

PROOF OF AND INFORMATION ABOUT FOREIGN LAW¹

Monika Pauknerová*

Abstract: Conflict-of-laws rules lead relatively often to the application of foreign law and the Czech judge, unlike judges of some other countries, is in principle obliged to apply that law. The issue of treatment of foreign law is covered by special regulation within Czech law. The new Private International Law Act 2012 contains section 23 entitled “Ascertainment and application of foreign law”, which builds upon the application of foreign law as it is perceived by contemporary Czech jurisprudence. The National Report also considers the possibilities to access to foreign law, under the viewpoint of both status quo, and further developments, in particular within the European Union.

Keywords: foreign law, private international law, treatment of foreign law, Czech Republic, Czech Private International Law Act

1. CONFLICT OF LAWS RULES

Conflict-of-laws rules in the Czech Republic have had a long tradition instituted by, and derived from, the Vienna Draft of Private International Law of 1913, which became a model for the codification of private international law in many countries in Central Europe.² The Czech Republic has been a typical example of a country whose legal system stems from continental law. Czech law maintains that conflict-of-laws rules are binding on judges; if a conflict rule in a particular matter determines foreign law to be the governing law of that matter, a Czech judge is obliged to apply that law. Czech doctrine speaks about the obligatory or binding nature of conflict-of-laws rules. Their binding nature in this sense should be distinguished from another dichotomy, namely whether respective conflict rules are mandatory or dispositive, i.e. with no possibility to derogate from their wording, or with allowed derogation respectively. The binding nature of conflict-of-laws rules, usually termed “mandatory conflict-of-laws rules” (contrary to the other type called “facultative conflict-of-laws rules”), signifies different consequences: it indicates whether there is a duty for a judge to apply the rules.³

Conflict-of-laws rules within Czech law frequently lead to the application of foreign law particularly in cases where the nationality is relevant as a connecting factor, i.e. in the branch of family law, succession law and the law of status. Such approach is radically changed with the new Private International Law Act⁴ entering into force on 1st January

¹ This Article is an adapted version of the Czech National Report – Czech Republic, 19th International Congress of Comparative Law, Vienna, July 2014. The author would like to thank the anonymous reviewers for their pertinent comments on an earlier version of this article.

* Professor JUDr. Monika Pauknerová, DSc., Institute of State and Law of the Academy of Sciences of the Czech Republic, Prague. This Report was created under subsidies for long-term conceptual development of the Institute of State and Law, Academy of Sciences of the Czech Republic (RVO: 68378122).

² For the history of Czech private international law see PAUKNEROVÁ, M. *Private International Law in the Czech Republic*. Netherlands: Kluwer Law International, 2011, p. 13 ff.

³ ESPLUGUES, C., IGLESIAS, J. L., PALAO, G. (eds.). *Application of Foreign Law*. Munich: Sellier, European Law Publisher, 2011, p. 18 ff.

⁴ Act No 91/2012 Coll. (Collection of Laws of the Czech Republic), the Private International Law Act.

2014, which replaced the existing Act Concerning Private International Law and the Rules of Procedure Relating Thereto (hereinafter “1963 PIL Act”).⁵

The new Private International Law Act (hereinafter “2012 PIL Act”) replaces, in many respects, the nationality as a connecting factor with habitual residence which may reasonably be expected to significantly reduce the necessity to apply foreign law. However, there will still be cases where foreign law would have to be applied not only in the field of family law, but also within obligations, rights *in rem*, etc. The law of neighbouring countries – Slovakia, Germany, Poland and Austria – is most frequently applied or invoked before courts in the Czech Republic. Due to ethnic and language minorities established in the Czech Republic, the application of Vietnamese, Ukrainian or Russian law has been expanded primarily in family and succession law cases; in addition, relations with other countries have been growing and their law may also be applied, such as that of a certain state of the US. As far as the law chosen by parties to obligations is concerned, the most frequently selected governing law is that of Switzerland, Germany or England; the choice of law in such cases usually depends upon the country of origin of the foreign party which incorporates its law in initial contractual documents which constitute the basis for concluding the subsequent main contract.

2. FOREIGN LAW BEFORE JUDICIAL AUTHORITIES

2.1. Introduction

The issue of treatment of foreign law is covered by special regulation within Czech law. The new PIL Act 2012 contains section 23 entitled “Ascertainment and application of foreign law”, which builds upon the application of foreign law as it is perceived by contemporary Czech jurisprudence.⁶ The section reads as follows:

Section 23 Ascertainment and application of foreign law

- (1) *Unless a provision in this Act provides otherwise, the foreign law which is to be applied under the provisions of this Act shall be applied also of own motion (ex officio) and in a manner in which it is applied in the territory to which it applies. Such provisions thereof shall be applied which would be applied in the territory to which the law applies to the matter in question (case at hand), regardless of their systematic classification or their public nature, provided they are not contrary to the overriding mandatory rules of the Czech law.*
- (2) *Unless the Act herein otherwise stipulates the content of foreign law to be applied under this provision is to be ascertained without motion ex officio. A court or a public body, charged with adjudication in matters governed by this Act, will take all necessary measures to ascertain the content.*

⁵ Act No. 97/1963 Coll., Concerning Private International Law and the Rules of Procedure Relating Thereto, as amended.

