *lex fori* were applicable regardless any choice of law made by the parties. The reason is that these mandatory rules are located outside the set of rules which are subject to the parties' contractual autonomy and its exercise meaning that the choice of law has no effect on them.

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[269] *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277.
[270] The highest judicial body of certain Commonwealth countries.
[271] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', p 382.

But the choice of law is now in the Member State, including the United Kingdom, generally, i.e. subject to exclusions listed in Article 1(2) of the Rome Convention, governed by the Rome Convention and as already mentioned be soon governed by the Rome I Regulation which is modelled on the Rome Convention[272].

The basic structure of the **Rome Convention** is unsurprisingly based on the principle that the parties may choose the law to govern their contract. Article 3 allows the parties to choose a law to govern their contract by expressly choosing the law or by doing so in another way if its may be ascertained with reasonable certainty from the terms of the contract or the circumstances of the case[273]. The choice of law made by the parties is according to the Rome Convention never invalid but sometimes certain rules of law of a country which was not the chosen one shall be applied be the court instead of the conflicting provision of the chosen law. This arises in relation to the so-called mandatory rules, whereby there are five groups of mandatory rules, or rather the court shall apply mandatory laws in five instances according to the Rome Convention. This will be addressed later on in Section 4.3.3 of this paper.

Secondly, the **parties may choose the law and that law may tell them that their contract is not a contract after all**[274]. Similar to jurisdiction agreements, it may be accepted that a choice of law by the parties is a choice of law by reference to which the rights and obligations of the parties will be tested by the court although the validity of the substantive contract in which it is contained could be contested. If then the conclusion is that the rights and obligations never came into existence or are not enforceable, it will still be done by reference to the chosen law.

At common law there were suggestions that a contract should, where possible, be always governed by a law which would validate it. These suggestions came into existence due to

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[272] The Rome I Regulation, of course, departs in certain respect from the Rome Convention. This will be dealt with in a separate section of this paper.
[273] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', p 389.
[274] Ibid, p 393.

the fact that the intention to be legally bound seems to be contradictory to the choice of law which would deny that there was a valid contract in the first place. On the one hand, there are authorities supporting such suggestions although they are only rare and applicable to the cases where the choice was not expressed[275]. On the other hand, the idea of a law being chosen which also invalidates the substantive contract is not inherently self-contradictory as each of the two agreements – the substantive agreement and the choice of law agreement have its own sphere of operation and each its own criteria of validity. Therefore the provision of the choice of law agreement will be used to determine whether the substantive contract is valid or not.

Hence we should also consider whether the chosen law should deal with all issues of contractual validity and how the validity of the disputed choice of law agreement itself should be dealt with. At common law, the chosen law may be used to decide all issues of validity except for some issues of capacity and form. This means that the existence of the agreement, the legal enforceability of agreement, the scope of the agreement, the subsequent right to invalidate, or actual invalidation of, the substantive agreement, the discharge of the agreement and the remedies available are all referable to the law chosen by the parties[276]. When it comes to capacity, it has already been mentioned that individuals cannot confer capacity upon themselves which they would otherwise lack. The answers to this question provided by the Rome Convention will be shown later in this Section.

Thirdly, the **existence of the choice of law agreement can be contested by one or both parties**. As to the question of how a court should decide whether there was an agreement on choice of law this situation is the trickiest one and needs a closer examination. This will be done in Section 4.3 hereof.

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[275] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', p 394.
[276] Ibid, p 395.

Under the Rome Convention, the answer to the problems raised by the second and third situations mentioned above is given by its Articles 3(4), 8, 9 and 11. The detail explanation of the solutions brought by the Rome Convention will be done again in Section 4.3 hereof.

It has been shortly shown how **complex and difficult situations** may arise and need to be solved by the courts regarding the choice of law. The principle question is whether the choice of law agreements are successful in changing the applicable law to the law chosen by the parties. As to choice of law agreements, the following topics need to be introduced.

First of all the definition of choice of law agreements will be given and questions about the choice of law agreements concerned will be answered. **The biggest concern will be given on choice of law agreements under Art 3 of the Rome Convention.** Therefore, the test of application of the Rome Convention to choice of law clauses will be introduced. Thereafter the ambit of the choice of law agreements and requirements for their validity and the validity of the substantive contract will be examined. Finally, the Czech ZMPS and the new Rome I Regulation will be shortly introduced whereby note on enforcement of choice of law agreements will also be included.

4.1. WHAT ARE CHOICE OF LAW AGREEMENTS

As with jurisdiction agreements, before we actually start to deal with choice of law agreements under different law systems, it is necessary to try to find a definition of a choice of law agreement and determine the range of choice of law agreements that will be dealt with.

4.1.1. Definition

Although it is hard to find a single definition of a jurisdiction agreement in international commerce due to its variety, the definition may be e.g. that an agreement on choice of law may be or may **contain a promissory obligation**, according to which each party to the contract agrees that it will accept the application of the chosen law to the obligation of the given contract, and it will not act in a way that will undermine that chosen law or otherwise make it impossible for the chosen law to operate[277].

Once again as with jurisdiction agreements, the choice of law agreement may be one **provision of an agreement or can comprise a contract in its own right.** So as already mentioned; on the one hand, a provision of a contract might simply subject all disputes arising out of it to a certain law. On the other hand, the choice of law clause, probably together with a jurisdiction clause, may form a whole dispute resolution agreement.

It is clear that most of the question that will arise regarding the choice of law agreements will be the same as regarding the jurisdiction agreements. It is also clear, that the answers may not be the same. A good example of such difference is the **legal nature of the choice of law agreements.** It is submitted that the choice of law is something over which the parties to a contract have legal power to create mutually binding obligations enforceable by private litigation[278]. The crucial question is whether the choice of law agreement has a

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[277] Briggs, Adrian: *'Agreements on Jurisdiction and Choice of Law'*, p 10.
[278] Ibid, p 11.

wider role, i.e. whether it produces obligations which are independently enforceable as promissory obligations. This paper will, after giving an overview of the problem of choice of law agreements, only include a short note on enforcement of choice of law agreements in Chapter 5 as the question of enforcement could be a topic of a whole new book.

But before being able to examine and analyse any particular agreement it is nevertheless necessary to mention some **general principles** relating to the scope of and rights and duties arising out of choice of law agreements.

4.1.2. Scope of Choice of Law Agreements

Basically, the same questions regarding the scope of the choice of law as regarding the jurisdiction agreement arise. Once again, the choice of law agreement will only come to effect if the dispute falls within its scope. In order not to repeat, the problems such as the one of contractual relationship or tort that were dealt with in Section 3.1.2 will be left out[279].

The basic rule is that choice of law rules for contractual issues primarily give effect to the law selected by the parties. But in certain relations, an unfettered freedom to choose a law may be a freedom to **exploit a dominant position**[280]. Hence, all laws limit the freedom to choose the applicable law. Whereas the common law e.g. denied that there was a power to choose a law where this was not 'bona fide and legal', the Rome Convention rather limits the effect of the choice by giving priority to certain mandatory rules of the lex fori or rules from other laws than the chosen law[281]. The reason for this limitation is to protect certain interests of weaker parties.

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[279] See Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', p 39 ff for more detail.
[280] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', p 37.
[281] E.g. Arts 5 and 6 on consumer and employment contract or Art 7(2) on mandatory rules.

Having said that, it is clear that what falls under the scope of the choice of law agreement is a matter of its construction[282]. Finally, what needs to be remembered is, that even if the respective dispute falls within the scope of the choice of law agreement, the choice of law agreement may not take effect due to the limitations imposed by the Rome Convention or other regulations. More on the scope of the choice of law agreement will be said in Section 4.2 on the Rome Convention.

4.1.3. Rights and Duties Arising out of Choice of Law Agreements

As with jurisdiction agreements, it is clear that the rights and obligations of the parties will depend on the **interpretation by the relevant court** of the words used by the parties. Hence, reference is made to the detail explanation of the interpretation problems with jurisdiction agreements. Nevertheless, this topic will inevitably come up later in this Chapter when dealing with the Rome Convention.

[282] See more on this in Section 3.1.2.

4.2. THE ROME CONVENTION

Although the Rome I Regulation will come into force soon we still need to be concerned with the Rome Convention as all case law (although national) at hand relates to it and it will certainly take time before all changes between the Rome Convention and all new provisions of the Rome I Regulation will be interpreted by the ECJ.

4.2.1. The Purpose of the Rome Convention

The **purpose of the Rome Convention** is to establish a uniform choice of law rules for contractual obligations throughout the Member States. The Rome Convention is seen as a continuation of the work on unification of private international law began by the Brussels Convention. As the Brussels Convention, the Rome Convention is concerned with creating the right conditions for an internal market with the free movement of persons, goods, services and capital among the Member States. More particularly, since the law will be the same wherever trial takes place in the Member States, it inhibits the forum shopping that the Brussels convention allows. The Rome Convention also increases legal certainty and makes it easier to anticipate the law to be applied.

Although the purpose of the Rome Convention seems to be praiseful the introduction of the Rome Convention e.g. into English law caused some controversy[283]. It was said that the Rome Convention uses ill defined continental concepts such as mandatory rules and characteristic performance and when it does use a concept familiar to English lawyers such as the parties' freedom to choose the applicable law this is put in unfamiliar language and in the unfamiliar form of a code. Moreover the **Rome Convention was initially not accompanied by the decisions of the ECJ interpreting it**[284]. On the other hand, it is uncontroversial in that the substance of the law is largely unaltered whereby it is submitted

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[283] The introduction was done by the Contracts (Applicable Law) Act 1990.
[284] More on the topic of interpretation is written below.

that the Rome Convention produces benefits in terms both of harmonisation and, more questionably, improved certainty in the law.

It is necessary to mention that the Rome Convention allows for some **reservations** to be made by the Member States. On ratifying the Convention, the UK, as it was entitled to pursuant to Art 22 of the Rome Convention, reserved the right not to apply Articles 7 (1)[285] and 10 (1) (e)[286]. The effect of this reservations will be dealt with later in this Chapter.

The effect of implementation of the Rome Convention is in the Member States such that, for contracts made after the Rome Convention had come into force, the relevant statutes dealing with choice of law issues[287], in case of continental law systems, and the traditional common law rules on contract choice of law in case of England, were largely replaced by the rules contained in the Rome Convention. It is not possible for parties to contract out of the Convention, for this would defeat its purpose. Nevertheless in certain case such as, defamation in England, the old rules will continue to be applied even to contracts made after the Rome Convention came into force in a number of situations.

4.2.2. Interpretation of the Rome Convention

Two Protocols on interpretation of the Rome Convention were signed in Brussels in 1988[288]. The first protocol defines the scope of jurisdiction of the ECJ and the conditions under which that jurisdiction is to be exercised ("**First Protocol**")[289]. Contracting States accept the jurisdiction of the ECJ under this First Protocol.

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[285] Mandatory rules of foreign countries.
[286] The consequences of nullity of a contract.
[287] Such as the ZMPS in the case of the Czech Republic.
[288] North, Peter; Fawcett J.J.: 'Private International Law', 13th edition, Oxford 1999, p. 538.
[289] Official Journal C 027 , 26/01/1998 p. 0047 – 0051.

The second protocol[290] confers powers on the ECJ to interpret the Rome Convention ("**Second Protocol**"). The First and the Second Protocols have only been in force as of 1 August 2004 and therefore the case law of the ECJ on the Rome Convention is rather small.

4.2.2.1. Referrals to the ECJ

Two **limitations** on when a national court can request preliminary rulings on interpretation are contained in the First Protocol. First, a court can only make such a request if that court considers that a decision on the question is necessary to enable it to give a judgment. So there is nothing to stop the Contracting States' courts from deciding that the case is clear and there is no need to refer to the ECJ. The second limitation is in respect of the courts which can request a ruling from the ECJ. Only courts from which no further appeal is possible and any court when acting as an appeal court may request a preliminary ruling[291]. So in the case of e.g. the Czech Republic only the Highest Court (*Nejvyšší soud*), The Highest Administrative Court (*Nejvyšší správní soud)* and other court when acting as an appeal court may request a preliminary ruling[292].

It is important to note that this Protocol states that the specified **courts may rather than must request a ruling** by the ECJ in contrary to the referrals to the ECJ under the Brussels Convention. Some Member States including the UK argued that a provision for the ECJ to have jurisdiction in relation to interpretation of the Rome Convention was undesirable. Many international contracts provide for trial in England so it was feared that foreign businessmen would, in the future, opt for trial outside England or the EC rather than face the prospect of a compulsory referrals to the ECJ as it will delay the settlement of their dispute[293]. So in exercising this discretion national courts may take into account any appropriate factor including the wishes of the parties, who may want a speedy outcome of the litigation.

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[290] Official Journal C 027 , 26/01/1998 p. 0052 - 0053.
[291] Art 2 of the First Protocol.
[292] Ibid or see Pauknerová, Monika: '*Evropské mezinárodní právo soukromé*', Praha, C.H. Beck 2008, p. 402 ff for detail information.
[293] North, Peter; Fawcett J.J.: 'Private International Law', 13th edition, Oxford 1999, p. 539.

4.2.2.2. The Principles and Decisions Laid down by the ECJ

A good example of the use of the **principles and decisions laid down by the ECJ** is England. Section 3 (1) of the Contracts (Applicable Law) Act 1990 (the "1990 Act") provides that where the meaning of the Rome Convention is not referred to the ECJ, it must be determined in accordance with the principles laid down by, and any relevant decision of the ECJ. The effect of this section is that the English courts have to act in accordance with two different types of authority. Firstly any relevant decision of the ECJ and secondly, the principles laid down by the ECJ. This means that if the ECJ has previously given a decision on the provisions in issue, this must be followed. But what if there have been no referrals under the 1988 Protocols regarding the question at hand?

As North and Fawcett state[294], the ECJ is likely to apply the same general principles of interpretation to the Rome Convention as it applies to other areas of law. For example, the meaning of a provision is ascertained in the light of its purpose rather than by looking at its literal meaning. More importantly, the ECJ laid down certain general principles of the interpretation in relation to the Brussels Convention such as that it usually gives an **autonomous Community definition** to concepts and terms. So the same principles might be applied to the Tome Convention as it is also concerned with the unification of rules of private international law.

4.2.2.3. Principle of Uniform Interpretation

Art 18 of the Rome Convention provides that in the interpretation and application of the preceding uniform rules, **regard shall be had to their international character** and to the desirability of achieving uniformity in their interpretation and application. This principle that the ECJ and national courts are bound to follow is the principle of uniform interpretation which. This means that the courts should not define concepts by reference to

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[294] North, Peter; Fawcett J.J.: 'Private International Law', 13th edition, Oxford 1999, p. 540.

national law systems but instead give independent Community meaning to the terms used in the Rome Convention[295].

4.2.2.4. Aids to Interpretation

The often problem with European instruments is their interpretation. The question is not only whether they should be interpreted according to national laws or independently as stated above, but where practitioners should seek help with their interpretation. There are certain official documents or methods that might help to interpret the Rome Convention.

Firstly, there is the **Giuliano and Lagarde Report**[296]. For example in England, the Act 1990 allows the Giuliano and Lagarde Report[297] to be considered by the English courts in ascertaining the meaning or effect of any provision in the Rome Convention.

Secondly, the decisions of other Contracting States' courts on interpretation of the Rome convention are of persuasive authority.

Thirdly, the text of the Rome Convention in other languages may be useful for finding the exact meaning of the terms used as all of these are equally authentic[298].

Fourthly, the Brussels Convention might be used as well as the two conventions use the same concepts such as contractual obligation[299].

Fifthly, some help may be found in the **Rome II Regulation**. The Rome II Regulation help us e.g. with the matter of interpretation of a contractual obligation. As the Rome II Regulation deals with non-contractual obligations, it is clear that all obligations will come under one or the other[300]. Hence if the matter is an obligation, you have two instruments to

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[295] Ibid.
[296] Giuliano-Lagarde Report on the Convention on the Law Applicable to Contractual Obligations C 282/1980.
[297] And also the Tizzano Report on the Protocols C 219/1990.
[298] A good example for England is the difference between Arts 3(3) and 7 of the Rome Convention where the English version uses the term 'mandatory rules' in both, e.g. the French version uses different term thereby easing the readers the understanding of the difference between the meaning and use of the two said Articles.
[299] See Arts 1(1) of the Rome Convention and 5(1) of the Brussels Convention.
[300] There can be a case which does not involve obligations but e.g. property cases. They involve title not obligation so it will not come within neither.

consider. Therefore in our case, if it seems to fall under the Rome II Regulation, it should be excluded out of the scope of the Rome Convention. It is necessary to mention that this system will fully work only after both the Rome I Regulation and the Rome II Regulation come into force.

