

COMPANIES IN PRIVATE INTERNATIONAL LAW – CZECHIA, CHINA AND EUROPEAN UNION

Monika Pauknerová*¹

Abstract: *The paper aims to examine the law applicable to companies in cross-border relations, under the viewpoint of the Czech, Chinese and European private international law (PIL). Attention is focused on common and different backgrounds of PIL in Czechia and China, with special regards to incorporation principle and real seat principle as enshrined in PIL legislation of both countries. Particular role is played by the EU law and the CJEU case law, as well as by the Draft Rules on the Law Applicable to Companies and Other Bodies (Rome V). Given the existing political circumstances, the adoption of the Draft of the Rome V Regulation is not quite realistic. However, it is apparent that the discussion will continue; in the author's opinion, the general trend of supporting cross-border mobility of companies evolves towards gradual promotion of the incorporation principle, with some necessary modifications.*

Keywords: *international company law, private international law, Czech Republic, China, European Union, Draft rules on the law applicable to companies and other bodies (Rome V Regulation)*

1. INTRODUCTION – PRIVATE INTERNATIONAL LAW – COMMON AND DIFFERENT BACKGROUNDS

Private international law, although formerly somewhat neglected, has recently stood at the forefront among academics and practitioners. No longer can we call it Cinderella as I once did, whether in the Czech Republic or in China. In the European Union, European private international law is often considered to be the most successful part of uniform EU private law.

Czech Republic

In the Czech Republic private international law has a long-standing tradition reaching back to the times of the Vienna Draft of Private International Law from 1913² which in spite of not becoming a valid law considerably influenced Czech/Czechoslovak codification of private international law. The Czech Republic is a contracting party to many international treaties of the Hague Conference on Private International Law, participates as a member also in other institutions unifying private law such as UNCITRAL (United Nations Commission on International Trade Law), UNIDROIT (International Institute for the Unification of Private Law), is a WTO member state etc. Since 2004 the Czech Republic has been a member state of the European Union. The tradition and experience of Czech private international law is confirmed also by the current Czech Act on Private Interna-

* Professor JUDr. Monika Pauknerová, CSc., DSc. Faculty of Law, Charles University, Prague, Czech Republic

¹ The paper was drafted with the support of the Research Programme of Charles University, Prague, Progres Q 03.

² Cf. the text in MÄNHARDT, F. Die Kodifikation des österreichischen Internationalen Privatrechts, Anhang III, Entwurf eines Gesetzes über Internationales Privatrecht (1914), „Wiener“ oder „Walker'scher“ Entwurf. In: *Schriften zum internationalen Recht*, 10. Berlin: Duncker&Humblot, 1978. p. 149–155.

tional Law (Czech PIL Act) which entered into force on 1 January 2014.³ This act follows up on former traditional Czech legislation in the field of private international law, which was once highly acclaimed also internationally.⁴ The Czech PIL Act explicitly envisages priority of promulgated international treaties and directly applicable provisions of EU law over its own provisions (Section 2 Czech PIL Act).

People's Republic of China

The conflict-of-laws legislation applicable in China today is represented by the Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations (Chinese PIL Act) of 2010 which entered into force on 1 April 2011. Also this act, which is the first private international law codification to take the form of a special statute containing conflict-of-law rules,⁵ is based on the former Chinese tradition of conflict-of-law rules which reaches back to 1918, has evolved along rather an intricate path.⁶ Similarly to Czechia, China also is a party to certain international conventions adopted as a part of the Hague Conference on Private International Law. China has its representatives in UNCITRAL and UNIDROIT and is a WTO member state. The principle of priority of international treaties over national private law is not laid down directly in the Chinese PIL Act but it can be inferred from the General Principles of the Civil Law of the People's Republic of China, promulgated in 1986, Chapter 8 on the Application of Law in Civil Relations with Foreign Elements (Article 142). Under this rule if any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty apply.⁷

Bilateral agreements

Despite many bilateral agreements on judicial assistance in civil and commercial matters concluded both by the Czech Republic and the People's Republic of China with third countries, no bilateral agreement on legal assistance is in place between the two states.

On 8 December 2005 the Czech Republic and the People's Republic of China entered into a bilateral Agreement on the Promotion and Protection of Investments (BIT) which contains a joint provision on the choice of law applicable to companies as investors.⁸

Thus far, the backgrounds of both states are relatively comparable.

³ Act No. 91/2012 Sb., on Private International Law (Sb. - Collection of Laws of the Czech Republic).

⁴ In particular Act No. 97/1963 Sb., on private international law and the rules of procedure relating thereto, and Act No. 101/1963 Sb., on legal relations in international commercial contacts (International Trade Code); the International Trade Code was repealed by the Commercial Code No. 513/1991 Sb.

⁵ CHEN, W. Chinese Private International Law Statute of 28 October 2010. *Yearbook of Private International Law*. 2010, Vol. 12, 27.

⁶ DU, T. The New Chinese Conflict-of-Law Rules for Legal Persons: Is the Middle Way Feasible? In: J. Basedow – K. Pißler. *Private International Law in Mainland China, Taiwan and Europe*. Tübingen: Mohr Siebeck, 2014, p. 331 ff.