⁶ KUČERA, Z. *Mezinárodní právo soukromé*. Brno-Plzeň, 2009, pp. 186–189; PAUKNEROVÁ, M. Treatment of foreign law in a comparative perspective. *Revue hellénique de droit international*. 2011, No. 1, pp. 5–25; PAUKNEROVÁ, M., BRODEC, J. Czech Republic and Slovakia. In: Esplugues, Carlos, Iglesias, José Luis, Palao, Guillermo (eds.). *Application of Foreign Law*. Munich: Sellier, European Law Publishers, 2011, pp. 173–183.

- (3) *Should a court or a public body in charge of adjudication in matters governed by this Act remain unaware of the content of foreign law they may also request an opinion of the Ministry of Justice in order to ascertain the content.*
- (4) *Where the system of law of a state, having more than one geographical jurisdiction or different regulation for particular groups of persons, is to be applied, the law of that state which determines the application of respective legislation will be conclusive.*
- (5) *If foreign law fails to be ascertained within a reasonable period of time, or if the ascertainment proves to be impossible, Czech law applies.*

2.2. Nature of Foreign Law

Czech jurisprudence and practice rely on the premise that foreign law is treated as “law”, not as a “question of fact” which should be proved. It is the very sense of private international law rules that, in particular cases, foreign law applies instead of the domestic law.

2.3. Application of Foreign Law

Continental legal systems generally maintain an assumption that where a conflict-of-laws rule refers to foreign law (including cases where foreign law has been chosen by the parties) a judge is obliged to apply the foreign law as it is ordered by the conflict rule. The judge applies foreign law *ex officio* irrespective of any reciprocity principle.⁷ Such approach was reflected in the opinion of the Supreme Court of the Czech Republic R 26/87, under which a court primarily deals with the issue of its jurisdiction. If the qualifying requirements for proceedings and adjudication have been met from the perspective of Czech judicial authorities and the jurisdiction has been established, then it is necessary to consider the question of which legal order and under which particular rules the case at issue should be considered.⁸

The 2012 PIL Act explicitly provides that unless another provision of the Act stipulates otherwise, foreign law to be applicable under this Act should be applied by a competent body of its own initiative and in such a way as it is common at the territory of original application of that law [sec. 23 (1) and (2) PIL Act 2012]. The Explanatory report clarifies that both foreign conflict-of-laws rules and foreign law referred to by the conflict rules are applied by an adjudicating body of its own initiative (without a motion raised by parties).

2.4. Ascertainment of Foreign Law

2.4.1. Ascertainment of foreign law in the Czech Republic and the principle “*iura novit curia*” before Czech judicial authorities

A Czech judge is obliged to ascertain the content of foreign law referred to by the respective conflict-of-laws rule. It is up to the court how it chooses to ascertain foreign law.

⁷ KUČERA, Z. *Mezinárodní právo soukromé*. Brno-Plzeň, 2009, p. 187.

⁸ R 26/87 – Collection of Judicial Decisions and Opinions of the Supreme Court of the Czechoslovak Republic No. 26/1987: On some questions of interpretation and application of rules regulating relations with a foreign element in international civil procedure, opinion approved by the Civil Law Division of the Supreme Court of the Czechoslovak Republic, August 27, 1987 (in Czech), 483.

PIL Act 2012 provides that unless there is a clause in the Act stipulating otherwise the content of foreign law to be applied under this provision is to be ascertained by an adjudicating body of its own initiative *ex officio*. A court, or a public body charged with adjudication in matters governed by the Act, will take all necessary measures to ascertain the content. If a court or a public body in charge of adjudication in matters governed by the Act is unaware of the content of foreign law they may request an opinion of the Ministry of Justice regarding the ascertainment [sec. 23(2) and (3) PIL Act 2012]. Consequently, this is certain clarification if compared with the 1963 PIL Act regulating only acts of judicial authorities. Foreign law is applied not only by courts but also by administrative bodies adjudicating in private relations with a foreign element; prior to the 2012 PIL Act, they had no direct legal grounds for their application of foreign law and relied on the 1963 PIL Act with necessary modifications. Under the new Act, a certain shift seems to have happened in that a judge may choose the mode of ascertaining foreign law: s/he may request an opinion (not just information) from the Ministry of Justice, but not as the first option, as has been the practice so far; the wording of Section 23 suggests that the request may be raised after the judge has taken relevant steps to become acquainted with the foreign law but failed to ascertain its content.

Considering the “*iura novit curia*” principle, the Valencia Report, a comparative study entitled *General Report on the Application of Foreign Law by Judicial and Non-Judicial Authorities in Europe*, in which the Czech Republic and the author of this Report as its representative took part, emphasizes that the European legal reality only rarely – if at all – directly reflects the theoretical classification relating to the nature of foreign law as *law* or as *fact*. Conflicts arise with respect to other issues, particularly to active cooperation in practice between parties and courts in ascertaining foreign law and the application of the *iura novit curia* principle.⁹ Whilst the latter has traditionally been connected with the classification of foreign law as *law*, procedural systems and practice often reflect the reality that “knowledge of the law” of a foreign country may appear to be rather difficult for a judge, that in many legal systems the position of foreign law need not necessarily lead to the presumption of *iura novit curia* in relation to applicable foreign law.