Finally, **referrals to the ECJ** can be made under the Firs Protocol and the Second Protocol. Why are there not many cases available? The reason is that the firs reference was only made on 28 March 2008 in *Intercontainer Interfrigo(ICF) S.C./M.I.C. Operations B.V*[301], by the Dutch Supreme Court (Hoge Raad) with regard to the interpretation of Art 4 of the Rome Convention. The preliminary reference is the first to be made pursuant to the two Protocols on the interpretation of the Convention by the Court of Justice, that were signed by the Member States in 1988. As we have already mentioned, the Protocols entered into force on 1st August 2004, following the ratification by Belgium.

The late ratification of the two Protocols was made due to the view of some countries that the whole question of references to ECJ was very controversial. Yet the Rome Convention will not work in a harmonised way unless there is sufficient ECJ case law providing communitarian meaning to the terms used. Nowadays, it is important that the issue of the Protocols does not need to be solved anymore due to the entry into force of the Rome I Regulation.

4.2.3. Application of the Rome Convention

The Rome Convention applies to matters falling within its scope. The Rome Convention is intended to be of **universal application**. Therefore, the Convention shall be applied by every Member State if trial is in a Member State, i.e. it applies regardless of whether the contract has any connection with a Contracting State. In particular, there is no need for either party to the contract to be domiciled or resident in a Contracting State. Therefore, it

[301] Dutch Supreme Court Case (Nr. C06/318HR - LJN BC2726).

is not like the Brussels I Regulation with two sets of rules; one for the defendant within the Member States and one from the others. This avoids the need to distinguish between Contracting States and non-Contracting States.

Furthermore, Article 2 of the Rome Convention states that any law specified by this Convention shall be applied whether or not it is the law of a Contracting State. This makes the law easier and prevents problems mentioned in Section 3.3 above on application of the Brussels I Regulation.

As already mention in the beginning of this Section, the Rome Convention applies to matters falling within its scope. Hence, first we need to discover what the scope of the Rome Convention is, before talking about the choice of law agreements itself.

4.2.4. Scope of the Convention

First of all, certain general remarks regarding the scope of the Rome Convention need to made. As to its **temporal scope**, the Convention does not have retrospective effect. Therefore, it only applies to contracts made after the Convention has entered into force in that respective State[302]. The traditional common law rules or statutes such as the ZMPS will continue to apply to contracts made before the convention has entered into force.

It is also important to note that the **Convention does not prejudice the application of other international conventions** to which a Contracting State is a party or becomes a party[303]. A good example of such other convention is, in case of England, the carriage of goods by sea that will still be governed by the Hague-Visby Rules, implemented by the Carriage of Goods by Sea Act 1971, and not by the Rome Convention. Furthermore, such conventions laying down choice of law rules relating to contractual obligations and acts

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[302] 1 April 1991 in the case of the UK and 1 July 2006 in case of the Czech Republic.
[303] Art 21 of the Rome Convention.

implementing them, as other Community Regulations and Directives and national laws implementing them[304], take precedence over the Rome Convention.

Having said that, we can now deal with the two separate basic requirements of application of the Rome Convention. As Article 1(1) states that 'The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries', it is clear that the Rome Convention only applies to contractual obligations and in case of a choice between two laws of different countries.

4.2.4.1. Contractual Obligation

Art 1(1) makes it clear that the Rome Convention does not cover e.g. tortious obligations, property rights and intellectual property rights[305].

Furthermore, in its Art 10(1) (e), the Convention also contains a provision dealing with 'the consequences of nullity of the contract' which is under English law traditionally regarded as being a **quasi-contractual issue.** However, in the continental law system countries, this is regarded as being contractual. Hence, a problem of classification arises. One Contracting State may classify an obligation as being contractual in circumstances where another state would classify it as being tortious. This problem would be avoided if there was a community meaning to the concept of a contractual obligation which there is not.

As we have already mentioned above, there are certain aids to interpretation of the Rome Convention, one of them being the Brussels Convention and the Brussels I Regulation. How did we come across the idea of using the Brussels I Regulation? Article 5 of the Brussels I Regulation states matters related to the contract. If we need to decide what a contractual obligation is for the purpose of the Rome Convention, the obvious first place to look is the case law on contract under the Regulation because consistency is wanted

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[304] E.g. the Unfair Terms in Consumer Contracts Regulation 1994.
[305] Although contractual obligation in respect of an intellectual property right would come within the scope of the Rome Convention.

between the concepts. The leading case is *SPRL Arcado v SA Haviland*[306], where the ECJ examined the concept of a matter relating to a contract under Art 5(1) of the Brussels Convention and held that it was to be given an independent Community meaning. Therefore, it is submitted that a **community meaning of a contractual obligation** shall be used.

It is clear, that the definition of a contractual obligation is more of a problem in common law countries. What is important for common law lawyers is that in cases where there is **concurrent liability in contract and tort**, the claimant presumably is free to frame the action in tort or contract[307].

4.2.4.2. A Choice between Laws of Different Countries

The condition set out in Art 1(1) of the Rome Convention means that the contractual obligation has to have a certain **foreign element**. The typical examples of a foreign element may be that one of the parties to the contract is a foreign national or habitually resident abroad; or the contract is concluded abroad; or the contract is to be performed by one of the parties abroad[308]. In such cases the relevant court shall apply the uniform rules contained in the Rome Convention.

As far as England is concerned, this makes explicit what was implicit under the traditional common law rules on contract choice of law, i.e. under English private international law a choice of law problem exists whenever the court is faced with a dispute that contains a foreign element. The same is valid for the Czech ZMPS which also requires the relationship to include a foreign element (*mezinárodní prvek*).

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[306] Case 9/87 *SPRL Arcado v SA Haviland* [1988] ECR 1539.
[307] Dicey Morris & Collins: '*The Conflict of Laws*', 14th edition, 2006, para pp 1198-1199.
[308] North, Peter; Fawcett J.J.: 'Private International Law', 13th edition, Oxford 1999, p. 544.

But the Rome Convention does not only deal with international contracts, it also with purely domestic contracts which include a foreign element[309]. Two different types of cases can then arise.

The first, and for us less important, case is where, for example, one of the parties to a purely domestic contract moves its seat to the country where the proceedings have been started. Although there is a foreign element, no real connection other than the one to the former country exists. Nevertheless, it is submitted that such a situation falls within the scope of the Rome Convention. The reason is that the object of the Rome Convention is harmonisation of choice of law rules in contract which is most likely to be attained if the scope of the Convention is given as wide an interpretation as possible[310].

The second type of case is one which includes choice of law agreements. There might be e.g. a purely Czech contract in which the parties choose lets say English law. At first sight, it does not look like a choice of law case. A choice of law has been artificially made by the parties by including a clause in their contract. But if we look at Article 3(3) of the Rome Convention, it contains a limitation on the right to choose the law governing the contract. The Rome Convention, as already mentioned, does not directly say that it falls within its scope but it deals with such situation in its Article 3(3). Therefore, such situations fall within the scope of the Rome Convention. It is also worth mentioning that the Rome Convention will not apply if there is a purely Czech contract which merely incorporates a part of English law. This is close to another problem which will be dealt with in the next paragraph.

The problem now is what a law of a country is. As we know, the choice must be between the **laws of different countries**. Of course, a country is not precisely defined in the Rome Convention. The only guideline is given in its Art 19(1) which deals with the situation

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[309] Although this is done rather indirectly by Art 3(3).
[310] North, Peter; Fawcett J.J.: 'Private International Law', 13th edition, Oxford 1999, p. 545.

where a **state with more legal systems** is involved. It is submitted that a country is understood in a common private international law sense as a territorial unit with its own rules of law, in this case relating to contractual obligations[311]. The result of this is simply that e.g. Czech courts will need to apply English or Northern Ireland law under the Rome Convention. Interesting is also that by the virtue of Contracts (Applicable Law) Act 1990, Northern Ireland, England and Scotland are separate countries fort he purposes of the Rome Convention even in intra United Kingdom disputes.

Furthermore, another issue regarding the understanding of what law is open for choice by the private international law can arise; although it is more of a problem for cases falling outside of the Rome Convention. It is clear from the Rome Convention and from what was mentioned above that national laws could certainly be chosen but it is not so as clear with non-national laws such as *lex mercatoria* or the sharia as it does not prohibit it expressly. The problem with such laws is in particular their scope and content which may not be clear enough. However, we need not to deal with it further as this issue has been solved e.g. in the English case of *Shamil Bank of Bahrain EC v Baximco Pharmaceuticals Ltd*[312], so that only a law of a country, as defined by the Rome Convention, may be chosen by the parties.

To conclude, it is interesting to mention a specific problem which English courts face. As already mentioned Art 1(1) of the Rome Convention states that there must be 'a choice between laws of different countries'. English law deals with this problem so that **if foreign law is not pleaded or proved** the court gives a decision according to English law[313]. This is a problem as the parties to the dispute may circumvent the Rome Convention by simply not proving the foreign law[314]. It would therefore be better if this sort of case was regarded as coming within the Rome Convention.

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[311] North, Peter; Fawcett J.J.: 'Private International Law', 13th edition, Oxford 1999, p. 545.
[312] *Shamil Bank of Bahrain EC v Baximco Pharmaceuticals Ltd* [2004] EWCA Civ 19.
[313] The courts are free to apply this rule in relation to the Rome Convention because matters of evidence and procedure are excluded from the scope of the Rome Convention.
[314] More on this in Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', p 31.

4.2.4.3. Excluded Matters

Article 1 of the Rome Convention **excludes a wide variety of matters from the scope of the Rome Convention**. There are three main categories of the excluded matters. Firstly, certain commercial contracts such as arbitration and choice of court agreements and certain contracts of insurance are excluded[315]. Secondly, non-commercial contracts such as matrimonial matters, agreements to make wills and agreements to pay maintenance are excluded[316]. Thirdly, it excludes certain matters which do not involve contract choice of law such as evidence and procedure or which under the law of some Member States do not involve contract choice of law, such as negotiable instruments and the issue of capacity to contract[317].

Furthermore, questions involving the status or legal capacity of natural persons without prejudice to Article 11 are excluded from the scope of the Rome Convention. Therefore, national courts are left to apply their traditional rules of private international law to the issue of capacity to contract. However Article 11t is an exception to this. This is a fairly narrow rule designed to protect a party who contracts with a natural person under incapacity from being caught unaware by this[318].

4.2.5. The Applicable Law

The Rome Convention is based on a notion of a so called 'Applicable Law'. The applicable law under the Rome Convention can be either the law **chosen by the parties or**, in the absence of choice, **ascertained by the relevant court**. A basic distinction needs to be drawn between the situation where the law is chosen by the parties and the situation where the applicable law is ascertained in the absence of choice as choice is concerned

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[315] Art 1(2) (d) and Arts 1(3) and (4) of the Rome Convention.
[316] Art 1(2) (b) of the Rome Convention.
[317] Art 1(2) (a), (c), (e), (f), (g) and (h) of the Rome Convention.
[318] North, Peter; Fawcett J.J.: 'Private International Law', 13th edition, Oxford 1999, p. 546.

with the actual intentions of the parties and absence of choice requires reference to objective connections localising the contract[319].

However the applicable law may be ascertained, the Rome Convention presupposes that there has to be an applicable law at the time when the contract is concluded[320]. This means that the traditional common law concept of the "floating" proper law, i.e. a proper law which was non-existent at the time when the contract was made, was rejected[321].

What needs to be also mentioned at the beginning is that the applicable law under the Rome Convention refers to the domestic law of the country in question whereby the doctrine of *renvoi*[322] is excluded[323].

The Choice of law, in its narrow sense, i.e. a **choice of law made by the parties**, is one of the two main subject matters of this paper. Therefore, indeed, emphasis will be placed on Art 3 of the Rome Convention which allows for the choice made by the parties. But as in certain cases of disputes about the validity of the choice of law clauses or in cases of limits to choice, as it has been already shown, the result can be that the applicable law needs to be ascertained as if there was no choice. Therefore, the determination of the applicable law in absence of choice will be also examined.

4.2.6. The Law Chosen by the Parties

By virtue of Art 3 of the Rome Convention, the parties shall be entitled to choose the law that will govern their contract. A more detail examination the law chosen by the parties will be presented in Chapter 4.3 hereof.

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[319] Ibid; p 552.
[320] See Arts 3 (2) and 4 (2) of the Rome Convention.
[321] North, Peter; Fawcett J.J.: 'Private International Law', 13th edition, Oxford 1999, p. 552.
[322] '*Zpětný odkaz*' in Czech; which is not strictly forbidden by the Czech ZMPS. See its Para 35.
[323] Art 15 of the Rome Convention.

4.2.7. Applicable Law in the Absence of Choice

In the absence of choice of law by the parties, the **court is left to ascertain the applicable law** on its own. As practitioners know this happens in a surprisingly high number of cases. The determination of the applicable law in the absence of choice is dealt with in Article 4 of the Rome Convention. Three rules exist to deal with the choice of law by the relevant court.

Firstly, the basic rule is that the contract shall be governed by the law of the country with which it is most closely connected[324].

Secondly, a general presumption for what the most closely connected country is exists. This presumption is based on the **concept of characteristic performance**[325]. The general presumption is supported by two special presumptions for two particular types of contract.

Thirdly, there is a provision which tells us when the presumptions shall be disregarded if it appears that the contract is most closely connected with another country[326].

The reason for these rules is to combine certainty, provided by the presumptions, with the flexibility, provided by the **closest connection test** and the power to rebut the presumptions[327]. It is clear from the structure of Art 4 of the Rome Convention that it is a result of **compromise between the common law and continental law concepts**[328].

Furthermore, it is submitted that the scheme of Art 4 of the Rome Convention raises questions as it is not clear if what is intended is a three, two or one stage process. However the Giuliano and Lagarde Report envisages that a one stage process which starts and finishes with the presumptions will be often the case[329].

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[324] Art 4(1) of the Rome Convention.
[325] Art 4 (2) of the Rome Convention.
[326] Art 4 (5) of the Rome Convention.
[327] North, Peter; Fawcett J.J.: 'Private International Law', 13th edition, Oxford 1999, p. 565.
[328] Pauknerová, Monika: '*Evropské mezinárodní právo soukromé*', Praha, C.H. Beck 2008, p. 227.
[329] The Giuliano and Lagarde Report at page 21.

In order to understand how the above mentioned system works, it is necessary to look at it in a bigger detail. It is also necessary to mention that it will not be dealt with special contracts, i.e. consumer an individual employment contracts, as these do not fall within the scope of this paper.

4.2.7.1. The Closest Connection

Article 4(1) of the Rome Convention states:

"*To the extent that the law applicable to the contract has not been chosen in accordance with article 3*[330]*, the contract shall be governed by the law of the country with which it is most closely connected*".

The Article means that the applicable law is determined by looking objectively at the connections linking the contract to a particular country. This rule is based on the common core of the law in Member States, where the same sort of flexible approach has been commonly used[331].

This system is inspired by[332] and therefore very close to the proper law of the contract approach in **England**. At common law in the absence of an express or inferred choice, the court looked for the system of law with which the transaction was most closely connected, i.e. took into account certain factors like place of residence or business of the parties, the place where the relationship between the parties was centred, the place where the contract was made or was to be performed or the nature and subject matter of the contract. Important is that these factors are still relevant under the Rome Convention. However, in contrast to the proper law of the contract approach, it is now possible to take account of certain factors which supervened after the conclusion of the contract.

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[330] Or, also, their choice have been ineffective
[331] See the Giuliano and Lagarde Report at pp 19-20.
[332] Pauknerová, Monika: '*Evropské mezinárodní právo soukromé*', Praha, C.H. Beck 2008, p. 226.

Article 4 of the Rome Convention applies a **purely objective test**, so it is therefore inappropriate to talk about the parties' intentions. It follows that the fact that the contract would be valid under one country's law but not under another's, cannot be considered under Article 4, since this factor is only relevant to the determination of the parties' intentions, i.e. the parties would expect the contract to be valid[333].

As this paper is also concerned with choice of jurisdiction agreement it should be noted that although certain terms of the contract, such as a choice of jurisdiction or arbitration clauses, should presumably be considered in the context of Article 4, i.e. their relevance when operating the objective test is limited to showing an objective connection with a country.

Finally it is necessary to remember that the connection must be between the contract and the country which law is to be applied and not e.g. between the dispute or transaction and that country.

4.2.7.2. Severability of the Contract

As to the severability, it needs to be noted that the last sentence of Art 4(1) of the Rome Convention states that it is possible for a part of the contract to be governed by the law of another country if it has a closer connection with that country. Although the Giuliano and Lagarde Report says that this should be done "**as seldom as possible**"[334], it is a clear distinction from previous regulations in continental states such as the Czech Republic where the ZMPS did not expressly allowed such severing[335].