⁷ XUE, H., JIN, Q. International Treaties in the Chinese Domestic Legal System. *Chinese Journal of International Law*. 2009, Vol. 8, No. 2, p. 303.

⁸ See No. 89/2006 Sb.m.s. (Collection of International Treaties of the Czech Republic).

European Union

Nonetheless, it should be noted that in the Czech Republic, European Union law plays an important role with a special mechanism of law application under which, as a rule, the basis is – rather than national rules – a common European legislation, in particular the Union regulations. The structure, style and formulations of these regulations are the result of compromises among the EU member states. A uniform interpretation within the EU is provided by the case-law of the Court of Justice of the European Union (CJEU) which should be taken into account by courts and authorities of the member states.

Thus, if we are going to compare both national legal systems in terms of international company law, in respect of Czech law we must bear in mind the very existence of the EU law. This applies despite the fact that the approach to the question of determining the principles of law applicable to companies has not been unified yet in the EU law and that it is still a matter of national law. This fact is emphasised also by the CJEU, in particular in its famous judgments *Daily Mail* and *Cartesio*, under which companies are creatures of national law and exist only by virtue of the national legislation which determines its incorporation and functioning.⁹

2. INCORPORATION PRINCIPLE AND REAL SEAT PRINCIPLE IN CZECH AND CHINESE HISTORY OF PRIVATE INTERNATIONAL LAW

As we know, a distinction is traditionally made between the incorporation principle and the real seat principle.

Under the incorporation principle, applicable law is the law of the state where a person was incorporated or, more precisely, under which it was established. The incorporation principle allows transferring a company seat to another state provided that if in such other state the incorporation principle is also applicable, legal personality or identity of the company is maintained and the applicable law which will govern the company can as a rule be maintained as well.

The second main principle of determining the personal statute of companies is the real seat principle under which applicable law is the law of the state where the company has its real seat, usually a seat of its central administration, a place where basic decisions are adopted, where the principal place of business is situated etc. By definition, the real seat principle does not allow direct cross-border transfer of the seat. If a company intends to move to another state, it must be wound up and liquidated in the state where it was originally incorporated and then re-incorporated in the destination state: its identity or continuity cannot be therefore maintained.¹⁰

Determination of applicable law has usually different results if a company is formally registered in one state but carries out its business to a prevailing or full extent in another state. Which of these laws should govern the company?

⁹ CJEU judgment no 81/87 *Daily Mail*, [1988] ECR 5483, paras 19 and 21 and judgment no C-210/06, *Cartesio*. [2008] ECR I-9641, paras 104-109.

¹⁰ Cf. in a more detail the author's opinion in PAUKNEROVÁ, M. *Společnosti v mezinárodním právu soukromém* (Companies in private international law, in Czech). Praha: Karolinum, 1998. The principles have not changed, only particular legal regulations representing both conflict-of-law principles gradually converge.

As a general trend both these principles gradually converge. None of these principles is therefore applied in practice in its pure form today: we can see a certain modification in favour of the opposite principle or directly a combination of both principles. This markedly manifests in connection with the possibility of cross-border transfer of the company seat, which under the traditional incorporation principle should be subject to no further limitations, while the traditional real seat principle basically does not allow a cross-border transfer of a company seat while maintaining its identity.

Historical development

Interestingly, historical development of determining the principles of international company law in Czechia and in China shows certain similarities. As discussed below, the main principle of the current regulation in private international law acts in both countries is the incorporation principle which is basically confirmed also by the Bilateral Investment Treaty between the Czech Republic and the People's Republic of China while originally the real seat principle was applicable in both countries.

Czech law

Originally, after the formation of the Czechoslovak state in 1918 under Czech and/or Czechoslovak law, which evolved from Austrian law, the real seat principle was applicable, however, it was not explicitly enshrined therein. It was only in the 1960s that the International Trade Code expressly implemented the incorporation principle (see Section 8 of the International Trade Code of 1964) which was adopted later on also by the 1992 Commercial Code (Section 22). As far as I know, Czech legislators were inspired by English law which conformed the interests of Czechoslovak international trade.¹¹ The incorporation principle serves as a basis also to the current Czech legislation which, however, has been partly modified in favour of the real seat principle.

Chinese law

As follows from sources available to the author, the Chinese approach to the applicable law was influenced primarily by the Japanese and German laws under which the real seat principle was applicable, in particular the law of the place where a legal person has its principal office.¹² This changed at a later point after the formation of the People's Republic of China when China adopted the concept of the USSR law system based on the incorporation theory. I should note that the thesis that this Soviet system in the period to follow 1950s was adopted practically by all socialist states (Tao DU)¹³ is rather simplified and not in the least

¹¹ This English origin is known to the author only from oral tradition (discussions of the author with the late professors of private international law Pavel KALENSKÝ, Ludvík KOPÁČ and Zdeněk KUČERA as no more exact information was published on this subject at that time. For more details, see PAUKNEROVÁ, M. *Společnosti v mezinárodním právu soukromém*, pp. 135–143 with further references. KOPÁČ was the drafter of Section 8 of the International Trade Code 1964, KUČERA was drafter of Section 22 of the Commercial Code 1992.