This is the case of the Czech Republic. Although foreign law is considered *law* and a judge is obliged to apply it *ex officio*, these principles are, to a certain extent, softened by the wording of Section 23 of the 2012 PIL Act which implies that the *iura novit curia* principle is inapplicable to foreign law. A judge has a duty to use foreign law *ex officio* but he or she has no duty to know that foreign law.¹⁰ The General Report on the Application of Foreign Law concludes that such cases which can be seen in many countries, imposing upon courts the duty to apply foreign law, but which result from the fact that a judge cannot be knowledgeable of all legal systems of the world, have a direct impact upon the effectiveness of the application of foreign law.¹¹

⁹ ESPLUGUES, C., IGLESIAS, J. L., PALAO, G. (eds.). *Application of Foreign Law*. Munich: Sellier, European Law Publisher, 2011, p. 30.

¹⁰ *Ibid.*, p. 34, referring to Czech and Slovak law (Pauknerová, M. Brodec, J. Czech Republic and Slovakia. *National Report*, p. 176).

¹¹ ESPLUGUES, C., IGLESIAS, J. L., PALAO, G. (eds.). *Application of Foreign Law*. Munich: Sellier, European Law Publisher, 2011, p. 37.

This issue was explicitly considered in relation to the case before the Arbitration Court (attached to the Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic) in case Rsp 78/92. Arbitrators stated that, essentially, they did not refuse to consider imperative regulations of foreign law; however, there is no duty on the part of arbitrators to know such regulations. Thus the principle *iura novit curia* is inapplicable as it applies only to national law.¹²

2.4.2. Kinds of means used to ascertain foreign law

The Explanatory Report attached to the PIL Act 2012 clarifies that a Czech court is not obliged to know foreign law but it is obliged to find out, i.e. to ascertain, what the content is of foreign law to which a respective conflict-of-laws rule refers. A court itself should consider what means it is to use to ascertain foreign law. A court itself may find relevant foreign regulation should it have reliable documents at its disposal. It may request cooperation of the parties and their legal representatives to arrange for, if practicable, the competent bodies of a foreign state to issue a certificate of relevant legal regulations. A court may request that legal specialists from a respective foreign country provide official information on the law applicable in that country. Even if all such means fail in achieving the objective, i.e. obtaining knowledge of the foreign law, a court, or any other adjudicating body, is not relieved from its duty to ascertain the content of foreign law. The Act enables the body to apply to the Ministry of Justice for its opinion on the content of foreign law. However, the opinion is not binding on the court as it may be possible, for example, that the Ministry's opinion could be based upon documents not reflecting all recent amendments of foreign legislation at issue.

Such approach is in line with what has been said above. However, unlike the Czech Republic, whose courts may issue a certificate of Czech law (see Sec. 108 of the 2012 PIL Act); many foreign states do not know or maintain such procedure.

The duty to ascertain foreign law cannot be delegated to the parties to a respective case; however, it should not be interpreted in a way that a court, or any other adjudicating body, cannot ask the parties to substantiate the content of foreign law or cannot rely in its decision making on instruments proving the content of foreign law that were submitted by the parties. Such procedure may be considered “necessary measures” taken by an adjudicating body in order to ascertain the content of foreign law in the meaning of Section 23(2) of the 2012 PIL Act, which has also been confirmed by the Explanatory Report. Another mode for a court or public body to ascertain the content of foreign law may be, for example, its relying on instruments at its disposal (such as those from older cases); however it is necessary in such cases to check the force and effect of the relevant foreign legislation. If a court or another adjudicating body appears to be proficient in a respective foreign language it may by itself ascertain the content of foreign law in, for example, publicly accessible Internet databases or printed sources. However, the court or an adjudicating body is fully responsible for the correctness and appropriateness of their conclusions regarding foreign law – not only in relation to a potential appellate review by a superior institution,

¹² The arbitral award was not published. In details see PAUKNEROVÁ, M. Overriding Mandatory Rules and Czech Law. *Czech Yearbook of International Law* 2010, No. 1, pp. 81–94.

but particularly with respect to the parties. This gives rise to the consequence that although a court or an adjudicating body knows foreign law and does not ascertain it further it is obliged to inform the parties to the proceedings of its content (the principle of predictability of a judicial decision) so that the parties may become acquainted with the foreign law and may procedurally react to the conclusions of the court or adjudicating body accordingly. This is why the file of the case should contain a material source of the wording of foreign law although the court may communicate the content of foreign law in any other way, such as during a hearing, where such communication is recorded in the case report.¹³

Czech courts cooperate with courts abroad - however, not directly but through the Ministry of Justice; cf. division V *infra* for the application of bilateral and multilateral treaties and utilization of international judicial networks. Informal cooperation between judges within the Internal Judicial Network has been significant: judges exchange information with respect to foreign law, share their experience regarding the service of documents to different states, etc. Another option has been to contact and engage a sworn expert, of whom a register is maintained by the Ministry of Justice,¹⁴ or to ask a specialist for an expert opinion who is not listed in the Ministry Register of sworn experts, but possesses relevant professional and educational background and knowledge and is competent to provide an opinion on relevant foreign law (e.g. an attorney-at-law experienced in the respective foreign law). Opinions on foreign law are provided also by certain private institutions abroad.

A classical principle, stemming also from treaties, has been maintained in the Czech Republic, namely that the provided legal information on the content of foreign law is not binding upon judicial authorities; such information should be perceived only as one of the potential modes of ascertaining foreign law.