4.2.7.3. The Presumptions – General Presumption

As we have already mentioned, the Rome Convention tries to find **balance between certainty and flexibility**. It is clear that an objective test that seeks to localise the contract

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[333] North, Peter; Fawcett J.J.: 'Private International Law', 13th edition, Oxford 1999, p. 566.
[334] See page 23 of the Report.
[335] Pauknerová, Monika: '*Evropské mezinárodní právo soukromé*', Praha, C.H. Beck 2008, p. 226.

is flexible but uncertain. Therefore, the Rome Convention tries to solve this problem with presumptions which can be applied also solely without searching for the country with the closest connection[336].

The **general presumption** relating to characteristic performance is contained in Article 4(2) of the Rome Convention which falls into two parts. First of all the characteristic performance under the contract has to be identified. After that the country where the party who is to affect the characteristic performance has its habitual residence or central administration needs to be ascertained.

The origin of the **characteristic performance concept**, which is typical for continental law[337], is the Swiss private international law[338]. Under English law place of performance is well know as a connecting factor does not work if both parties have to perform and may have to do so in different states[339]. The concept of characteristic performance seeks to avoid this difficulty by concentrating on just one performance; the one which is characteristic of the contract as a whole.

Although there is a problem of identifying the characteristic performance it is submitted that the characteristic performance is, generally, the **performance of one party against which monies shall be paid**[340]. The Swiss law does not help much as there this depends on the type of contract involved. The Giuliano and Lagarde Report states that the characteristic performance is usually the performance for which the payment is due[341]. The Giuliano and Lagarde report also gives some examples of characteristic performance such as the delivery of the goods, the granting of a right to make use of property, the provision of a service.

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[336] Page 21 of the Giuliano and Lagarde Report.
[337] Pauknerová, Monika: '*Evropské mezinárodní právo soukromé*', Praha, C.H. Beck 2008, p. 226.
[338] Swiss Federal Statute on Private International Law, 1987 art 117
[339] North, Peter; Fawcett JJ.: 'Private International Law', 13th edition, Oxford 1999, p. 569.
[340] Pauknerová, Monika: '*Evropské mezinárodní právo soukromé*', Praha, C.H. Beck 2008, p. 226.
[341] See page 20.

In other cases not named by the Giuliano and Lagarde Report we have to look at the **case law**. There are numerous national cases in this regard. To name at least one, in *Bank of Baroda v Vysya Bank*[342], an **English case**, the court made it clear that with a contract of guarantee, the characteristic performance is always that of the guarantor. In this case the position of a bank confirming a letter of credit was regarded as being analogous to that of a guarantor. The characteristic performance of the contract between the confirming bank and the issuing bank was the honouring by the confirming bank of its confirmation whereby the characteristic performance between the issuing bank and the beneficiary was the issue of letter of credit.

Interestingly, the concept of characteristic performance is well known for Czech lawyers due to the interpretation of Para 10 of the **Czech ZMPS** according to which the applicable law is the law of the country in which the party, whose performance is characteristic for the particular contract and distinguishes it from other contracts, has its seat or habitual residence[343]. Hence the new regulation is in accordance with the previous praxis of Czech courts thereby easing the use of the Rome Convention for Czech practitioners.

Nevertheless, the characteristic performance concept met with some **criticism**. Above all, there are some contracts which cannot be fitted within the concept; such as a contract of barter[344]. Other difficult examples such as contracts for the commercial exploitation of intellectual property rights may be given[345]. The Rome Convention provides a solution to this in Article 4(5) which will be dealt with later.

Furthermore, **other reasons for criticism** such as that the definition of characteristic performance in terms of the performance for which the payment is due does not stand up well to close scrutiny or that in terms of economic strength, the large enterprise, the

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[342] *Bank of Baroda v Vysya Bank* [1994] 2 Lloyd's Rep 87.
[343] Pauknerová, Monika: '*Evropské mezinárodní právo soukromé*', Praha, C.H. Beck 2008, p. 227.
[344] See Case 266/85 *Shenavai v Kreischer* [1987] ECR 239.
[345] Fawcett, JJ; Torremans, Paul: '*Intellectual Property and Private International Law*', Oxford 1998, pp. 559 ff.

manufacturer of the goods, the provider of the services and the professional is favoured against the other party who may well be in a weaker economic position[346].

The next step after determining the characteristic performance is to determine the **place of residence**, or in a case of a company, its central administration, of the party that is to affect the characteristic performance[347]. Furthermore according to Art 4(2), if the contract is entered into in the course of the trade or profession of the party who is to affect the characteristic performance, reference is made to the principal place of business of that party or to another place of business. Thus, as already mentioned in this section and according to the English case of *Bank of Baroda v Vysya Bank*, in a contract between a bank issuing a letter of credit and another bank confirming this, if the performance characteristic of the contract is affected through the confirming bank's London office, English law will govern the contract.

It is very important to remember that Article 4(2) of the Rome Convention makes it clear that reference is to be made to the habitual residence or central administration as at the **time of the conclusion of the contract**. The reason for this solution is clear; the possibility of changes in this connecting factor. It is noticeable that, whilst provision is made for the situation where characteristic performance cannot be ascertained, there is no corresponding provision dealing with the situation where the habitual residence etc cannot be ascertained[348]. Presumably the forum will have to use its own national definitions of these concepts.

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[346] North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 570.
[347] See the wording of Article 4(2) of the Rome Convention.
[348] North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 571.

4.2.7.4. The Presumptions – Special Presumptions

Beside the general presumption which is applicable regardless of the type of contract involved, two special presumptions relating to immovable property[349] and carriage of goods[350] have been deemed necessary.

According to Art 4(2) of the Rome Convention, as to **immovable property**, the assumption is that the contract is most closely connected with the country where the immovable property is situated. However this provision only applies to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property. The Giuliano and Lagarde Report (The Report) gives us some aid by stating that e.g. a contract for the sale of property or for the rental of a holiday home would come within this, but a contract for construction or repair would not because the main subject matter of the contract is not the immovable property itself[351]. As with the general presumptions this can be rebutted if the contract is more closely connected with another country.

As to contracts for the **carriage of goods** one of a number of alternative connections with a country needs to be satisfied for the law of that country to be the applicable law[352]. If this is not the case, presumably no presumption operates[353]. As already mentioned, other international conventions may apply and these take precedence over the Rome Convention. This is exactly the case with contracts of carriage which will often be governed by the Hague-Visby rules[354].

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[349] Art 4(3) of the Rome Convention.
[350] Art 4(4) of the Rome Convention.
[351] At page 21.
[352] Art 4(4) of the Rome Convention.
[353] North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 573.
[354] I.e. the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading drafted in Brussels in 1924 as amended by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading from 1968.

4.2.7.5. Non-application of the presumptions

Art 4(5) of the Rome Convention is a **general provision enabling flexibility** in the use of other provision of Article 4(5)[355]. It provides that: 'Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2,3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country'.

This deals with two very different situations. Firstly, where the **characteristic performance cannot be determined** Article 4(2) does not apply and the applicable law has to be determined by using the closest connection approach under Article 4(1) of the Rome Convention. In such a case, the court will need to ascertain all the connections with the different countries, give weight to these and if they are evenly balanced between two countries, find one especially important connection which tips the balance in favour of one country[356]. This is very close to what happens at common law with the search for the objective proper law of the contract.

Secondly, if it appears from the circumstances as a whole that the **contract is more closely connected with another country**, presumptions under Art 4 of the Rome Convention are to be disregarded. This power to rebut the presumptions provides flexibility and was thought to be necessary because of the wide variety of different types of contract that have to be dealt with under the Convention[357]. However the flexibility brings the risk of uncertainty and lack of predictability.

The **Czech law**, although it does not include a provision similar to Art 4(5) of the Rome Convention, allows flexibility by using the term "generally"[358] when dealing with the use

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[355] Pauknerová, Monika: '*Evropské mezinárodní právo soukromé*', Praha, C.H. Beck 2008, p. 229.
[356] North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 573.
[357] Ibid.
[358] See Paras 10(2) and (3) of the Czech ZMPS.

of the presumptions thereby enabling the judge to rebut them and use the closest connection test. It is submitted that this possibility is used in practice quite often[359].

The theory is one thing, the **use in practice** another. The question about when a contract is more closely connected with another country is a hard one. Once again, we can find some help in the case law, in particular in the already mentioned English case of *Bank of Baroda v Vysya Bank* and a Dutch case usually referred to as the *Machinefabriek BOA case*[360].

On the one hand, Mance J applied Article 4 (5) of the Rome Convention. This involved several separate contracts of letter of credits and Mance J was concerned that these should not be governed by different laws. Otherwise this could lead to the situation where the applicable law varied according to the bank against which the beneficiary decided to enforce the credit. According to Article 4(2) of the Rome Convention, English law governed the contract between the beneficiary and the plaintiff confirming bank, whereas Indian law governed the contract between the beneficiary and the defendant issuing bank. The result of applying Article 4(5) in relation to the latter contract was that it too was governed by English law.

On the other hand, the Dutch Supreme Court refused to apply Art 4(5) of the Rome Convention to rebut the presumption that Dutch law applied even though the only connection with the Netherlands was that it was the place of business of the person whose performance was characteristic performance whereas many other elements referred to France.

It is necessary to mention that the **relation between the general presumption in Art 4(2) and Art 4(5)** of the Rome Convention has been subject of dispute between above all the United Kingdom and some continental countries[361]. These disputes led to the new

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[359] Pauknerová, Monika: '*Evropské mezinárodní právo soukromé*', Praha, C.H. Beck 2008, p. 229.
[360] *Societe Nouvelle des Papeteries de l'Aa v Machinenfabriek BOA* from 25 September, NJ (1992) No 750.
[361] Pauknerová, Monika: '*Evropské mezinárodní právo soukromé*', Praha, C.H. Beck 2008, p. 229.

regulation set forth in the Rome I Regulation which will be discussed late in Section 4.4 hereof.

This dispute shows the **difference between the common law and civil law approaches** to such cases. It is submitted that the English attitude is that Article 4(5) of the Rome Convention formally makes the presumption very weak and the presumption is displaced if the court considers that it is not appropriate to apply it in the circumstances of any given case whereby the Civil law approach is that the presumption is of great weight and should only be rebutted in exceptional cases and that the law identified by the presumption prevails unless it has no real significance as a connecting factor[362].

[362] North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 574.

4.3. AMBIT AND VALIDITY OF CHOICE OF LAW AGREEMENTS

After the Rome Convention has been introduced and is clear when it applies and what its purpose is, we can discuss certain issues regarding the choice of law made by the parties in more detail and pin-point some interesting differences to pre-Rome Convention national laws.

4.3.1. Freedom of Choice

The question regarding the freedom of choice of law is whether the parties should be free to choose the law applicable to their contract, to what extent does the Rome Convention give effect to that and what limits, if any, should there be on such freedom. As the answers seem to be quite easy, let us make some **advanced conclusions** and make a detail examination later in this section.

Firstly, it is good that parties are free to choose. It is submitted that the parties are entitled to choose the terms of the contract, most aspects of the contract such as the place of delivery, the place of payment etc. Why should they not be able to choose the law governs the contract?

Secondly, it is clear from the Rome Convention[363] that the parties can choose the law to govern their contract that has nothing to do with the circumstances of the contract. Even when the parties choose the applicable, they may change it later on. That may involve altering the applicable law even after a dispute has arisen. The principle is that the parties can have different clauses covered by different laws.

Thirdly, it is submitted that limitations on the parties' freedom to choose the governing law existed before the Rome Convention and are of course contained in the Rome Convention as well. As already mentioned, prior to the Rome Convention, there were some restrictions

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[363] See the previous explanation in Section 4.2.6 of this paper.

such as that the choice must be bona fide and legal[364]. By virtue of the Rome Convention, the restrictions mentioned in Sections 4.3.3 and 4.3.4 exist.

4.3.1.1. Party Autonomy

Art 3 of the Rome Convention which states that "A contract shall be governed by the law chosen by the parties" is based on **party autonomy**. This party autonomy shall provide the certainty and predictability which are essential in commercial matters[365]. Hence the parties shall also have the right, at any time, to pick and choose the applicable law so that governs the whole or merely part of the contract and later to vary that choice. This is consistent with Para 9 of the Czech ZMPS[366] which again confirms the opinion that the Rome Convention builds on previous national regulations and that its application should not be difficult even for lawyers from the new EC Member States.

4.3.1.2. *Dépaçage*

As to the possibility for the parties to choose different applicable law for different parts of the contract, the principle is called by the French word "*Dépaçage*"[367] and is expressed in the last sentence of Art 3(1) of the Rome Convention. Thus there could be an express choice of Czech law to govern one part but an express choice of English law to govern the rest of the contract. The difference between a choice expressed by the parties or inferred by the court will be discussed later in Section 4.3.2 of this paper.

The Giuliano and Lagarde Report[368] raises certain **restriction on the principle of *Dépaçage***, in particular that the choices made by the parties must be logically consistent. This will be dealt with later in this Section.

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[364] This restriction was created by Lord Wright in the case of *Vita Products Inc v Unus Shipping Co Ltd.*
[365] North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 553.
[366] Pauknerová, Monika: '*Evropské mezinárodní právo soukromé*', Praha, C.H. Beck 2008, p. 222.
[367] The term used in other countries is e.g. "Aufspaltung" in German or "Štěpení" in Czech which correspond to "Partitioning" in English.
[368] E.g. on page 17.

It is submitted that the parties can also choose a law to govern a part of the contract but exercise no choice in respect of the remainder of the contract[369]. In this situation the applicable law for the remainder of the contract must be ascertained by the rules on the applicable law in the absence of choice[370]. The question now is what exactly is meant by part of the contract.

Firstly, it is submitted that a **separate clauses** in a contract is a part of a contract[371]. This means that the parties can choose one law to govern a particular clause and a different law to govern other clauses.

Secondly, from the example given by the Giuliano and Lagarde Report[372], it also appears that 'part' can include a **particular issue relating to the contract**. Hence the parties shall be entitled to choose one law to govern the interpretation of the contract and a different law to govern its discharge.

Finally, some contracts which consist of several independent contracts are **naturally severable**. Different laws can clearly be applied to these different contracts, whereby the last sentence of Article 4 (1) of the Rome Convention needs to be remembered. The parties have the freedom to sever the contract when exercising their choice as to the applicable law; the courts have the same power in the absence of choice but this is an exceptional power and should be used as seldom as possible.

If we are looking for an example of an **inconsistent choice of** law, it seems to follow from the example given by the Giuliano and Lagarde Report[373] that the parties are not free to take a single issue such as repudiation of the contract and to split this so that one law governs one party's rights and a different law governs the other party's rights. Hence, if

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[369] The Working group preparing the Rome Convention rejected the notion of a presumption that the law chosen for one part of the contract should govern the entirety.
[370] North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 553.
[371] Giuliano and Lagarde Report, p 17.
[372] Ibid.
[373] Ibid.

the parties do so and if the chosen laws cannot be reconciled, both choices fail and the rules on the applicable law in the absence of choice have to be used.

To conclude, it is required that the nature of the contract must be such that a part of the contract is independent from the rest and can be severed from it. The Giuliano and Lagarde Report gives examples such as joint ventures and other complex contracts.

This principle of "*Dépaçage*" seems to be, again, consistent with the interpretation praxis of the **Czech** ZMPS[374]. As to **England**, it is submitted that the provision on *dépaçage* does not seem to represent a major change in the law s well[375]. In *Vesta v Butcher*, it was held that although a reinsurance contract was governed by English law, the inferred intention of the parties was that certain clauses in the contract were to be governed by Norwegian law[376].

4.3.1.3. Timing and Variation of Choice

Article 3(2) of the Rome Convention provides that the parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under Article 3 or of other provisions of the Rome Convention. It is submitted that the choice can be made before the contract is concluded, at the time of the contract or even after the conclusion of the contract[377]. It follows that if the parties' choice is made only after the conclusion of the contract, then the applicable law at the time of the conclusion of the contract will have to be determined by reference to Art 4 of the Rome Convention. This law will apply until the parties subsequently exercise their choice, which may involve a variation in the applicable law.

The parties' **freedom to vary the applicable law** is a logical result of their right to choose the applicable law at any time. For example, the parties may have agreed at the time of

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[374] Kučera, Zdeněk: '*Mezinárodní právo soukromé*', 6th edition, Brno, Doplněk 2004, p 134.
[375] North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 553.
[376] *Forsikringsaktieselskapet Vesta v Butcher* [1986] 2 All ER 488.
[377] North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 554.

contracting that Czech law shall govern the contract and then later that, instead, English law shall govern the contract. The same is true for cases when the applicable law is chosen by virtue of the rules on the applicable law in the absence of choice, i.e. Art 4 of the Rome Convention.