The costs of ascertaining foreign law are usually borne by the state. However, it is not excluded that, under certain circumstances, a court may call the party who has invoked the application of a foreign law, which is not known to that court and the ascertainment of which would require significant costs to be spent, to cooperate in the ascertainment along with sharing the costs of such ascertainment.¹⁵

2.5. Interpretation and Application of Foreign Law

Another highly demanding duty imposed upon a Czech judge is that foreign law should be applied in the way it would be applied by a judge of a respective foreign legal system. Mere knowledge of the text of a foreign legislation appears to be insufficient; what should be complemented is the context of relevant case-law and/or relations with other legislation within the foreign legal system including amendments which may be applied retrospectively regarding the contract under consideration. Czech judges are usually provided with the bare text of a foreign statute, as relevant foreign case law is not easily available.

¹³ ZAVADILOVÁ, M. Commentary on Sec. 23 PIL Act. In: PAUKNEROVÁ, M., ROZEHNALOVÁ, N., ZAVADILOVÁ, M. *Zákon o mezinárodním právu soukromém. Komentář*. Praha: Wolters Kluwer, 2013, p. 171.

¹⁴ Czech Ministry of Justice. List of sworn experts.

[http://datalot.justice.cz/justice/repznatl.nsf/\\$\\$SearchForm?OpenForm](http://datalot.justice.cz/justice/repznatl.nsf/$$SearchForm?OpenForm). Accessed 24 October 2014.

¹⁵ *In concreto*, this was a case where the law of the US was to be ascertained; the application of US law was invoked during the appellate proceedings; the judgment is not publicly available.

What may follow are expert opinions and reports including those issued by renowned foreign institutions; however, arranging for such documents is usually rather expensive. What may become a helpful source are foreign commentaries on, or annotations of, legislation and possibly textbooks, but it should be checked how recent and up-to-date they are.

The new 2012 PIL Act expressly provides for such principle. As indicated above, Sec. 23(1) requires that foreign law referred to by a conflict-of-laws rule should be used in the same manner as it is applied on the territory of the respective foreign legal system. Such provisions are to be used which would be applied in adjudication of a case within that territory irrespective of their systematic categorization or public nature, unless the foreign provisions are non-compliant with applicable imperative Czech laws. The Explanatory Report notes that, should an order of the respective conflict-of-laws rule referring to foreign law be satisfied, it is necessary that the foreign law should be applied to a respective case in the same way it is applied and interpreted in the country of its origin. Any other approach would not respect the order contained in the conflict rule and would lead not only to incorrect treatment of foreign law but also to the violation of a national conflict-of-laws rule.

The principle that foreign law should be applied in the way it applies in the country of its origin means that attaining just the text of a relevant law is insufficient in order to ascertain the content of foreign law; where the content and mode of application is not clearly ascertainable from the text itself it should be complemented with information on its interpretation (commentaries, interpretative opinions, case law). A gap in foreign law should be filled up under the same principles.

2.6. Failure to Establish Foreign Law

Czech jurisprudence maintains that, in case provisions of an applicable foreign law could not be ascertained within a reasonable period of time, the *lex fori* principle should be applied.¹⁶

This principle has been incorporated in Sec. 23 of the 2012 PIL Act: if the content of a foreign law which should be applied under a respective conflict-of-laws rule is not ascertained within a reasonable period of time, then Czech law applies. We would argue that “a reasonable period of time” should not be treated as a uniform time-limit since it is necessary to always consider the circumstances of a particular case. What would be decisive is the nature of the facts at issue and relating specialization of the legislation: for example, the ascertainment of the content of foreign law regarding divorce would be undoubtedly easier than ascertaining a particular legal institution within intellectual property law. In addition, the “distance” of foreign law from Czech law may be another decisive factor, whether it is a geographical, legal (e.g. continental vs. common law) or linguistic remoteness. An important aspect for considering “proportionality” may be whether the Czech Republic has a certain legal basis (international treaty) upon which an exchange of information on foreign law and experience in its recent application may be built. The reasonableness of the time period determined for ascertaining foreign law should be considered

¹⁶ KUČERA, Z. *Mezinárodní právo soukromé*. Brno-Plzeň, 2009, p. 189.

in the light of settled case law of international courts with respect to the right to a fair trial and relating reasonable length of judicial proceedings. Acts of a court aimed at ascertaining foreign law may take more time compared to other procedural acts of the court; however, if a court pursues rational acts aimed at attaining the desired objective, i.e. ascertaining foreign law, the time spent on such activity should not be a considered delay in proceedings. “Substitute” application of Czech law should be substantiated in the reasoning of a judgment; otherwise it would be considered a defect in judgment having a potential impact upon the correctness of the decision on the merits and would constitute grounds for successful appeal and/or appellate review, if applied for.¹⁷

3. JUDICIAL REVIEW

A general premise has been that a judicial decision may be contested in an appeal by one of the parties, unless the law precludes this. If conflict-of-laws rules have been applied erroneously, or the foreign law has been applied incorrectly or insufficiently, the parties may file an appeal under standard conditions included in the Czech Code of Civil Procedure (hereinafter CCP).¹⁸ Recourse on a point of law is admissible against the judgment of an appellate court.¹⁹

The appellate procedure is standard in accordance with current conditions included in the CCP. The appeal may be filed within fifteen days of service on the parties of the court’s decision which is contested. The appeal should be filed with the court whose decision is challenged.²⁰

This approach results from the assumption that there has been erroneous application of the conflict-of-laws within Czech proceedings, irrespective of whether the rule originated in Czech law or was a uniform conflict-of-laws rule contained in European or international legal instruments whose application is superior over national law. Erroneous application may generally be included in the cause of appeal under Sec. 205(2) g) CPP, i.e. the appeal against the first instance judgment is challenging the incorrect legal consideration of the matter by the first instance court. It is essentially possible (as an extraordinary remedy) to file an application for appeal review on a point of law with the Supreme Court of the Czech Republic unless expressly stipulated grounds render such application inadmissible. Special restrictions existing in certain legal systems regarding appellate proceedings in the matter of treatment of foreign law are absent in Czech law.

4. FOREIGN LAW IN OTHER INSTANCES

It should be emphasized in the beginning that other instances, i.e. non-judicial adjudicating authorities, have to deal with foreign law only exceptionally. Foreign law mostly concerns agenda covered by registry offices. These authorities, in most cases, do not apply

¹⁷ ZAVADILOVÁ, M. Commentary on Sec. 23 PIL Act. In: PAUKNEROVÁ, M., ROZEHNALOVÁ, N., ZAVADILOVÁ, M. *Zákon o mezinárodním právu soukromém. Komentář*. Praha: Wolters Kluwer, 2013, p. 171.

¹⁸ Sec. 201 Act No 99/1963 Coll., the Code of Civil Procedure (CCP).

¹⁹ In details see Sec. 236 and 237 CCP.

²⁰ Sec. 204 CCP.

foreign law directly; for example, they have to determine from the perspective of foreign law whether the requirements for marriage have been met as they assess the capacity of a foreigner to enter into marriage, or evaluate conditions for the registration of changes in the name and surname of individuals in international cases.

The Czech Office for International Legal Protection of Children as well as the Ministry of Labour and Social Affairs may observe foreign rules on child abduction, maintenance obligations towards children, inter-country adoption, and the protection of children in general.²¹ In addition, administrative proceedings before other Ministries and regional or district administrative authorities may include certain civil matters with a foreign element.

The issue of the application of foreign law by non-judicial authorities was not specially regulated before the 2012 PIL Act; these authorities usually cooperated with the Ministry of Justice and conditions for observing foreign law were the same as in cases determined by judicial authorities. With entering into force of the 2012 PIL Act on January 1, 2014, there is express regulation in Sec. 23(2) under which any adjudicating body, whether a court or a public body charged with adjudication in matters governed by the Act, will take all necessary measures to ascertain foreign law. A ‘public body’ is any authority entrusted with powers to adjudicate in matters within the scope of the 2012 PIL Act, i.e. with respect to private relations and circumstances.

There is a need from time to time to ascertain and apply foreign law in arbitration, mediation and any other mode of alternative dispute resolution. As a result, an arbitrator has a duty to ascertain the content of foreign law referred to by a conflict-of-laws rule as was explicitly stated in the above quoted award of the Arbitration Court Rsp 78/92.²² Arbitrators may ascertain foreign law by themselves: many states provide sufficiently reliable information on their legislation on the Internet. Arbitrators may ask parties to submit relevant foreign laws; however, such documents would be acceptable only if submitted in a trustworthy format. Arbitrators may also ask a general court for cooperation under Sec. 20(2) of the Arbitration Act;²³ the requested court would direct the question to the Ministry of Justice. However, it is not excluded, as has been shown in practice, that the Ministry of Justice be addressed directly by the Secretariat of the Arbitration Court attached to the Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic, requesting cooperation. The Ministry is not obliged to satisfy such request but has done so in the past; what would undoubtedly be relevant is how difficult the question raised would be.

5. ACCESS TO FOREIGN LAW: STATUS QUO

The Czech Republic provides its legal information through the official (Government) website²⁴ in the Czech language; certain significant laws, such as the Czech Constitution, are available also in English.

²¹ See Act No 359/1999 Coll., on Social and Legal Protection of Children and the respective Hague conventions.

²² In details see PAUKNEROVÁ, M. Aktuální otázky používání zahraničního práva v soudním a v rozhodčím řízení. *Právník*. 2012, No. 12, pp. 1265–1290.

²³ Act No 216/1994 Coll., on Arbitral Proceedings and Enforcement of Arbitral Awards, the Arbitration Act.

²⁴ <http://portal.gov.cz/app/zakony/?path=/portal/obcan/>. Accessed on 24 October 2014.

Czech judges can make use of foreign Internet resources, such as the Hague Conference Judicial Network or the European Judicial Network; however they do so quite rarely and prefer obtaining information on foreign law directly from the Ministry of Justice.

The Czech Republic is party to the European Convention on Information on Foreign Law, London 1968, and to the Additional Protocol to this Convention of 1978. Positive experience with the European Convention on Information on Foreign Law has been reported, although a rather lengthy process of acquiring requested information appears to be a problematic aspect of the application of the Convention.