As it has already been mentioned, the doctrine of *renvoi* is excluded; therefore it is irrelevant that the chosen law, e.g. Czech or English law, might not allow such variation. It is necessary to mention that if the variation is made during the course of legal proceedings, it is for the forum's law of procedure to decide the extent to which this is effective[378].

However there are certain **dangers in allowing a variation** of the applicable law by the parties. In particular, the new law chosen by the parties might contain formal requirements which were not known under the law originally applicable and which could create doubts as to the validity of the contract during the period preceding the new agreement between the parties. Or, the rights acquired by third parties at the time of the conclusion of the contract between the original contracting parties can be affected by a subsequent change in the choice of the applicable law.

To solve these potential dangers, the second sentence of Article 3(2) of the Rome Convention provides a **safeguard** by stating that any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.

Some scholars[379] mention two other **potential dangers** that can arise from the parties' variation of the applicable law. Firstly, the parties might thereby evade the mandatory rules of the country whose law was originally applicable. However, it is submitted that the same limitations on the right to choose the applicable law will apply to a subsequent choice

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[378] Giuliano and Lagarde Report, p 18.
[379] E.g. North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 556.

of the law as apply to an initial choice. Secondly, the parties might choose a new law which invalidates the contract thereby rendering the contract invalid. According to Art 8(1) of the Rome Convention, this is a matter for the new law that has been chosen, i.e. the validity of a choice of Czech law is a matter for Czech law.

It is submitted that the rule on variation is also consistent with the interpretation of Para 9 of the **Czech** ZMPS as it corresponds to the party autonomy principle[380]. As to **English** law, the rule on variation represents a welcome change. As it has already been mentioned, under the common law rules there was a suggestion that once proper law had been determined at the time the contract was made, it was then unchangeable during the life of the contract[381].

4.3.1.4. Choice and the English rules on pleading and proof of foreign law

Under common law, a problem not known to continental lawyers arises. The question is what happens if the parties choose e.g. Ugandian law but then neither of the parties pleads such law. It has already been mentioned that English procedural rule preserved by the Rome Convention indicates that English law must be applied automatically[382]. Hence there could be a procedural variation of the applicable law.

But Article 3(1) of the Rome Convention clearly states that the contract shall be governed by the law chosen by the parties. But this leads to a practical problem of what an English judge is to do if the parties fail to plead and prove foreign law. In view of this difficulty the English courts are likely to take a pragmatic line and simply apply English law under the English procedural rule[383].

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[380] Pauknerová, Monika: '*Evropské mezinárodní právo soukromé*', Praha, C.H. Beck 2008, p. 223.
[381] See e.g. *Armar Shipping Co Ltd v Caisse Algérienne d'Assurance et de Réassurance* [1981] 1 All ER 498.
[382] North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 556.
[383] Ibid.

4.3.2. Express and Inferred Choice of Law

Now as we know "when" we also need to look at "how" the parties are able to make a choice of the governing law. It is submitted that there are two basic ways; an express choice or an inferred (implied) choice. In particular, the Rome Convention states in its Art 3(1) that the choice of law must be expressed or "demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case".

It will be dealt with the **differences between the express and implied choice** of law in details later. An interesting question now is if the parties want a law to govern their contract why do they not put an expressed choice in it, i.e. why do they leave out choice of law clause? The reason is often simple; they do not agree to the clause. Hence a problem arises as when you leave the matter of choice of law open without choice of law clause it is clearly not a good idea. The position you are left in is, because of Art 4 of the Rome Convention, very uncertain and complicated as the Article is very difficult to apply and include lots of scope for argument. Therefore, parties who do not make an express choice of law are leaving themselves open to litigation the outcome of which cannot be predicted beforehand. A good example of the difficulties of use of Art 4 of the Rome Convention, in particular the exception under Article 4(5), has been given in the English case of *Definitely Maybe v Marek Lieberberg Konzertagentur GmbH*[384].

Due to problems mentioned in the previous paragraph, it is important that the choice of law should not only be a choice implied from the terms of the contract, e.g. a jurisdiction clause or use of some clauses typical for a certain law. So if the parties have included e.g. a jurisdiction agreement for proceedings in the Czech Republic, the inference is that the parties also want Czech law to govern. The fact that the parties have put a choice of jurisdiction or arbitration clause in that contract can be used to work out the intentions of

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[384] *Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH* [2001] 1 W.L.R. 1745.

the parties about what law should govern the contract. Other example is a standard form contract such as the Lloyd's Policy of Marine Insurance[385].

It is now clear that the parties have two possibilities to choose the law to govern their dispute, although one is a rather indirect choice. Hence, we should deal with the possibilities in more detail now.

4.3.2.1. An Express Choice

The express choice is for the parties an **obvious and easiest way to make a choice of law.** The parties can express a choice simply by including a choice of law clause in the contract stating that e.g. all disputes shall be governed by Czech law. As it has already been mentioned, it is important that the parties make an express choice, for without this there is considerable uncertainty as to the applicable law. The problem of consent to and the validity of the choice will not be dealt with in this Section as it is the subject matter of Section 4.3.6 hereof.

It is also worth mentioning that both under the common law rules and under the Rome Convention[386], it is important to **distinguish the express selection of the proper law from the incorporation** in the contract of certain domestic provisions of a foreign law, which thereupon became terms of the contract. Incorporation may be affected either by a transcription of the relevant provisions, i.e. a shorthand method of expressing agreed terms, or by a general statement that the rights and liabilities shall in certain respects be subject to these provisions[387].

For example, the parties to a Czech contract may expressly provide that their duties with regard to performance shall be regulated by certain specific rules contained in a German Code, which is in practice more common than one would think. Whether a particular term

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[385] The up-to-dated version of the policy may be found e.g. at http://www.lloyds.com/.
[386] Article 3 of the Rome Convention is only concerned with choice of law.
[387] North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 561.

incorporated in this manner is valid and effective, is a matter for determination by the applicable law under the Rome Convention. It appears that under the Rome Convention, once a part of foreign law was incorporated into the contract as a term it remained constant in the sense that it is unaffected, unlike if it was the applicable law, by any change in the relevant foreign law occurring after the date of the contract[388].

As Czech law does not include any specific provision on this matter, it can be presumed that the position on express choices of law is the same.

4.3.2.2. Inferred Choice

As already mentioned, Article 3(1) of the Rome Convention provides, as an alternative to express choice, that there can be a choice demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. This concept of an inferred or implied choice is well known in English law and is to be found in civil law countries as well[389], e.g. the Czech ZMPS enables it in its Para 9.

According to the Giuliano and Lagarde Report, an inference as to the parties' intentions can be drawn from the terms of the contract or the circumstances of the case.

As to the former, the Giuliano and Lagarde Report provides a number of examples of situations where a court may draw an inference as to the parties' intentions. In most of these examples the **inference is being drawn from the terms of the contract**, e.g. where the contract is a standard form known to be governed by a particular system of law, such as the already mentioned Lloyd's Policy of Marine Insurance[390].

Furthermore, the contract can contain a choice of forum clause or an arbitration clause naming the place of arbitration or there might be a reference to specific articles of the German Civil Code. The logic behind this is clear; if the parties intended that trial should

[388] North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 561.
[389] The Giuliano and Lagarde Report, pp. 15-17.
[390] For an example of such a situation in Czech law see Pauknerová, Monika: '*Evropské mezinárodní právo soukromé*', Praha, C.H. Beck 2008, p. 222.

take place e.g. in the Czech Republic, they must also have intended that Czech law should apply as it would be inconvenient and expensive for a foreign law to be applied, if not proved otherwise.

It is submitted that these are only examples of situations where it is possible to infer a choice from the terms of the contract, albeit particularly good ones[391]. Therefore, let us examine them in some detail by introducing some case law.

In this context, it needs to be said that the English law still preoccupies a dominant position in international commerce, in particular in maritime commerce. This together with the fact that the three examples, given by the Giuliano and Lagarde Report, of an inferred choice mentioned above are **standard examples of an inferred choice under the common law rules**[392], means that English case law is of great use, even for continental practitioners, for every day drafting of different commercial agreements.

For this reason, a pre-Rome Convention case of *Amin Rasheed Shipping Corpn v Kuwait Insurance Co*[393] may be introduced in more detail. In that case, Lord Diplock said that the terms of a standard Llyod's form of policy showed by necessary implication that the parties intended that the English law of marine insurance should apply. The result was very logical from the commercial point of view as Kuwait had no law of marine insurance so the parties could not have intended Kuwait law to apply. As we have already mentioned, the Giuliano and Lagarde Report gives a similar example of an inferred choice. Therefore the result of this famous English case would be presumably the same under the Rome Convention.

In another English case, *Egon Oldendorff v Liberia Corpn*[394], a clause which provided for arbitration in London was treated as an inferred choice of English law to govern the

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[391] North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 562.
[392] North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 562.
[393] *Amin Rasheed Shipping Corpn v Kuwait Insurance Co* [1984] AC 50.
[394] *Egon Oldendorff v Liberia Corpn* [1995] 2 Lloyd's Rep. 64.

contract by virtue of Article 3(1) of the Rome Convention. In this case the plaintiffs were German, the defendants Japanese, and the contract provided for arbitration in London. The defendant's pleadings that the arbitration was a minor factor and that other factors pointed objectively towards Japanese law, such as that a Japanese shipbroker acted as intermediary between the parties and the ships chartered were to be delivered and redelivered in Japan, have been rejected by the English court. It was also relevant in this case when inferring intention that the parties used a well known English language form of charter-party containing standard clauses with well known meanings in English law.

Now as some examples of inferred choices have been given, it needs to be remembered that, firstly, the inferred choice **must be demonstrated with a reasonable certainty**. If it is not, then the provisions on the applicable law in the absence of choice (Article 4 of the Rome Convention), must be applied to decide the case. Secondly, only actual or real intentions of the parties can be considered[395].

The result of this being that in cases like *Amin Rasheed* or in cases involving arbitration or choice of jurisdiction clauses it is submitted that parties had real intentions. On the other hand, the same cannot be said in a case where all that can be shown is that, for example, there is a clause in the contract relating to the currency in which payment is to be made. This is in clear contrast with the common law cases, where, although the language of inferred intent was often used, it seems that the courts were looking for a real or actual intention on the parties' part[396]. Hence it seems harder to draw an inference of intention under the Rome Convention than it was under the common law rules.

The Giuliano and Lagarde Report[397] makes it clear, by giving two other examples, that the other sources of interference are **the circumstances of the case.** The two examples are firstly where there is an express choice in a related transaction and secondly where there is

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[395] See the *Egon Oldendorff v Liberia Corpn* case for more details.
[396] North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 562.
[397] At page 17.

a previous course of dealing under contracts containing an express choice of the applicable law and this choice of law clause has been omitted in circumstances which do not indicate a deliberate change of policy by the parties[398]. Another distinction between common law and the Rome Convention may be drawn from these examples. The English courts under the common law rules used the language of inferred intent in similar circumstances. However they also inferred intent from the sort of purely objective factors, such as the residence of the parties or the nature and location of the subject of the contract from which it would be inappropriate to infer an actual intention under the Convention[399].

The obvious problem with the inferred choice and the **interferences** drawn from the terms of the contract or the circumstances of the case is that they might be **irreconcilable**. The Giuliano and Lagarde Report gives some hints how to solve such situation. It states that any inference which arises from a choice of jurisdiction clause "must always be subject to the other terms of the contract and all the circumstances of the case"[400]. The most common situation could be as follows; a choice of jurisdiction clause may point to an intention that Czech law shall apply, whereas previous course of dealing may point to an intention that the English law shall apply.

The **notion of conflicting inferences** is doubtlessly not confined to the situation where an inferred choice is being drawn from the presence of a choice of jurisdiction clause in the contract[401]. What seems to be clear from the Giuliano and Lagarde Report is that if there are conflicting inferences, then it cannot be said that the choice has been demonstrated with reasonable certainty, whereby Art 3(1) of the Rome Convention does not permit the court to infer a choice of law if the parties had no clear intention of making a choice[402]. Hence, the governing law has to be determined according to the rules on the applicable law in the absence of choice.

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[398] Ibid, p. 563.
[399] North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 563.
[400] See page 17.
[401] North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 563.
[402] The Giuliano and Lagarde Report, p. 17.

Other difficult examples of the conflicting interferences can be given, e.g. when the previous course of dealing raises the inference that English law governs, but certain objective connections point at the Czech Republic. The inference that the parties intended English law to govern can seemingly only be challenged by a conflicting inference, i.e. by evidence showing a real intention that Czech law should govern. The question now is if it is possible to draw such an inference from the factual connection with Czech Republic such as the residence of the parties and the place of performance.

The answer to this question can be found in the already mentioned English case od *Egon Oldendorff v Liberia Corpn.* It follows from the case that although it is possible to draw a **conflicting inference from objective factors**, it seems that the circumstances where it will be right to do so may be relatively rare[403]. Therefore, once it had been decided that there was English jurisdiction, there was a strong argument that the parties' intention was to choose English law to govern the case which it actually really did. Hence, it is submitted that the approach towards arbitration clauses under Article 3 of the Rome Convention was little or any different from that at common law which allows us to see the English authorities as useful even today.

4.3.3. Limitation on Choice – Art 3 of the Rome Convention

It will now be dealt with restrictions contained in Art 3 of the Rome Convention. The provision of Art 3(3) of the Rome Convention is concerned with the situation where there is an essentially domestic contract which is turned into a conflict of laws case by virtue simply of the parties' choice of a foreign applicable law.

According to Article 3(3) of the Rome Convention **mandatory rules** are rules that cannot be derogated from by the contract, e.g. clauses contained in the English Unfair Contract

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[403] North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 564.

Terms Act 1977[404] or provisions listed in Para 263 of the Czech Commercial Code[405] which states that these provisions cannot be derogated from by the parties. Other examples can be consumer contracts or labour law, e.g. when an employer would try to contract out of his responsibility in a purely domestic case by choosing a foreign law and the relevant statute, as a part of the domestic law, says you cannot do that. More on restrictions impose by other mandatory rules under Art 7 of the Rome Convention will be written later in Section 4.3.4 hereof. It is necessary to make clear that the concept of mandatory rules under Art 3(3) is different and shall be strictly distinguish from the concept under Art 7 of the Rome Convention. It is submitted that the unlucky wording of the English version of the Rome Convention causes confusion[406].

The effect of Article 3(3) of the Rome Convention is clearly the limitation of the right to choose the applicable law, but only to the extent of preserving the mandatory rules of the country where all the other relevant connections are situated[407]. So if the parties' choice of e.g. English law would appear to have been made with a view of evading their own law's e.g. Czech law, in particular mandatory rules contained in it, Article 3(3) will stop such evasion of the respective mandatory rules[408].

So when exactly does Art 3(3) of the Rome Convention apply? Firstly, it **requires parties to have chosen a foreign law**. Although some difficulties may arise, it seems to be clear that Article 3(3) of the Rome Convention is concerned with the choice of a foreign law and with the situation at the time of the choice, i.e. if a previously chosen foreign law shall cede to be foreign, Art 3(3) shall still operate.

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[404] Whereby this Act makes it clear that these controls will, in certain circumstances, apply despite the parties' choice of a foreign law to govern the contract.
[405] Act No. 513/1991 Sb., the Commercial Code, as amended.
[406] Whereby the Czech version causes the same confusion by using the term "imperativni ustanoveni" in both Arts 3(3) and 7.
[407] Ibid, p. 557.
[408] It has to be remembered that Art 3(3) of the Rome Convention goes in fact wider than this and it will ensure that any Czech mandatory rules apply even if the parties' have chosen English law for some perfectly legitimate reason, such as the fact that this is the applicable law under some related contract between the parties, and not in order to evade the Czech mandatory rules.

Secondly, the words "all **the other elements relevant** to the situation" contained in Article 3(3) of the Rome Convention may cause problems. The question here is obvious; when is an element relevant to the situation? You might get an argument about what is relevant connection, i.e. the concept is uncertain. Some suggestion may be found in English case law, such as that if payment for part of the transaction between the parties is made in a third country or the business between the parties is to some extent solicited in a third country, it cannot be said that all elements relevant to the situation are connected with the country which mandatory rules shall be applied[409]. Hence, the answer to this problem is not clear at all and has to be solved by further case law.

Thirdly, it is submitted that the structure of the Rome Convention suggests that the country, whose mandatory rules have to be applied, will be a foreign country and not the forum[410]. However, also mandatory rules of the forum under Article 7(2) of the Rome Convention shall be encompassed although this Article is concerned with a different and narrower type of mandatory rules.

Even when it is clear that Art 3(3) of the Rome Convention applies, it has to be solved by looking at the law of the country with which there are all the other relevant connections which domestic rule of that country is one which cannot be derogated from by contract. If such domestic rule is found, the effect of applying that mandatory rule is to override the parties' choice of law whereby the chosen law should still operate to govern other issues than the one overridden by the mandatory rule.