In addition, it has concluded some bilateral agreements on legal or judicial assistance which permit the Czech Ministry of Justice to require information concerning the foreign law of a respective foreign authority (usually the Ministry of Justice) of the other Contracting State. Some of these bilateral agreements were agreed upon by Czechoslovakia before it's splitting into the Czech Republic and the Slovak Republic as of January 1, 1993. For example, under Article 4 of the Agreement between the Government of Czechoslovakia and the Government of the French Republic on legal assistance, recognition and enforcement of decisions in civil, family and commercial matters of 1984,²⁵ the Ministries of Justice of both Contracting States should mutually provide, upon request, information on legislation which is, or was, applicable in the territory of their States.

The Agreement between Czechoslovakia and Spain on legal assistance, recognition and enforcement of decisions in civil matters of 1987²⁶ states in Article 10 that central authorities of the Contracting Parties must provide, upon request and within the scope of that Agreement, information on legislation which is, or was, applicable in their territory along with the wording of these rules and information on the practice of judicial authorities. There are bilateral agreements on legal assistance in civil matters concluded by the former Czechoslovakia, or later by the Czech Republic, with states outside the EU, such as Cuba,²⁷ Vietnam,²⁸ the Russian Federation (formerly the Union of Soviet Socialist Republics)²⁹ and some states of the former USSR, which succeeded in the original bilateral agreement (e.g., Belarus,³⁰ Moldova³¹); while a new modern bilateral agreement has been concluded between the Czech Republic and Ukraine,³² among others.³³ These instruments, in particular bilateral agreements on mutual legal assistance, apply regularly.

Considering communication with foreign authorities, the linguistic aspect should be recognized, which under certain circumstances might amount to a language barrier although foreign language proficiency of officers of the Czech Ministry of Justice is often above the usual standard. What appears to be relevant is what authority abroad has been contacted; in addition, personal contacts between officers in different countries, as well as their individual approach to searching and providing information on foreign law, play a significant

²⁵ No 83/1985 Coll.

²⁶ No 6/1989 Coll.

²⁷ No 80/1981 Coll.

²⁸ No 98/1984 Coll.

²⁹ No 95/1983 Coll.

³⁰ No 79/2009 Coll. of International Treaties.

³¹ No 81/2009 Coll. of International Treaties.

³² No 123/2002 Coll. of International Treaties.

³³ PAUKNEROVÁ, M., BRODEC, J. Czech Republic and Slovakia. In: Esplugues, Carlos, Iglesias, José Luis, Palao, Guillermo (eds.). *Application of Foreign Law*. Munich: Sellier, European Law Publishers, 2011, pp. 177–178.

role in achieving the desired goal. Practice has indicated that it is extremely important how the question searching for information on foreign law has been formulated. However, practice and experience in this particular issue may differ among jurisdictions.

6. ACCESS TO FOREIGN LAW: FURTHER DEVELOPMENTS

6.2. Practical Need

The need to improve access to foreign law appears to objectively exist whether with respect to judicial authorities, administrative and other non-judicial authorities, arbitrators, attorneys, parties, especially those who cannot afford costly measures to be taken, and/or any other stakeholders.

These questions have been studied by a number of scholars and they have been a subject of interest debated at various forums for a long time, in particular at the Hague Conference on Private International Law and at the European Commission.

As far as the latter regional work in the EU is concerned, special attention should be drawn to two studies that were prepared on the basis of contracts awarded by the European Commission. The first study “Application of foreign law by judicial and non-judicial authorities in Europe” was conducted by the University of Valencia team (so called Valencia Report) which resulted in the publishing of a book entitled “*Application of Foreign Law*”.³⁴ The second study was conducted by the Swiss Institute of Comparative Law in Lausanne³⁵ and its published outcome was entitled “*Foreign Law and its Perspectives for the Future at the European Level*”.

On the other hand, the Hague Conference has presented *inter alia* two important documents in recent years: “Accessing the content of foreign law and the need for the development of a global instrument in this area – a possible way ahead”,³⁶ and “Guiding Principles to be considered in Developing a Future Instrument”.³⁷ The Guiding Principles were also annexed to another important document called “Conclusions and Recommendations – Access to Foreign Law in Civil and Commercial Matters”, adopted at a Brussels conference, organized jointly by the European Commission and the Hague Conference on Private International Law, held on 15–17 February 2012.³⁸ In April 2013, the Council of the Hague Conference invited the Permanent Bureau to continue to follow developments in accessing the content of foreign law and the need for the development of a global instrument in this area.³⁹ Unfortunately, no particular results can be pointed out and prospects in this direction seem to be rather unclear.

What should not be forgotten in this context is the activity of, and long-lasting debates within, GEDIP (*Groupe européen de droit international privé*), which resulted in drafting

³⁴ ESPLUGUES, C., IGLESIAS, J. L., PALAO, G. (eds.). *Application of Foreign Law*. Munich: Sellier, European Law Publisher, 2011, p. 30.

³⁵ This study was published by the EU Commission in 2012, see http://ec.europa.eu/justice/civil/document/index_en.htm. Accessed on 24 October 2014.

³⁶ Hague Conference on Private International Law, General Affairs and Policy, Prel. Doc. No 11 A, March 2009.

³⁷ Principles developed by the experts who met in 2008 at the invitation of the Permanent Bureau of the Hague Conference on Private International Law as part of its feasibility study on the access to foreign law.