To conclude, as Article 3(3) of the Rome Convention is only concerned with preserving certain mandatory rules and imposes no restrictions on the choice of law itself, the **parties can choose the law of a country with which there is no relevant connection**[411]. This, of

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[409] See e.g. the English case *Shell International Petroleum Co Ltd v Coral Oil Co Ltd* [1999] 1 Lloyd's Rep 72 at 78-79.
[410] North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 558.
[411] Ibid, p. 559.

course, subject to other general restriction such as those mentioned in the following Sections.

4.3.3.1. Logically Consistent Choices

It follows from the notion of *Dépaçage* that if the parties choose two different laws for different parts of the contract, this choice must be logically consistent. If that is not the case the choice of law is meaningless and should be ignored[412]. But the difficulty in working out whether a choice of law clause is meaningless can be seen from a case decided under the traditional common law rules[413] which is of help even today for ascertainment of the position under the Rome Convention.

In that case a contract for the carriage of oil was to be governed by the laws of the flag of the vessel carrying the goods. Although the Court of Appeal held such choice meaningless because the contract contemplated that it would be performed in a number of different vessels flying different flags, the **House of Lords** interpreted it as referring to the law of the flag of the ships primarily used to carry the cargo.

4.3.3.2. Other Limitations under Art 3(3) of the Rome Convention

The applicable law under Article 3(3) of the Rome Convention refers to the law of a country. As already discussed[414], a problem may arise where the parties choose the *lex mercatoria*. It is a kind of trans-national law consisting of internationally accepted principles of trade law to be ascertained by arbitrators. Therefore, it is outside the parties' freedom to choose the applicable law.

Finally, the question is whether the parties can choose a **floating applicable law** to govern the contract, i.e. they agree that one of the parties will be able to ascertain the applicable law after the signing of the contract. The answer is no as the applicable law must exist and

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[412] North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 559.
[413] *Compagnie D'Armement Maritime SA v Cie Tunisienne de Navigation SA* [1971] AC 572.
[414] See 4.2.4.2 above.

be identifiable at the time when the contract is made[415]. The position was the same under the common law[416].

There are other restrictions on the right to choose e.g. mandatory rules and public policy under Articles 7 and 16. These restrictions are wider in a sense as they do not just restrict the right to choose the governing law but they also restrict the applicable law chosen according to Article 4 of the Rome Convention. Therefore, they will be dealt with in the next Section.

4.3.4. Limitation on the Applicable Law Chosen by the Parties – Mandatory Rules

Let us first think about why were mandatory rules introduced into the Rome Convention. Even if there is no choice of law included in the contract, i.e. Article 4 is to be applied, mandatory rules and public policy act as exceptions to the law applicable. Why these restrictions?

The reason is obvious; one of the most important principles of the Rome Convention is the freedom of choice. Parties can choose whatever law governs the contract. But at the same time, states have their own interests. Even before the Rome Convention, all countries in Europe have laid down limits on the parties' freedom of choice. The Rome Convention is simply preserving that.

Furthermore and as already mentioned, although the rules under Art 7 are called "Mandatory rules" they should be better called as **"Overriding mandatory rules"**. It is noteworthy that in the Rome I Regulation, the equivalent provision is called "Overriding mandatory provisions".

Article 7 is dealing with a different type of mandatory rules than Art 3(3) of the Rome Convention. Article 7(1) of the Rome Convention is concerned with foreign countries'

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[415] North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 559.
[416] *Dubai Electricity Co v Islamic Republic of Iran Shipping Lines* [1984] 2 Lloyd's Rep 380.

mandatory rules, whereby Art 7(2) with mandatory rules of the forum. Although the same rules can often fall and be used under Arts 3(3) and 7 of the Rome Convention the biggest difference is the scope of such mandatory rules.

Under Article 3(3), the situation is rather straight forward. The question here is; are the parties allowed to contract out of a certain **domestic substantive rule?** If they are not, such rule is a mandatory rule in the sense of Article 3(3). In this case, there has to be a purely domestic context. So if all connections are for example with the Czech Republic, the question will be if such rule is a rule that under Czech law the parties are not allowed to contract out of. As already mentioned, an example could be certain provision of the Czech Commercial Code, where the Code itself makes it clear that you cannot contract out of them[417].

Article 7 of the Rome Convention is actually very different because the rules under it are overriding mandatory rules, i.e. **they override some other rules**. Why are they called overriding? The reason is that Article 7 is concerned with mandatory rules in international context. What it really overrides are normal principles of private international law.

For example, under Article 7(2) of the Rome Convention, **the forum's mandatory rules** are concerned. If the trial takes place in the Czech Republic then it is Czech mandatory rules that apply. Let's say that you have a Czech statute which provides special protection for employees, whereby English law does not provide such protection. The parties, Czech and English, of an employment contract choose English law to evade the Czech law. The special protection in question actually applies regardless of the law applicable to the contract which is English law. Hence what is overridden is the normal principle of private international law as if it was not a domestic case you would normally apply English law.

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[417] See Para 263 of the Czech Commercial Code.

To conclude the example, the Czech statute in question has to be applicable in international context regardless of whatever law applies internationally. It is clear that not many statutes will do that. Most of them say nothing about the international situation; they assume that normal conflict of laws principle is going to be applied. Another good example of an act that expressly provides that it is to have overriding effect is the English Employment Rights Act 1996 which states in its Section 204(1) that it is immaterial whether the law governing the contract is English law or not.

Another question is the **definition of mandatory rules**. This is necessary in particular because the already mentioned difference between mandatory rules under Arts 3(3) and 7 of the Rome Convention. Some examples have already been given. We already know that we have two types of mandatory rules.

Firstly, **"normal" mandatory rules** under Art 3(3) and secondly **overriding mandatory rules** under Art 7 of the Rome Convention. So where else in the Rome Convention do we find the term mandatory rule? For example in Articles 5(2) and 6(1). Now the problem of determination of their character arises, i.e. in which sense is the term used? Is it Article 3(3) type or Article 7 type? In this case, it is clear that it is the Article 3(3) type as if you look at Article 7, it states that its rules shall apply whatever law applicable to contract. Article 5(2) does not state that. The situation is the same with Article 6(1) as it does not say anything about its overriding sense. As to other provisions, Article 9(6) may be given as an example of the "Article 7" type because it says "irrespective of the law governing the contract".

Let us now take a closer look at the provision of Art 7 of the Rome Convention.

4.3.4.1. Art 7(1) of the Rome Convention

It is necessary to mention that e.g. **England and Germany have made a reservation** for Art 7(1)[418] of the Rome Convention; i.e. it has restricted the application of foreign mandatory rules. In other words, foreign mandatory rules will be only applicable if they come within Article 3(3) or Article 5, Article 6, or Article 9(6) of the Rome Convention. On the other hand, e.g. the Czech Republic has not made such reservation and therefore Art 7(1) of the Rome Convention fully applies.

The reason for the reservation is that Art 7(1) provides uncertainty[419]. It says that the law of a foreign country with which the situation has the **closest connection** may be applied. What does the closest connection mean? This is hard to answer. It would be better to somehow pinpoint which country it is as you can have a contract which has a connection with 5 different countries. While working out what the governing law is, what is a practitioner suppose to do with all these connections with all these other countries? Is a Czech lawyer supposed then start the enquiry into Indian law and Chinese law and asking lawyers there whether they have mandatory rules which would apply in this situation?

Another problem with that is the wording of Art 7(1) that "**effect may be given**". Once again the question is what does that mean? It gives discretion as sometimes foreign countries' mandatory rules might be undesirable. A good example is when the American president passes a presidential decree without the involvement of the American Senate or House of Representatives. This degree freezes the money of the Iran government worldwide i.e. London or Prague as well. Should the Czech or English courts give effect to the presidential decree? A presidential decree is probably a mandatory rule under U.S. law. But other than the U.S. government can think that such prohibitions are not the best thing to do, therefore, the discretion is very useful.

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[418] On the other hand, under 7(2) of the Rome Convention England made no reservation because they like to apply English mandatory rules.

[419] For a detail discussion on this see North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 575 ff.

The reservation to Art 7(1) has a **political dimension** to it. The positive effect of the reservation is now clear. On the other hand, actually, Art 7(1) of the Rome Convention does perform a useful function and without is it leaves a country unequipped to deal with some typical situations we can face or have already faced in the past where a foreign mandatory rule needs to be upheld.

The problem of reservations to Art 7(1) of the Rome Convention is closely linked to public policy. As will be discussed below, **public policy has a negative form,** i.e. it restrains from using foreign law. But what if you need to uphold a foreign law, what provision do you have to apply? The answer is that Art 7(1) needs to be applied. It is interesting to mention that in the past, e.g. England could uphold the foreign law on the basis of the notion of public policy[420]. But now, England does not have any instruments to deal with such situation. This is often seen as a problem in England[421].

As regards Article 3(3) of the Rome Convention again, the wording is different. In particular, the rules have to be applied, i.e. there is no discretion under Art 3(3). Under Art 3(3) mandatory rules of a foreign country shall apply if the case passes the test of all relevant facts connected to one country. It is submitted that Article 3(3) is wider in a sense as its overriding element does not need to be shown. But the truth is that many cases will come within both[422].

4.3.4.2. Art 7 (2) of the Rome Convention

According to Art 7(2) of the Rome Convention "nothing in this Convention shall restrict the application of the rules of the **law of the forum** in a situation where they are mandatory irrespective of the law otherwise applicable to the contract". The opening words of Article 7(2) make it clear that this provision was put in so that the forum could

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[420] The so called 'Comity of Nations'.
[421] For a closer discussion see e.g. North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, pp. 557 ff.
[422] For example, the English Unfair Contract Terms Act comes within Article 3(3) but at the same time it has some sort of overriding effect as well according to its Sections 26 and 27; i.e. it has got some limited overriding effect.

continuo to apply its own mandatory rules to override contract choice of law rules even after the new regime under the Rome Convention entered into force[423]. The result of this Article should be the immediate application by the relevant judge of the mandatory rule of the *lex fori* although not part of the applicable law to the contract[424].

Regarding Art 7 (2) of the Rome Convention the ECJ case ***Ingmar***[425] is worth mentioning. The case is about a mandate agreement between an English company and a Californian company, whereas Californian law, as the law of the principle, was chosen to be the applicable law. The principle terminated the agreement and then the mandatory claimed damages. The Court of Appeal raised a preliminary question to the ECJ on the applicability of the EC Directive 86/653 which allows such claims for damages.

The ECJ decide the case to the effect that the respective directive was to be used although one of the parties was a non-EC resident and the chosen law was one of a non-Member State. It is submitted that the result means that a regulation included in an EC Directive may be seen as a part of the mandatory rules of the *lex fori*[426].

In England, there can be either mandatory statutory rules or mandatory common law rules. This of course leaves the problem of identifying such rules and of identifying a situation when such rules are given overriding effect. If, for example, the statute has no express provision on its overriding effect, it is indeed very difficult to ascertain whether it is intended to have an overriding effect in a particular situation. It is submitted that it is matter of construction of the statute[427]. To give an example from the Czech Republic, various provisions of the Czech Foreign Exchange Act[428] which state that some transactions related to foreign exchange should be approved by Czech authorities by

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[423] North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 578.
[424] Pauknerová, Monika: '*Evropské mezinárodní právo soukromé*', Praha, C.H. Beck 2008, p. 247.
[425] Case 381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000] ECR I/9305.
[426] For a more detail discussion see Pauknerová, Monika: '*Evropské mezinárodní právo soukromé*', Praha, C.H. Beck 2008, p. 247.
[427] North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 581.
[428] Act on Foreign Exchange No. 219/1995 Sb., as amended.

granting a special permission otherwise such transaction shall be invalid. It is submitted that such provisions fall under the scope of Art 7(2) of the Rome Convention.

4.3.5. Public Policy

The wording of Article 16 of the Rome Convention is **negative in form**. What it means is that although the parties may have agreed on Czech law to apply; the application of Czech law may be refused if it is against e.g. English public policy. Hence you apply English law actually. It follows that if there is a provision of English law which is rather objectionable, its application may be refused on the ground that it is against Czech public policy.

There are plenty of reported English cases before the Rome Convention helping to understand the use of the notion of public policy[429]. A recent theoretical example of a clear use of public policy would be e.g. prostitution. Prostitution is strictly forbidden under English law whereby this is not the case e.g. under Dutch law. As a result, English courts will not apply the foreign law due to its public policy. The same result would be under the Czech ZMPS[430].

Nonetheless, the understanding of the '***ordre public***' under the common law is far wider than in civil law countries as it also includes the commity of nations[431]. Therefore the problem arises with application of Art 16 of the Rome Convention. Nevertheless, the Giuliano and Lagarde Report[432] together with some ECJ case law[433] make it clear that Art 16 will only be used in exceptional circumstances. Hence, it is submitted that the ECJ, in case of England, would not allow the use of the *ordre public* as a substitution to the missing Art 7(1) of the Rome Convention.

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[429] For an interesting discussion on this topic see e.g. *Apple Corpn Ltd v Apple Computer Inc* [1992] FSR 431.
[430] Section 36 of the ZMPS.
[431] See North, Peter; Fawcett, JJ: 'Private International Law', 13th edition, Oxford 1999, p. 585.
[432] On page 38.
[433] Case 150/80 *Elefanten Schuh GmbH v Jacqmain* [1981] ECR 1671.

To make it clear, the main difference is that mandatory rules are positive (they demand to be applied) whereas public policy is negative (it restrains the application of foreign law).

4.3.6. Problem of Consent to Choice and the Validity of the Substantive Contract

There can be a **dispute as to whether one of the parties has consented to the choice**. In such case, large problems arise. The absence of consent may take several forms. Firstly, the person may argue that there was no contract at all. Secondly, the person may argue that a contract has been terminated with or without retrospective effect[434]. It is submitted that the identification of a choice of law rule to asses such arguments is difficult[435].

The common law solution is to give effect to an agreement on choice of law if there was one, whereby this will not be done if the proposed choice of law was not agreed to. But the problem here is unavoidably that if such agreement means 'contractual agreement', how can we look upon the agreement on choice of law when there is no contractual agreement about such choice?. The common law has solved this problem by adopting of a so called '**putative proper law**', i.e. the law which would have governed the respective contract if it had been valid and effective[436].

The **Rome Convention** has adopted a slightly different approach. Article 3(4) provides that issues in relation to the validity and existence of consent are determined in accordance with the special rules in the Rome Convention relating to material validity (Art 8), formal validity (Art 9) and incapacity (Art 11). This means that the solution has two parts. Firstly, the law which the contracts would have been governed by, if they were taken to be valid, shall be used. But secondly, the objecting party shall be allowed to rely on its own law to show that, by reference to it, it had not consented and was therefore not bound[437]. It is submitted that the Rome Convention solution is superior to the common law as it avoids

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[434] The contract might have been rescinded or frustrated etc.
[435] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 38.
[436] See e.g. the case of *The Parouth* [1982] 2 Lloyd's Rep 351 (CA).
[437] Arts 8(1) and 8(2) of the Rome Convention.

the 'whirlpools of theory'[438]. Nevertheless, Article 3(4) of the Rome Convention has also been criticised as the effect of it appears to be that one party can choose the law to govern the issue of consent to the choice.

To conclude, it is clear that were there is consent, the choice of law is valid and the law to be applied is the law which governs the contract. If there is no valid consent to the choice, presumably the applicable law must be determined under the rules on the applicable law in the absence of choice. Finally, the situation where an express choice of law will be ineffective due to the limitations set out in the Rome Convention, is primarily not a problem of consent or validity and have already been dealt with in Section 4.3.3 hereof.

[438] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 39.

4.4. THE NEW ROME I REGULATION

The Rome Convention has been for a long time one of the last instruments in the branch of private international law at the EC level, which was in the form of an international agreement. Hence it had all the negatives of that form e.g. the possibility of reservations to certain provisions of that instrument[439].

Works on the new regulation started on 15.12.2005 when the EC Commission introduced its proposal for the new regulation[440]. It is not the purpose of this paper to trace the history of the implementation of the new regulation therefore it is enough to mention that the new Rome I Regulation was passed by the EC Council on 5.-6.6.2008 and published in the Journal on 4.7.2008[441]. It is submitted that the final form of the Rome I Regulation represents a compromise among the Member States and above all an attempt to coordinate its provisions with other EC private international law instruments such as the Brussels I Regulation and the Rome II Regulation.

The Rome I Regulation transforms the Rome Convention into an EC Regulation and thereby brings **uniform regulation** to the choice of law in contractual matters in the Member States[442]. Although the Rome I Regulation follows the Rome Convention in most of its provisions, it is clear that it brings new solutions and concepts affected by e.g. the ECJ case law[443] and other EC private international law instruments such as the Brussels I Regulation.

Let us now deal with some changes that the Rome I Regulation will bring. It will only be dealt with changes that also fall under the scope of this paper defined in Chapter 1 hereof.

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[439] See for example Article 22 of the Rome Convention.
[440] COM (2005) 650 final available at www.eur-lex.europe.eu
[441] Myšáková, Petra: 'Nařízení Řím I – revoluce v oblasti rozhodného práva pro závazky ze smluv?', Obchodněprávní Revue 2/2009, C.H. Beck, p. 40.
[442] Pauknerová, Monika: '*Evropské mezinárodní právo soukromé*', Praha, C.H. Beck 2008, p. 255.
[443] To mention only one, the already discussed case *Ingmar*. See Section 4.3.4.2 of this paper for more detail.

As we will see the Rome I Regulation is not a revolution but more an evolution of the current legal regulation.

4.4.1. Scope of the Rome I Regulation

The Rome I Regulation shall apply to contracts concluded after its effect[444], i.e. contracts conclude before 17 December 2009 shall still fall under the scope of the Rome Convention. Nevertheless the scope of the Rome I Regulation defined in its Art 1 is the same as that of the Rome Convention. The Rome I Regulation only makes it clear in its Art 1(1) what does not fall under its scope thereby introducing the same negative definition of its scope as the Brussels I or Rome II Regulation.

As the Rome Convention the Rome I Regulation shall also be applicable no matter if the applicable law is a law of one of the Member States, i.e. its application is universal.

4.4.2. Choice of Law by the Parties

The changes brought by the Rome I Regulation in case of choice of law by the parties cannot be seen as fundamental[445]. The biggest changes brought by Art 3 of the Rome I Regulation are the two following.

Firstly its Para 1 includes a more precise wording by changing the words 'demonstrated with reasonable certainty' included in the Rome Convention for 'clearly demonstrated'.

Secondly the implementation of the new Para 4 means that the EC law shall be, in purely domestic situations, protected on the same level as any Member States' law. Hence if the parties choose e.g. Californian law whereby all other elements relevant to the situation are

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[444] Arts 28 and 29 of the Rome Convention.
[445] Myšáková, Petra: 'Nařízení Řím I – revoluce v oblasti rozhodného práva pro závazky ze smluv?', Obchodněprávní Revue 2/2009, C.H. Beck, p. 41.

located in one or more Member States the parties' choice of law shall not prejudice the application of provisions of the EC law[446].

It is also necessary to mention that Art 3(3) of the Rome Regulation does not describe the rules referred to by it as 'mandatory rules' thereby ending the confusion caused by Arts 3 (3) and 7 of the Rome Convention, i.e. by two different types of mandatory rules.

4.4.3. Applicable Law in the Absence of Choice by the Parties

One of the crucial changes to the Rome Convention is the **new concept of Art 4**, i.e. applicable law in the absence of choice[447]. Article 4(1) of the Rome I Regulation now lists certain specific agreements and laws applicable to them. Art 4(2) then includes the presumption relating to characteristic performance whereby Art 4(3) includes the provision enabling flexibility[448]. Finally Art 4(4) includes the closest connection test for cases where the applicable law cannot be determined pursuant to Art 4 Paras 1 or 2.

It is submitted that the new wording of Art 4 of the Rome I Regulation is a reaction to the contradictory jurisprudence of national courts applying Art 4 of the Rome Convention whereby mainly English courts often applied the flexible provision of Art 4(5) of the Rome Convention thereby ignoring the presumptions contained in Art 4 Paras 2, 3 and 4[449]. Although the new concept may be criticized for its rigidity, it is a welcome change for all Czech lawyers as it is close to Section 10 of the ZMPS and therefore well known for them and for other lawyers as well as it increases certainty and predictability of the outcome of the determination of applicable law in absence of choice of law.

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[446] Art 3(4) of the Rome I Regulation.
[447] Pauknerová, Monika: '*Evropské mezinárodní právo soukromé*', Praha, C.H. Beck 2008, p. 262.
[448] The wording is almost the same as the one of the second part of the sentence included in Art 4(5) of the Rome Convention.
[449] Myšáková, Petra: 'Nařízení Řím I – revoluce v oblasti rozhodného práva pro závazky ze smluv?', Obchodněprávní Revue 2/2009, C.H. Beck, p. 42.

4.4.4. Overriding Mandatory Provisions

As it has already been mentioned, the Rome I Regulation has solved the confusion caused by the use of the term 'Mandatory Rules' by the Rome Convention. The former Art 7 of the Rome Convention has been transformed into Art 9 of the Rome I Regulation. Art 9 now includes a definition of the overriding mandatory provisions which again increases certainty a will probably also increase uniformity in the interpretation of the Rome I Regulation.

Furthermore the application of the overriding mandatory provisions of the forum shall not be restricted by the Rome I Regulation according to its Art 9(2). Finally the overriding mandatory provisions of a foreign forum where the obligation arising out of the contract have to be or have been performed may be applied according to Art 9(3) in so far as those provisions render the performance of the contract unlawful. Once again[450] if the court considers whether to give effect to these overriding mandatory provisions of a foreign forum, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

[450] Compare the wording of Art 7(1) of the Rome Convention and Art 9(3) of the Rome I Regulation.

5. NOTES ON ENFORCEMENT OF JURISDICTION AND CHOICE OF LAW AGREEMENTS

The legal instruments regulating the jurisdiction and choice of law agreements have been introduced and some of the problems regarding these agreements have been set out in more detail in order to give the reader understanding of how to produce a good and well working jurisdiction and choice of law agreement. Furthermore it has been shown how to avoid some basic mistakes while drafting jurisdiction agreements and how to possibly reach the desired result through including certain wording in it.

Nevertheless, no matter how well the respective jurisdiction or choice of law agreement may be drafted, sometimes it will be necessary to **enforce it against a party in** breach. A party can breach the jurisdiction or choice of law agreement by starting proceedings in a different than the chosen forum, or, when the other party starts the proceedings at the chosen forum, by contesting the jurisdiction agreement itself, or contesting the choice of law agreement itself.

The fundamental principle of the common law and the civil law systems is ***pacta sunt servanda***, i.e. that a breach of a contract gives rise to right to damages[451]. The basic question that has to be answered when it comes to enforcement of jurisdiction and choice of law agreements is whether they are ordinary private contractual undertakings or whether they may be regarded as a part of public law, i.e. the matter of jurisdiction and choice of law lies beyond the autonomy of the parties. If the former is the case their enforcement should be possible. If the latter is the case, the issue becomes more complex as it is not certain whether the common law acknowledges existence of promises that do not give rise to secondary obligation to pay compensatory damages[452].

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[451] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', Oxford 2008, p 10.
[452] Ibid.

An interesting note may be written on **choice of law agreements** solely and the consequences of their breach. Here the problem is even more difficult than with jurisdiction agreements where the breach is at least easy to prove. It is submitted that there is no case which says, clearly or even ambiguously, that an agreement on choice of law is a term of a contract which may be broken whereby in the words of Briggs 'whether an agreement on choice of law is capable or incapable of being breached is easy to ask but awkward to answer'[453]. This paper will not try to find the answer as it is submitted that, as also Briggs states[454], that there appears to be no discoverable case in which a court of a common law jurisdiction has been required to rule on the submission that a contract was broken simply by bringing proceedings before a court which would not apply the law expressly chosen by the parties to govern their contract. As to civil law countries the solution should be easier as these law systems generally accept contractual penalties which may also cover the breach of choice of law clauses or agreements. Nevertheless, the author of this paper has not found any case ruling that damages have to be paid due to a breach of a choice of law agreement.

To conclude, although the possibility of enforcement, or rather the lack of it, of jurisdiction and choice of law agreements may jeopardize the well done work of a drafter, the topic of this paper does not allow to go into any detail on enforcement. It has already been shown in Chapter 3.7 how to, by **good drafting**, increase the chances of enforcement of a specific jurisdiction agreement. Finally, the same may be said about choice of law agreements.

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[453] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', p 448.
[454] Ibid, 450.

6. CONCLUSIONS

The most important legal instruments regulating the jurisdiction and choice of law agreements have been introduced thereby specifying the legal framework for choice of law and jurisdiction in international commerce. It has been made clear that European regulation of the topic becomes increasingly more important not only in Europe and for EC Member States but also in world-wide context as the EC forms the largest economical market in the world.

It is also submitted, as already mentioned, that the Brussels I Regulation, the Rome II Regulation and other European instruments concerning private international law matters, have been one of the biggest successes in EC legislature. These instruments are widely accepted and seen as profitable for businessmen in Europe. This statement has been recently confirmed by the accession of the United Kingdom to the Rome I Regulation.

The recent debate in the EC Member States has clearly shown that a European-wide regulation of private international law will not harm even such international business centres as London but will rather bring comparative advantages by boosting legal certainty in every day business. As the Rome I Regulation has been also accepted by the United Kingdom, the belief that a compromise between the common law and civil law systems may be found and the fundamental differences reconciled has been strengthened[455].

After this major success of European private international law, the future of the European regulation of private international law seems to be brighter than ever. It is also definitely regarded as one of the most progressive parts of European law. It will be of great interest to observe the progress of European private international law in the forthcoming years.

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[455] Whereby there is a debate in Denmark on the possibility of accession to the Rome I Regulation at least in the form of an international convention, e.g. a novelized Rome Convention. This would of course contribute to the legal certainty in the EC.

6.1. GENERAL CONCLUSIONS

This paper has tried to briefly describe three law systems, in particular the Czech, English and European ones, in order to be able to introduce some legal solutions to problems concerning the jurisdiction and choice of law agreements. It has been shown that although the traditions from which the Czech and English law systems arise, is absolutely different, the results to problems in every day life is often the same. The European law has been introduced as an element which tries to, and it has to be submitted that successfully, reconcile the difference between the common law and the civil law systems.

Thereafter, the basic theoretical issues regarding jurisdiction and choice of law agreements have been covered. By introducing the problems of submissions to and severability of these agreements and further e.g. the importance of consent and agreement in international private law, this paper tried to give to the reader basic knowledge in the subject.

Then the two basic subtopics of this paper have been shown in more detail thereby allowing the reader to understand better the importance of the jurisdiction and choice of law agreements. Here emphasise has been laid on the recent legal regulation of the topics which have been put in contrast with previous regulations, such as the Brussels Convention[456], and the future regulations, such as the Hague Convention and the Rome I Regulation.

Finally, the most important and pretentious part of this paper was an attempt to show how to avoid some basic mistakes while drafting jurisdiction agreements and how to possibly reach the desired result through including certain wording in it.

[456] Or actually also the Rome Convention which will, as already mentioned, cease to be effective in December 2009.

6.2. JURISDICTION AGREEMENTS

As the first major topic this paper has introduced the legal framework of jurisdiction agreements in the Czech Republic, England and the EC whereby the new Hague Convention has been also introduced as it ambition is no lower than to regulation choice of court agreements worldwide. As already mentioned before, it has also tried to show how important good and precise drafting of jurisdiction agreements can be. The reasons may be summarized as follows.

Firstly, it is submitted that due to the common law principles of private international law much of the decisional authority has fallen to the parties[457]. This means that where a choice of jurisdiction agreement has been concluded, the courts will generally give effect to it. If not, secondary obligations, such as obligations to pay damages, may arise. This strengthens the authority of the jurisdiction agreement and increases the chances of its enforcement. Due to cases as *Gasser v Misat srl*[458], this is not the same under the Brussels I Regulation scheme, nevertheless, it may be hoped that the upcoming reform of the Brussels I Regulation will solve the problem known as the *Italian Torpedo*[459] and shift the Brussels I Regulation scheme's treatment of jurisdiction agreements towards the English approach.

Secondly, it has been shown that many questions about jurisdiction agreements, such as possible variations of the Brussels I Regulation, have not been solved or even addressed by the courts yet. That is exactly the reason why drafting of jurisdiction agreement is even more crucial for the parties' later bargaining position or chances in possible litigation. A well drafted jurisdiction agreement, if it clearly states the parties' obligations, has a chance of winning the possible 'court battle' even where no precedent case law exists.

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[457] Briggs, Adrian: '*Agreements on Jurisdiction and Choice of Law*', p 523.
[458] Case C-116/02 *Erich Gasser GmbH v Misat srl* [2003] ECR I-14293.
[459] For more detail see an article by Prof. Franzosi, Mario: "*Worldwide Patent Litigation and the Italian Torpedo*" [1997] 19 (7) E.I.P.R., pages 382 - 384.

Thirdly, even where the rules regulating jurisdiction agreements are clear, inept drafting can have serious advert consequences. It is simply better to use specific words and make yourself clear from the outset and avoid future litigation. As has been mentioned in the Introduction, good drafting is in most of the cases a cheaper and more comfortable way to avoid later expensive and time consuming litigation.

The purpose of this part of the paper was not to, in case of jurisdiction agreements, discover new law or discuss in detail theoretical issues as that would require much more space. Nor was it to elaborate a 'perfect' jurisdiction clause as such does not exist[460]. The main purpose of this paper was to draw more attention to using and drafting of jurisdiction agreements.

[460] The reason for that being that such a 'perfect' clause would differ according to its applicable law.

6.3. CHOICE OF LAW AGREEMENTS

In the second major part of this paper the legal framework of choice of law agreements in the Czech Republic, England and the EC has been introduced. Stress has been put on the Rome Convention which has superseded the national legal regulations in most of the EC Member States. Due to its universal application, i.e. it applies no matter where the parties to the dispute are domiciled or resident, the Rome Convention applies in more cases and therefore plays an even more important role than the Brussels I Regulation. The biggest problem of the Rome Convention is lack of ECJ case law and therefore difficulties with interpretation in different Contracting States.

This will not be the case of the new Rome I Regulation which will come into effect in December 2009. As with every EC legal instrument the ECJ will provide a helpful guideline to its interpretation by its case law. Until then and due to fact that its terminology has been unified with the one of the Brussels I Regulation, practitioners and scholars will be able to take advantage of the case law regarding the Brussels I Regulation.

Hence, the major differences of the Rome I Regulation to the Rome Convention have been introduced. It has been shown that the Rome I Regulation brings some new interesting solutions which should solve some of the problems that have been encountered while applying the Rome Convention.

Finally, some interesting similarities between the Rome I Regulation and the Czech ZMPS have been summarized in order to show that although more than forty years old the ZMPS has at its time brought good solutions to some private international law matters.

To conclude, it is clear that the future development of the choice of law in Europe should be followed up as it has great impact on the every day life of every European person. These days, we all take part in cross border relations more and more often.

7. TABLE OF CASES

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PRÁVNICKÁ FAKULTA
UNIVERZITY KARLOVY V PRAZE

DISERTAČNÍ PRÁCE - SHRNUTÍ

Květen 2009

Petr Juliš

PRÁVNICKÁ FAKULTA
UNIVERZITY KARLOVY V PRAZE

Katedra obchodního práva

DISERTAČNÍ PRÁCE

VOLBA ROZHODNÉHO PRÁVA A MÍSTA ŘEŠENÍ SPORU V MEZINÁRODNÍM OBCHODU

CHOICE OF LAW AND JURISDICTION IN INTERNATIONAL COMMERCE

SHRNUTÍ / SUMMARY

Školitelka: Prof. JUDr. Monika Pauknerová, CSc.

Květen 2009 **Petr Juliš**

VOLBA ROZHODNÉHO PRÁVA A MÍSTA ŘEŠENÍ SPORU V MEZINÁRODNÍM OBCHODU

OBSAH DISERTAČNÍ PRÁCE

Seznam zkratek a definic:

Bruselská úmluva	Bruselská úmluva o pravomoci soudů a uznání a výkonu rozhodnutí ve věcech občanských a obchodních 1968
Členské státy	Současní členové Evropského společenství
ECJ	Evropský soudní dvůr
ES	Evropské společenství
Hágská úmluva	Hágská úmluva o smlouvách o volbě soudu ze dne 30. června 2005
Nařízení Brusel I	Nařízení rady (EC) č. 44/2001 o příslušnosti a uznávání a výkonu soudních rozhodnutí v občanských a obchodních věcech
Nařízení Brusel IIa	Nařízení rady (EC) č. 2201/2003 o příslušnosti a uznávání a výkonu rozhodnutí ve věcech manželských a ve věcech rodičovské zodpovědnosti
Nařízení Řím I	Nařízení rady (EC) č. 593/2008 o právu rozhodném pro smluvní závazkové vztahy
Nařízení Řím II	Nařízení rady (EC) č. 864/2007 o právu rozhodném pro mimosmluvní závazkové vztahy
Nařízení Řím III	Návrh nařízení rady (EC) o právu rozhodném ve věcech manželských
OSŘ	Zákon č. 99/1963 Sb., občanský řád soudní, v platném znění
Římská úmluva	Římská úmluva o právu rozhodném pro smluvní závazkové vztahy (Řím 1980)
ZMPS	Zákon č. 97/1963 Sb., o mezinárodním právu soukromém a procesním, v platném znění

VOLBA ROZHODNÉHO PRÁVA A MÍSTA ŘEŠENÍ SPORU V MEZINÁRODNÍM OBCHODU

1. ÚVOD

Účelem smluv o volbě rozhodného práva a místa řešení sporu v mezinárodním obchodu je prosadit přání stran smlouvy ohledně jimi preferovaného místa řešení sporu a systému právních norem, které mají být rozhodující pro jejich spor. Pravidla výběru místa řešení sporu a rozhodného práva obvykle spadají pod část právního řádu, která se nazývá mezinárodní právo soukromé. Mezinárodní právo soukromé je tedy ta část právního řádu, která působí v případech, kdy daný soudní případ zahrnuje jistý prvek, událost nebo transakci, které jsou blízce spojeny s cizím právním řádem do té míry, že to vyžaduje, případně, že je vhodné, se pro řešení dané otázky obrátit k tomuto cizímu právnímu řádu.