³⁸ The English and French texts of the Conclusions, the Conference Report and other documents are available at <http://www.hcch.net/upload/hidden/2012/xs2foreignlaw.html>. Accessed on 24 October 2014.

a report entitled '*Reflexions on the application and proof of, and access to, foreign law*', Copenhagen 2010, Brussels 2011, The Hague 2012, and Lausanne 2013.⁴⁰ GEDIP terminated its activities in this area in 2013 with conclusions that, undoubtedly, a global instrument on improving access to foreign law is considered to be useful, as has been repeatedly pointed out by the Hague Conference. For some time it appeared that, with respect to the various existing concepts of the treatment of foreign law, such a solution on a global level was the only realistic approach. However, the recent results within the Hague Conference - April 2013 - show that the States are not yet ready to start particular activities (preparatory work) in this respect.

The 2012 Brussels Conference stressed that such a global instrument should focus on the effective *facilitation* of access to foreign law and should not attempt to harmonize the status of foreign law in national procedures. Specific features of the European Union, consisting of specific sources of law and close judicial cooperation in cross-border civil matters, together with the first proposals of specific rules on the treatment of foreign law, may indicate new starting points. It is evident that such rules cannot exist in a vacuum and they should be accompanied by certain guarantees that the access to the foreign law could be facilitated.⁴¹

A practical need to unify and simplify the access to foreign law arises in the Czech Republic as well. Due to its geographical position in Central Europe, members of different nationalities and ethnic origins meet, and often collide, in the Czech Republic, whether they are individuals or juridical persons, and the scope of regulation applicable to their matters range from family and succession law to the law of business transactions. The need to apply foreign law referred to by a conflict-of-laws rule arises in proceedings before courts, notaries and in rare situations before non-judicial authorities, and also before arbitrators and mediators. Since judgments and other adjudicating documents including arbitral awards are not published (with the exception of judgments of the Supreme Court and the Constitutional Court) it is difficult to provide any reliable numbers of cases where foreign law has been applied.

6.3. Conflict of Laws Solutions

In general, issues we may refer to the outcomes of debates held within the framework of the European Group for Private International Law (GEDIP) focusing on the possibility that parties would, in particular cases, agree on the application of *lex fori*. However, no compromise solution has been found yet.⁴²

A trend indicated in recent European Regulations can be seen also in recent Czech law, namely that an accord between *ius* and *forum* should be reached, i.e. an accord between

³⁹ The Conclusions and Recommendations adopted by the Council (9–11 April 2013) can be retrieved at: http://www.hcch.net/upload/wop/gap2013concl_e.pdf. Accessed on 24 October 2014.

⁴⁰ See Pauknerová, Monika, van Loon, Hans. 2010. *Reflexions on the application and proof of, and access to, foreign law*. European Group for Private International Law (GEDIP), Copenhagen meeting, available at <<http://www.gedip-egpil.eu/reunionstravail/gedip-reunions-20-fr.htm>>, referring also to Geneva meeting of the GEDIP Group in 1995. The next outputs are reported at the webpage of the GEDIP at http://www.gedip-egpil.eu/gedip_reunions.html - "*La condition du droit étranger selon le droit de l'Union*". Accessed on 24 October 2014.

⁴¹ GEDIP Report 2013, see http://www.gedip-egpil.eu/gedip_reunions.html. Accessed on 24 October 2014.

⁴² GEDIP Report 2013, *ibidem*.

the venue where a case is to be heard and decided and the applicable law. This objective can be reached, or at least approximated, by introducing the institution of *habitual residence* as the connecting factor in lieu of the traditional connecting factor of *nationality*. This has been incorporated in the 2012 PIL Act in new conflict-of-laws rules relating to matrimonial property relations (Sec. 49), succession (Sec. 76), or personal status of individuals (Sec. 29). In case of contracts which are not covered by European law or an international treaty, the choice of law is usually permitted (Sec. 87); it depends upon parties which law they choose and whether subsequently they alter their choice. However, a situation when only Czech law would apply before courts in the Czech Republic would never be reached. Foreign law should be respected not only if it has been chosen by the parties, but primarily also in cases where foreign law has been referred to by mandatory conflict-of-laws rules – typically within the protection of children and adoption (Sec. 54, 61), capacity to marry (Sec. 48) or the area of rights *in rem* (Sec. 69). This trend has been apparent both in European law (Maintenance Regulation⁴³ and The Hague Protocol,⁴⁴ Succession Regulation⁴⁵) and certain Hague conventions, such as the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. There are no doubts that the issue of the treatment of foreign law must be solved collectively at an international level or, in the beginning, at least at the European level. However, to harmonize ideas and goals of individual states representing civil law and common law respectively seems to be an unattainable task for the time being.

6.4. Methods of Facilitating Access to Foreign Law

The author of this Report is also a co-author of the GEDIP Reports on the treatment of foreign law, particularly of the Part II entitled “*The practical means of improving the determination, by the authorities of EU Member States, of the content of the applicable foreign law*”. Three ways to advance future work and mechanisms in this area might be outlined as basic starting points: (a) Information technology and its impact on ascertainment of foreign law; (b) Judicial and administrative cooperation; and (c) Networks of experts.⁴⁶

6.4.1. International or regional instruments

There is no doubt, and it has already been emphasized, that the only way of how to solve effectively the issue of administrative and/or judicial cooperation in exchanging information on the law of participating States, is the adoption of a uniform legal instrument incorporating the rules for such cooperation. As to the structure and mechanisms of such instrument, the European Judicial Network in Civil and Commercial Matters (EJN) seems

⁴³ Regulation No. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

⁴⁴ Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

⁴⁵ Regulation No. 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

⁴⁶ GEDIP Report 2013.

http://www.gedip-egpil.eu/gedip_reunions.html. Accessed on 24 October 2014.

to be a proper platform as it provides a wide range of information on EU law, as well as some information on national law of the Member States. Evidently, it may be difficult to assess the efficiency of this type of activity in general: it substantially depends on individual national contact points and their mutual relations and interaction. As is well known, administrative cooperation is connected with increased costs, which is one of the main challenges in the ascertainment of foreign law in general. International cooperation within the Hague Conference on Private International Law would obviously be a more appropriate forum because the issue of the treatment of foreign law cannot be reduced just to EU law; on the other hand, a decline in interest of the members of the Hague Conference in dealing with this issue has been recently quite evident and should be noted and taken into consideration.

Another problem deserving attention and emphasis in cooperation between authorities of different states has been the issue of translation of legal texts and case law. In countries whose official language is not one of international languages, such as the Czech Republic and the Czech language, the requirement to provide accessible information on legal texts would mean to arrange for good and reliable translation of their legislation which subsequently should be updated regularly. Translation apparently represents another financial barrier in relation to facilitating access to foreign law.

Due to so many circumstances giving rise to many difficulties in attaining quality and reliable information on foreign law, a realistic approach should be taken regarding the access to services supplying legal information. Such services cannot be provided for free; they should be adequately appraised and a reasonable system of fees should be maintained.

Legal information supplied to courts cannot be binding because such an approach would, *inter alia*, intrude on the independence of judges and courts; moreover, it can never be excluded that such information may be imprecise or even incorrect. As a result, it is necessary that courts or any other adjudicating body preserve their discretion in considering and deciding the issue.

6.4.2. Other feasible methods of facilitating access to foreign law

Such methods naturally involve processes enhancing direct communication of judges; establishing networks for other legal professionals; identifying qualified experts whether individuals or juridical persons; and providing information on national legislation on the Internet.

All those methods, however, are quite demanding with respect to expenditures to be made in order to make them work. As suggested earlier in this Report, this applies particularly to countries whose official language is not international and globally used. The Czech Republic, with the Czech language as the language in which the information on Czech law is provided, finds itself in a much more complex situation than countries with English as the official or a widely spoken language. This linguistic handicap can affect even the first above-mentioned option, namely establishing direct contacts between judges and other persons charged with the duty to ascertain and apply foreign law. A linguistic barrier, along with the workload of judges, indicates that this method is far from being prospective.

Networks among certain professional groups have existed: typically between lawyers and particularly within large groups of law firms. However, these are just internal relations

of a particular group arranged to, *inter alia*, reduce high time and financial costs relating to the networking. A certain solution may be the engagement of experts, whether individuals or institutions; but even in such case high costs and lengthy procedures should be taken into account.

The Internet is still a relatively new phenomenon but it has not yet been fully deployed considering all opportunities that it offers. We have to bear in mind that much information on foreign law currently offered by way of the Internet may be provided on many websites and, as to its provenance, it is not necessarily reliable, up-to-date or transparent. Such information must often be verified and perhaps also authenticated by other sources. Moreover, the finding and ascertainment of foreign law by means of various Internet databases requires an experienced person with necessary orientation in the respective legal system. Usually, only a plain text of the applicable legislation is accessible, which may not be sufficient in order to know the full contents and context of the law. Besides, the language issue plays its role again: such information is mostly available only in the language of the respective state. Thus we return back to those basic and sensitive issues determining and/or limiting chances to attain information on foreign law: time demands, language barriers and particularly high financial expenditures.

6.5. In conclusion

There is an accord, more or less, as it has been indicated, in that access to foreign law should be made more efficient, in particular in cases where foreign law is to be applied as a result of a unified conflict-of-laws rule. Opinions differ in selecting the way in which the issue may be solved, and in determining the extent to which the coordination of efforts to find a uniform solution should be maintained.

It seems to be obvious that, irrespective of any potential unification of national procedural laws, it is necessary to arrange for the widest possible access to foreign law. This premise has been supported by all specialists, whether academics, scholars or practitioners, who have recently dealt with such issue. Neither unification, nor harmonization of procedural provisions, should be blind.

I personally tend to express certain scepticism with respect to the willingness of states to be subjected to unifying tendencies; regardless of how limited they may be, aimed at simplification of access to their own law. For most countries whose language is not an international language it would require to arrange for and provide quality translation of their legislation; in addition, in some states legislation is not publicly available on the Internet and information on their law is provided primarily by specialized offices for fee.

Another serious issue is the role of a judge who is to decide under foreign law. Even if the foreign law has been ascertained, which by itself is a rather demanding task, the judge would have to rely on the information acquired and to work with foreign law, which is again extremely demanding. My personal experience suggests that certain wider contexts of the relevant law may remain concealed, for example when the regulation of a relating legal institution is contained in a law other than that whose translation was provided.

It should be noted in conclusion that the requirement to apply foreign law with all relating consequences, as it has been understood in the Czech Republic, corresponds with a classical concept of equality of legal orders which should be respected by all of us.