Vzhledem k tomu, že není možné, aby práce zahrnula celou problematiku možnosti volby rozhodného práva a místa řešení sporů, bylo nutno jasně vymezit její rozsah. Především, jak je patrno z názvu práce, se práce zabývá jen otázkami volby v mezinárodním obchodu. Zde je třeba se blíže zabývat významem termínu "mezinárodní obchod". Význam slova "mezinárdoní" se zdá být jasný. Je možné jej vyložit např. v souladu s Nařízením Brusel I, které jasně stanoví, že se vztahuje jen na otázky "mezinárodná jurisdikce" v Členských státech. Logickým závěrem omezení na "mezinárodní obchod" je, že nebudou řešeny tzv. čistě domácí situace.

Pojem "obchod" bude používán ve smyslu o něco užším než pojem „občanské a obchodní věci", často používaný v právních instrumentech ES. Přesto, že ani pojem „občanské a obchodní věc" není přímo definován, a to ani v takových instrumentech jako Nařízení Brusel I a Římská úmluva, ECJ již vícekrát rozhodl, např. v rozhodnutí *LTU v Eurocontrol*, že má tento pojem být vykládán v souladu s právem ES. Proto bude v této práci i pojem "obchod" používán v souladu s právem ES, tj. v souladu s interpretací danou mu ECJ v jeho rozhodnutích jako například *Netherlands State v Rüffer* nebo Schlosser Report.

Ale přes výše uvedené vymezení rozsahu práce, bylo nutné její rozsah dále omezit, a to ještě před řešením samotných otázek týkajících se volby práva a místa řešení sporu. Důvodem byla snaha vytvoři práci, která přehledným a jasným způsobem provede základní komparaci úprav této problematiky v právu ES, v Anglii a České republice.

Co se týče anglického a českého práva, uvedení právě těchto dvou právních řádů není náhodné. Na jedné straně anglické právo, jako právo tradičně nejčastěji užívané v mezinorádním obchodu, bude použito jako základ pro výklad principů a teorií, které utvářejí moderní evropské mezinárodní právo skoukromé, a na druhé straně české právo, které je typické představitelem kontinentálního právního řádu.

Vzhledem k tomu, že národní úpravy mezinárodního práva soukromého byly v poslední době z větší části nahrazeny úpravou ES, konkrétně pak Nařízením Brusel I a Římskou úmluvou, resp. Nařízením Řím I, se tato práce zaměří nejvíce na tyto dva zásadní instrumenty práva ES a práva, která z nich plynou stranám možného sporu.

Práce dále konstatuje, že unifikace mezinárodního práva soukromého se neděje jen na poli ES. Bude také nadále prohloubena, a to na celosvětové úrovni, Hágskou úmuvou o smlouvách o volbě soudu ze dne 30. června 2005, a to za předpokladu, že bude ratifikována dostatečným počtem zemí. Vzhledem k ambicím Hágské úmluvy ji není možno ignorovat a bude představena jako nejmodernější a potencionálně nejuniversálnější nástroj upravující smlouvy o volbě místa řešení sporu, které budou dále označovány také jen jako smlouvy o volbě soudu.

Závěrem je nutno představit další otázky, které vyvstávají v souvislosti se smlouvami o volbě práva a soudu. Za prvé, přání stran ohledně volby práva a místa řešení sporu může být viděno, především v Anglii a dalších zemích patřících do skupiny zemí s common law, jako rozpor s povinností soudu konat spravedlnost. Za druhé vznikají velmi složité otázky ohledně existence souhlasu zúčastněných stran s volbou a otázky existence, platnosti a rozsahu samotné smlouvy o volbě.

Není možné také zapomenout na skutečnost, že přestože mohou být velmi podobné smlouvám o volbě soudu, resp. pod tuto kategorii spadají, tato práce se nebude zabývat arbitrážními dohodami, neboť jejich hlavním cílem je odejmutí příslušnosti soudu a cílem této práce je zabývat se jen volbami, které naopak vytvářejí příslušnost soudů.

2. ZÁKLADNÍ POZNATKY

Základním cílem práve je, jak již bylo uvedeno, představení dvou národních právních řádů a jejich pravy mezinárodního práva soukromého a současné úpravy Evropského mezinárodního práva soukromého. Z tohoto důvodu práce nejdříve pojednává o vztahu národních právních řádů a práva ES a poté krátce všechny tři systémy představuje.

Vzhledem k tomu, že práce ve značném rozsahu pojednává o současném právu ES, je nutné zdůraznit, že dvěma ze základních princpipů práva ES jsou jeho přednost v aplikaci a přímý účinek. Tato skutečnost je zásadní pro řešení možných konfliktů mezi národními právními systémy a právem ES.

Účelem práce není vysvětlení účínků a aplikace práva ES. Bez ohledu na to, je z výše uvedených důvodů potřeba na rozhodnutí ECJ, jako např. *Flaminio Costa v. ENEL,* ukázat dopad principů přednosti aplikace. Nejzásadnějším je skutečnost, že neplatí zásada *lex posterior derogate priori.*

Pochopení principu přednosti a přímého účinku práva ES je skutečně zásadní pro pochopení funkce a aplikovatelnosti evropského mezinárodního práva soukromého. Práce ukazuje, že evropské mezinárodní právo soukromé je jedno z nejvíce unifikovaných odvětví práva v rámci ES a instrumenty jako Nařízení Brusel I jsou považovány za výrazný úspěch legislativy ES. Z těchto důvodů můžeme dnes používat termínu Evropské mezinárodní právo skoukromé s jasným obsahem a ne jako dříve s uvozovkami a bez přesné představy o jeho obsahu.

Logickým důsledkem výše uvedeného je skutečnost, že značné části národních úprav mezinárodního práva soukromého byly nahrazeny úpravou Evropského mezinárodního práva soukromého. To samozřejmě neznamená, že jednotlivé národní úpravy byly zrušeny, pouze se omezila jejich použitelnosti a v případě jejich konfliktu s úpravou práva ES má přednost evropská úprava.

Práce dále shrnuje základní poznatky o českém právu. České právo patří do skupiny kontinentálních právních systémů a jeho tradice, pokud se týče mezinárodního práva soukromého, sahá až do roku 1882, kdy byla založena česká Právnická fakulta v Praze. Samožřejmě bylo a stále je české právo výrazně ovlivněno rakouským a německým právem. České práve je tedy právem výlučně psaným, což znamená, že soudní rozhodnutí nejsou pramenem práva. V důsledku toho, je úprava českého mezinárodního práva soukromého jednotná, přehledná a poměrně detailní. Mezinárodní právo soukromé je v České republice považováno za samostatnou část českého práva.

Mezinárodní právo soukromé je definováno jako soubour zvláštních právních norem, které jsou určeny k řešení situací obsahujících cizí prvek. V České republice zahrnuje pojem mezinárodní právo skoukromé i tzv. mezinárodní právo procesní, které tvoře systém právních norem upravujících postup soudů v případech s cizím prvkem, tedy část práva veřejného. Takto šířeji definované mezinárodní právo soukromé je v České republice upraveno zákonem o mezinárodním právu soukromém a procesním. Další pramenem úpravy je Ústava České republiky a mezinárodní smlouvy závazné pro Českou republiku, které mají přednost před zákony České republiky.

Tento systém úpravy, může být na rozdíl od např. Anglie, kde není rozlišováno mezi soukromým a veřejným právem, považován v rozporu se samotným názvem předmětu, tedy „mezinárodní právo soukromé". Je proto nutné zdůraznit, že i přes tyto možné nejasnosti, je v práci termín mezinárodní právo soukromé používán v jeho širším smyslu, tedy včetně úpravy mezinárodního práva procesního.

Jedním ze základních rozdílů mezi českým právem a anglickým právem je, že české právo obsahuje sadu jasně určených právních norem upravujících určení práva a použití zahraničního práva je povinností příslušného soudu, přičemž soud má k dispozici prostředky jak určit obsah zahraničního práva. Naopak anglické soudy nemaji povinnost určovat zahraniční právo a řídí se domněnkou, že obsah cizího práva je shodný s anglickým, pokud jim strany sporu neprokáží opak. S tím souvisí skutečnost, že dle

českého práva mají, až na některé výjimky ve prospěch *lex fori*, všechny právní systémy rovné postavení, zatímco v Anglii byla a v některých oblastech stále je jasná tendence ke zvýhodňování anglického práva.

Pokud se týče úpravy českého mezinárodního práva soukromého jako celku, zdá se, že jeho cílem je především právní jistota. Jak práce ukazuje, anglické právo naopak tradičně upřednostňuje flexibilitu, která napomáhá rozvíjení obchodních vztahů v mezinárodní měřítku. Evropské právo se pak zřetelně snaží nájít kompromis mezi přístupem common law a kontinentálních právních systémů.

Závěrem tedy je, že se české mezinárodní právo soukromé řídí především principy rovnosti právních systémů, povinnosti aplikace zahraničního práva a skutečností, že zahraniční právo je aplikováno jako práva a ne jako skutečnost, která musí být dokazována. Dále patří mezi základní zásady princip rozumného uspořádání vztahů a rovného zacházení s cizími státními příslušníkem pokud jde o jejich osobnostní a majetková práva.

Anglické práv se na první pohled zdá být velmi rozdílným od českého práva. Ale pokud blíže prozkoumáme výsledky, kterých oba právní systémy dosahují i přes velmi rozdílné metody a postupy řešení, zjistíme, že jsou si velmi podobné nebo dokonce stejné. Práce uvádí jako příklad koncepci „ nejvýznamnějšího vztahu (*most significant relationship*)" dle tradičního anglického práva a princip rozumného uspořádání dle ZMPS. Ať už použijeme kterýkoliv přístup, např. kupní smlouva se bude ve většině případů řídit právem místa sídla prodávajícího za předpokladu, že bude předmět koupě předán na tomto místě.

V Anglii je mezinárodní právo soukromé tradičně považováno za součást anglického práva, která je použita kdykoliv soud řeší případ s cizím prvkem. Má tři základní úkoly. Za prvé, určit podmínky, za kterých je soud oprávněn resp. povinen řešit spor. Za druhé, určit konkrétní právní řád, dle kterého mají být určena práva a povinnosti zúčastněných stran. Za třetí, specifikovat okolnosti, za kterých může být v Anglii uznáno a vykonáno cizí rozhodnutí.

V Anglii je obecně uznáváno, že hlavním důvodem proč neaplikovat čistě právo místa soudu, tedy důvodem proč vlastně existuje mezinárodní právo soukromé, je skutečnost, že neexistence tohoto práva by vedla k nespravedlnosti. Tento argument často angličtí akademici spojují s koncepcí tzv. *comity of nations*.

Na závěr kapitoly o anlgickém právu práce podotýká, že mezinárodní právo soukromé není v Anglii považováno za samostatnou část právního řádu jako například právo smluv (*law of contract*). S tím souvisí i skutečnost, že mezinárodní právo soukromé má v Anglii jistý universální charakter, neboť je rozprostřeno v podstatě ve všech částech právního řádu.

Stejně jako v případech mezinárodního práva soukromého jakéhokoliv národního státu, práce Evropské mezinárodní právo definuje jako soubor právních norem upravujících soukromé vztahy, které obsahují jistý zahraniční prvek nebo přeshraniční případ. Práce dále popisuje, stejně jako u anglického práva a českého práva, základní tři skupiny právních norem, tj. týkajících se určení soudu, rozhodného práva a uznání a výkonu cizích rozhodnutí.

Závěrem druhé kapitoly práce shrnuje několik základních možností volby soudu a práva. Především jde o rozdíl mezi jednostrannými právními úkony a smlouvami, které jsou v mezinárodním obchodě nejobvyklejší. Dále jde o rozlišování mezi výslovnou a nevýslouvnou volbou.

Se smlouvami o volbě soudu a práva jsou spojeny některé specifické otázky. Přestože řešení těchto otázek nebývá v čistě domácích případech velkým problémem, v mezinárodním obchodě bývá obvykle komplikovanější. Práce tedy řeší otázku oddělitelnosti ustanovení o volbě soudu a práva, otázku smluvní autonomie a problematiku souhlasu a dohody v mezinárodním právu soukromém.

3. SMLOUVY O VOLBĚ SOUDU

Po řešení některých základních a obecných témat, se práce zabývá řešením otázek ohledně rozsahu, platnosti a vykonatelnosti smluv o volbě práva. Ať už je to u anglických nebo českých soudů, tyto otázky vyvstávají na úvod řízení. Práce popisuje tři základní situace, které mohou při výskytu smlouvy a volbě soudu nastat.

Za prvé, strany sporu mohou souhlasit s tím, že jsou vázání smlouvou o volbe soudu, ale zpochybňovat právní důsledky takové smlouvy. V takovém případě jde spíše o problém aplikace rozhodného práva než o problém smluv o volbě soudu.

Za druhé, strany mohou souhlasit s tím, že jsou vázání smlouvou, ale zpochybňovat, zda tato smlouva obsahuje ustanovení o volbě soudu. V takovém případě je nutno přistoupit k podrovnější analýze problému.

Posledním případem je situace, kdy jedna ze stran sporu odmítá uznat to, že je vůbec stranou nějaké smlouvy. V takovém případě především nesmí soud řešit skutkovou podstatu věci, ale musí se především zabývat samotným určením zda je příslušným soudem.

Toto krátké shrnutí problémů, které mohou nastat na začátku soudních sporů, ukázalo, jak složité situace vznikají a musí být řešeny soudy. Zásadní otázkou, kterou musí každý soud vyřešit, je, zda je konkrétní smlouvy a volbě soudu úspěšná v derogaci či prorogaci příslušnosti soudu. Aby práce mohla odpovědět na tuto základní otázku, podrobněji řeší následující otázky.

Práce se především pokouší najít mezinárodně přijatelnou definici smluv o volbě soudu. Co se týče samotných smluv o volbě soudu, je největší důraz kladen na ty, které jsou upraveny v čl. 23 Nařízení Brusel I. V rámci tohoto výkladu práce představuje rozsah aplikace Nařízení Brusel I, možný okruk případů, které mohou smlouvy o volbě soudu upravovat a podmínky jejich platnosti. Dále jsou představeny český ZPMS a nová Hágská

úmluva, a to včetně vztahu mezi Nařízením Brusel I a Hágskou úmluvou. Závěrem kapitoly práce zdůrazňuje důležitost precizního sepisování smluv o volbě soudu.

Účelem práce není definice rozsahu smluv o volbě soudu ani výčet práv a povinností smluvních stran vyplývajících z těchto smluv, ale především porovnání některých řešení problémů spojených se smlouvami o volbě práva, které nabízejí různé právní řády. Práce se též blíže zabývá problémy spojenými se sepisováním smluv o volbě soudu a dává, rozebíráním několika konkrétních případů, praktické rady.

Před řešením těchto praktických otázek nemohla ovšem práce vynechat podrobnější rozbor některých obecných teoretických poznatků týkajících se rozsahu smluv o volbě soudu, práv a povinností s nimi spojených a jejich platnosti. Toto je v práci řešeno představením evropské úpravy této problematiky a jejího srovnání s anglickou a českou úpravou. Takto představené teoretické poznatky jsou následně v dalších kapitolách aplikovány na konkrétní případy.

Práce v úvodních článcích o smlouvách o volbě soudu dochází k závěru, že není možno najít universální definic smluv o volbě práva ani není možné najít jeden universální typ takové smlouvy. Existuje více variant těchto smluv a práce představuje několik základních variant, tj. způsobů jak je možno přikázat příslušnost soudu v mezinárodním obchodu.

Co se týče Nařízení Brusel I, práce zdůrazňuje, že toto nařízení je aplikováno pokud jedna ze stran má bydliště v Členském státě a jsou zvoleny soudy Členského státu. V ostatních případech musí být aplikovány národní právní instrumenty.

Pokud jde o české právo, práce konstatuje, že je úprava mezinárodního práva soukromého obsažena v zákoně o mezinárodním právu soukromém a procesním. Úprava volby soudů a jejich příslušnosti, tedy mezinárodního práva procesního, je upravena v § 37 a následujících ZMPS. Dále je tato problematika upravena četnými mezinárodními smlouvami a úmluvami, pričemž ZMPS má být použito jen pokud tyt smlouvy a úmluvy nestanoví jinak.

Vzhledem k tomu, že se práce zabývá smlouvami o volbě soudu a práva především v evropském měřítku, použití ZMPS bude jen velmi omezené. Práce tedy pouze konstatuje, že úprava ZMPS má za následek použití českého práva pro řešení procesních otázek, tj. bude použito *lex fori*. Tento princip má jen několik výjimek, mezi nimi případ subjektivity zahraničních osob nebo použití zahraničních veřejných dokumentů jako důkazů.

Pro práci nejdůležitější část ZMPS je jeho § 37. Tento paragraf umožňuje stranám majetkových sporů volbu soudu. Vzhledem k tomu, že na procesní otázky se v České republice, až na výše uvedené výjimky, použije české právo, musí být i při volbě v majetkových sporech s mezinárodním prvkem dodrženy základní principy českého práva. Smlouvy o volbě práva musí tedy být především písemné a nesmí měnit pravomoc českých soudů.

Dalším pro práci významným instrumentem je Hágská úmluva. Tato úmluva má být dle práce aplikována na ujednání o výlučné příslušnosti v občanských a obchodních věcech. Pokud takto definujeme rozsah aplikace Hágské úmluvy je zřejmé, že hlavní aktuální otázkou je vymezení hranice mezi aplikací Nařízení Brusel I a Hágské úmluvy, tj. které faktory rozhodnou o tom, který z těchto instrumentů bude v daném konkrétním případě aplikován.

Hágská úmluva je, resp. bude, aplikována především na případy, kdy budou zvoleny soudy, nebo jeden či více konrétních soudů, státu, který je smluvním státem Hágské úmluvy. Aplikace Hágské úmluvy v rámci ES je upravena v jejím čl. 26.6(a). Hágská úmluva tedy bude aplikována pouze, pokud bude mít alespoň jedna strana sporu bydliště mimo Členské státy. To logicky znamená, že na případy, kdy mají strany sporu bydliště v Členských státech, se bude nadále aplikovat Nařízení Brusel I, tj. problémy, které práce představuje na soudních rozhodnutích jako *Gasser v Missat srl* zůstanou a jeden z největších nedostatků Nařízení Brusel I nebude odstraněn.

3.1. SEPISOVÁNÍ SMLUV O VOLBĚ SOUDU

Znalosti teoretických problémů spojených se smlouvami o volbě soudu nepostačují k zabránění případných problémů, které mohou vznikat v každodenním životě v mezinárodním obchodu. Je zřejmé, že sepisování smluv o volbě soudu a právu je zásadní pro uplatnění teoretických otázek spojených s těmito smlouvami, resp. pro převedení těchto teoretických znalostí do praxe. Z toho plyne, že správné a precizní sepisování těchto smluv je často nejjednodušším a nejlevnějším způsobem jak zabránit možným zdlouhavým soudním procesům.

Z tohoto důvodu se práce v poměrně velkém rozsahu zabývá sepisováním smluv o volbě soudu a způsobům jak zabránit možným problémům spojených s těmito smlouvami. Práce v této části odkazuje, až na výjimky, pouze na soudní rozhodnutí amglických soudů, které mají dlouho tradici řešení těchto případů, a snaží se kriticky zhodnotit znění některých smluv. Smlouvy o volbě práva jsou v práci řešeny pouze, pokud jde o jejich vliv na smlouvy o volbě soudu.

Tato práce tedy, namísto snahy vytvořit jakýsi vzor „ideálního" ujednání o volbě soudu, o což se pokusilo už mnoho odborných publikací, dává čtyři příklady smluv, resp. ujednání, o volbě soudu, které byly použity v praxi a řeší problémy spojené s jejich platností a případnými účinky, a snaží se tak ukázat jak je důležité věnovat velkou pozornost sepisování těchto smluv.

V závěrečné části třetí kapitoly se práce zabývá vlivem smluv o volbě práva na smlouvy o volbě soudu, neboť je zřejmé, že každý, kdo sepisuje smlouvy o volbě soudu, se bude muset zabývat otázkami volby práva a tyto také významně ovlivní účinnost a vykonatelnost smluv o volbě soudu.

4. SMLOUVY O VOLBĚ PRÁVA

Poté co soud vyřeší problematiku své příslušnosti, konkrétně tedy shledá svou příslušnost, dalším úkolem je vypořádat se s otázkou rozhodného práva předmětu řízení. Stejně jako u smluv nebo ujednání o volbě soudu zde vyvstávají otázky ohledně rozsahu, platnosti a vykonatelnosti smluv o volbě práva.

Je jasné, že určení rozhodného práva může být rozhodující pro meritorní rozhodnutí daného případu. Práce se zabývá situacemi, kdy strany sporu uzavřou smlouvu o volbě práva nebo případně jedna ze stran tvrdí, že taková smlouva existuje. Opět mohou nastat tři základní situace.

Za prvé, strany řízení mohou připustit, že uzavřely a jsou vázány smlouvou o volbě práva a dle rozhodného práva je tato volba platná. V tomto případě nebývají možné problémy nijak zásadní. Zásadnějšími jsou omezení, které se vztahují na samotnou volbu práva.

Římská úmluva je založena na principu svobodné volby práva stranami. Článek 3 umožňuje stranám zvolit si právo, které bude rozhodné pro jejich smlouvu. Volba musí být vyjádřena výslovně nebo vyplývat s dostatečnou jistotou z ustanovení smlouvy nebo okolností případu. Dle Římské úmluvy není volba práva učiněná stranami nikdy neplatná, avšak vztahují se na její důsledky jistá omezení, která práce podrobněji rozebírá v celé kapitole 4. Především jde o to, že dochází k aplikaci právních norem, tzv. imperativních ustanovení, jiného nebo jiných právních řádá než rozhodného práva.

Za druhé, si strany mohou zvolit rozhodné právo a dle tohoto práva může být smlouva mezi těmito stranami neplatná. Stejně jako u smluv o volbě soudu lze přijmout, že zvolené právo má být použito na určení práv a povinností stran ze smlouvy přestože platnost smlouvy může být zpochybněna. Pokud má být závěrem, že práva a povinnosti nikdy nevznikly, bude tak učiněno dle zvoleného práva.

Za třetí, existence smlouvy o volbě práva může být zpochybněna jednou nebo oběma stranami. Vzhledem k tomu, že tato situace je nejsložitější, zabývá se jí práce podrobněji v kapitole 4.3.

Co se týče předchozích dvou problémů zmíněných výše, řeší je články 3, 8, 9 a 11 Římské úmluvy. Podrobnější popis možných řešení dle Římské úmluvy opět obsahuje kapitola 4.3 práce.

Práce ukazuje, jak složité situace mohou nastat ohledně volby práva a musí být řešeny příslušnými soudy. Zásadní otázkou je, jestli jsou smlouvy o volbě práva úspěšné v prosazení zvoleného práva jako rozhodného práva. Co se týče smluv o volbě práva, práce pojednává o následujících otázkách.

Za prvé, práce definuje smlouvy o volbě práva a odpovídá na otázky ohledně dotčených smluv o volbě práva. Největší důraz je kladen na smlouvy o volbě práva dle článku 3 Římské úmluvy. Z tohoto důvodu je podrobněji rozebrána aplikace Římské úmluvy, rozsah smluv o volbě práva, požadavky na jejich platnost a platnost smlouvy, ve které je volba práva obsažena. Na závěr kapitoly práce krátce představuje český ZMPS a nové Nařízení Řím I. Práce též obsahuje krátké poznámky ohledně výkonu smluv o volbě práva.

Stejně jako u smluv o volbě soudu se práce, předtím než se zabývá komparací právních úprav různých právních řádů, snaží najít definici smluv o volbě práva a zúžit okruh smluv o volbě práva, kterými se bude zabývat.

Přestože Nařízení Řím I vstoupí v platnost ještě koncem roku 2009, práce stále klade hlavní důraz na Římskou úmluvu, neboť veškerá judikatura, přestože převážně národních soudů, se pochopitelně vztahuje k Římské úmluvě a bude trvat poměrně dlouho, než se objeví judikatura ECJ ohledně nového nařízení.

Účelem Římské úmluvy je ustanovit uniformní pravidla pro určení rozhodného práva pro smluvní závazkové vztahy ve smluvních státech Římské úmluvy. Římská úmluva je

považována za pokračování prací na unifikaci mezinárodního práva soukromého započatých Bruselskou úmluvou. Stejně jako v případě Bruselské úmluvy, je cílem Římské úmluvy vytvoření vhodných podmínek pro vytvoření a podporu vnitřního trhu s volným pohybem osob, zboží, služeb a kapitálu v Členských státech. Závěrem této části práce konstatuje, že Římská úmluva zvyšuje právní jistotu především tím, že výrazně ulehčuje možnost předpovědět, kterým právem se bude konrétní právní vztah řídit.

Po krátkém představení Římské úmluvy a rozsahu její aplikace práce podrobněji představuje některé problémy spojené s určením rozhodného práva a volbou práva učiněnou stranami a zdůrazňuje některé zajímavé rozdíly mezi úpravou obsaženou v Římské umluvě a národních prváních řádech.

Vzhledem k tomu, že Římská úmluva byla dlouhou dobu posledním instrumentem v oblasti mezinárodního práva soukromého na evropské úrovni, který byl ve formě mezinárodní smlouvy, práce konstatuje, že tato skutečnost vedla k některým negativním důsledkům, především ve formě různých výjimek z aplikace pro jednotlivé smluvní státy.

Z tohoto důvodu byla dne 15.12.2005 zahájena práce na novém nařízení, když Komise ES představila návrh nového nařízení. Práce poté konstatuje, že nové Nařízení Řím I bylo přijato Radou ES 6.6.2008 a zvěřejněno v oficiálním věstníku ES dne 4.7.2008. Obecně je uznáváno, že konečná podoba Nařízení Řím I představuje kompromis mezi Členskými státy, především pak mezi přístupem kontinentálním a common law, a snahu sjednotit úpravu volby práva, zde především terminologicky, s ostatními instrumenty mezinárodního práva soukromého ES jako např. Nařízením Brusel I a Nařízením Řím II.

Práce dále konstatuje, že Nařízení Řím I transformuje Římskou úmluvu do formy nařízení ES a tímto přináší uniformitu v procesu určení rozhodného práva ve všech Členských státech. Přestože Nařízení Řím I následuje ve většině svých ustanoveních Římskou úmluvu, je i na první pohled jasné, že přináší nová řešení a koncepty ovlivněné např.

judikaturou ECJ a ostatními právními instrumenty mezinárodního práva soukromého ES, jako např. Nařízením Brusel I.

Práce poté v kapitole o novém Nařízení Řím I představuje některé důležité změny, které nové nařízení přináší. Práce se z pochopitelných důvodů zabývá pouze změnami, které ovlivní předmět práce, to je volbu práva v mezinárodním obchodu. Závěrem této kapitoly práce konstatuje, že v případě Nařízení Řím I nejde o revoluci v právní úpravě volby práva, ale spíše o evoluci stávající právní úpravy.

Práce tedy ve svých kapitolách 3 a 4 shrnuje základní právní úpravu smluv o volbě místa řešení sporu (smluv o volbě soudu) a smluv o volbě práva ve snaze uvést čtenáře do problematiky a umožnit mu sepsání účinné a vhodné smlouvy, či ujednání, o volbě místa řešení sporu a práva. Ve své kapitole 6 pak práce krátce představuje problematiku výkonu, resp. možnost vymoci, těchto smluv proti straně, která danou smlouvu či ujednání porušuje.

5. ZÁVĚRY

Práce představuje nejdůležitější právní instrumenty upravující problematiku smluv o volbě soudu a práva v mezinárodním obchodu. Bylo jasně ukázáno, že evropské mezinárodní právo soukromé je čím dál tím důležitější nejen v evropském ale i celosvětovém kontextu, neboť ES v současnosti tvoří největší ekonomický subjekt světa.

Vedle toho, že jsou právní instrumenty evropského mezinárodního práva soukromého, jako Nařízení Brusel I, obecně vnímány jako jedny z největších úspěchů legislativní činnosti ES, jsou tyto instrumenty přijímány i evropskými podnikateli, kteří je hodnotí jako velmi přínosné. Tato stanoviska byla v poslední době potvrzena například i přistoupením Velké Británie k Nařízení Řím I, a to po dlouhé debatě vlády Velké Británie s podnikatelským sektorem především v Londýně. Tato debata jasně prokázala, že celoevropská úprava mezinárodního práva soukromého nepoškodí ani taková centra světového obchodu jako je Londýn, ale naopak jim přinese komparativní výhodu zvýšením právní jistoty. Přijetím Nařízení Řím I též Velká Británie podpořila víru v možnost nalezení kompromisu mezi přístupem common law a kontinentálních právních systémů k mezinárodnímu právu soukromému.

Vzhledem k úspěchům Evropského mezinárodního práva soukromého se zdá jeho budoucnost příznivější než kdy předtím. S tím souvisí i skutečnost, že je vnímáno jako jedna z nejprogresivnějších částí práva ES. Bude tedy velmi zajímavé sledovat další vývoj Evropského mezinárodního práva soukromého.

Pokud se podíváme trochu podrobněji, práce tedy představila tři různé právní systémy, konkrétně pak český, anglický a evropský, a jejich úpravu mezinárodního práva soukromého ohledně předmětu práce. Důvodem byla snaha představit některé základní problémy spojené se smlouvami o volbě soudu a práva. Dalším důvodem byla snaha ukázat, že přestože se výrazně liší tradice právní úpravy common law a kontinetálních právních systémů, výsledky, ke kterým sice vedou různé metody, bývají velmi často stejné.

Evropské mezinárodní právo soukromé pak bylo představeno jako právo, které je schopné nalézt, a to velmi úspěšně, kompromis mezi těmito dvěma světy.

Práce je rozdělena na dvě základní části. Přestože smlouvy o volbě práva a smlouvy o volbě soudu mají mnoho společného, toto rozdělení umožnilo podrobněji popsat důležitost a účinky obou typů smluv. Zároveň to umožnilo zařadit to této práce asi její nejambicióznější část, a to část o sepisování smluv o volbě soudu, resp. místa řešení sporu.

Co se týče smluv o volbě soudu, byla též zařazena část o Hágské úmluvě, která má ambice stát se právním instrumentem s celosvětovými účinky. V části ohledně smluv o volbě soudu bylo účelem práce především zvýšit povědomí čtenáře o důležitosti použití těchto smluv a především pak o zásadní roli precizního formulování ustanovení těchto smluv.

Co se týče smluv o volbě práva, zásadní je změna právní úpravy spočívající v přijetí nového Nařízení Řím I. Proto byly vyzdviženy rozdíly v právní úpravě před a po prosinci 2009. S tím souvisí i uvedení zajímavých podobností mezi úpravou představenou Nařízením Řím I a českým ZMPS, které jasně prokazují, že přestože jde v případě ZMPS o již více jak 40 let starý právní instrument, stále má co nabídnout.

Závěrem práce konstatuje, že vzhledem k tomu, že jsme dnes každý stále častěji účastníky přeshraničních vztahů, a to aniž si to často uvědomujeme, je velmi důležité mít povědomí o této velmi zajímavé části práva ES a sledovat její vývoj.

6. SEZNAM SOUDNÍCH ROZHODNUTÍ

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Boils Distilleries BV v Superior Yacht Services Ltd [2007] 1 WLR 12

British Aerospace plc v Dee Howard Corp [1993] 1 Lloyd's Rep 368

Catlin Syndicate Ltd v Adams Land & Cattle Co [2006] 2 CLC 425

Channel Tunnel Group v Balfour Beatty Limited [1993] A.C. 335

Comandate Marine Corp v Pan Australian Shipping Pty Ltd [2006] 157 FCR 45

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Hamilton & Co. v Mackie & Sons (1889) 5 T.L.R. 677

Harbour Assurance Co. (UK) Ltd v Kansa General International Insurance Co. Ltd and others [1993] 1 Lloyd's Rep. 455

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Rozhodnutí ECJ

Case 9/87 *SPRL Arcado v SA Haviland* [1988] ECR 1539

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