¹² Tao DU refers to Article 29 of the 1929 Chinese Civil Code as the source, see DU, T. *The New Chinese Conflict-of-Law Rules for Legal Persons: Is the Middle Way Feasible?* p. 331.

¹³ *Ibid.*, pp. 332–334.

can be accepted in relation to the then Czechoslovak law.¹⁴ China saw further developments after the adoption of a new Reform and Opening Policy in 1978, in particular in connection with the introduction of the possibility to form Chinese-foreign joint ventures; this policy was followed in 1986 by the General Principles of the Civil Law. The principle of determination of a personal statute of legal persons was expressly laid down in China as late as in 1988 in the Opinion of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles on Civil Law. Pursuant to Article 184 of the Opinion, applicable law is the law of the state where the legal person is registered.¹⁵ The registration principle applies in a certain, although a partly modified form, also in the current Chinese PIL Act.

3. PRESENT SITUATION IN CZECHIA AND IN CHINA

3.1. Czechia – Czech PIL Act

At first sight the Czech PIL Act speaks clearly:

Section 30(1) of the Czech PIL Act:

Legal personality and legal capacity of an entity other than a natural person shall be governed by the law of the state under which it was established (incorporated). This law shall also govern a trade name or a name and internal relations of such an entity, the relations between such an entity and its partners or members, mutual relations of its partners or members, responsibility of its partners or members for liabilities of such an entity, a person responsible for acting on behalf of such an entity, as well as its winding up.¹⁶

This provision undoubtedly enshrines the incorporation principle: applicable is the law of the state under which a company was established. The provision covers a wide range of issues which are thus governed by the law of incorporation. Under Section 30(3) PIL Act, a legal entity domiciled in the Czech Republic may be established only under the Czech law. This shall not affect the possibility to transfer a seat of a legal entity domiciled abroad and incorporated under the law of a foreign state to the Czech Republic, provided it is allowed by an international treaty, a directly applicable provision of the European Union law or other legislation.

The incorporation principle is formulated quite undoubtedly in the PIL Act. However, the possibility of transferring a seat from the Czech Republic abroad and from abroad to the Czech Republic leads to a certain modification. In general, the rules on a seat transfer are enshrined in the Civil Code (Sections 138-143 of the Civil Code)¹⁷ and especially in Sections 59a through 59zb and 384a through 384p of the Transformations Act.¹⁸ As has already been mentioned, a seat transfer is permitted by Section 30(3) of the Czech PIL Act as well. The Civil Code contains the basic regulation of legal persons including corpora-

¹⁴ See PAUKNEROVÁ, M. *Společnosti v mezinárodním právu soukromém*, at p. 142 with further references.

¹⁵ DU, T. *The New Chinese Conflict-of-Law Rules for Legal Persons: Is the Middle Way Feasible?* p. 335.

¹⁶ English translation of the PIL Act is available at English Translation of the New Czech Act on Private International Law. In: BŘÍŽA & TRUBAČ [online]. 25. 3. 2014 [2020-01-05]. Available at: <<https://www.brizatrubac.cz/en/blog/english-translation-of-the-new-czech-act-on-private-international-law>>.

¹⁷ Act No. 89/2012 Sb., Civil Code (hereinafter 'Civil Code').

¹⁸ Act No. 125/2008 Sb., as amended, on the transformations of business corporations and cooperatives (hereinafter 'Transformations Act').

tions whilst a special regulation is provided under the Business Corporations Act.¹⁹ The Transformations Act is a piece of legislation which implements the European Union law (Section 1) and formally applies, in addition to companies in the Czech Republic, to companies having their seat, real seat or principal place of business in an EU member state or in a EEA (European Economic Area) member state (for more details see Section 3 and Section 59b of the Transformations Act). The Transformations Act is thus a *lex specialis* relating to the provisions of the Civil Code which are formulated in a more general way.

Discussion arises with respect to third states' companies, i.e. companies outside the EU and the EEA, including companies in China: could the Transformations Act which includes the details necessary for a transformation procedure apply? In my opinion nothing can prevent such interpretation regarding areas where the Civil Code is silent.²⁰ A different view would contradict the incorporation principle which is the basic principle of *lex societatis* determination under Czech law (Section 30 Czech PIL Act).

The principle regulating a seat transfer lies in the fact that in a cross-border transfer of a seat, precisely when transferring a company seat from abroad to the Czech Republic, the personal statute simultaneously changes as well. In other words, this personal statute, i.e. the applicable law, after the transfer must be Czech law: the legal regulation of internal affairs of a legal person and liability of shareholders for debts arising after the transfer should be subject to Czech law (Section 138 of the Civil Code, Section 384a of the Transformations Act). In the opposite direction, a company may change its seat upon a transfer abroad without being wound up and without a new person being formed. However, the personal statute and legal form of the company will continue to be governed by Czech law only if not otherwise required by law of the state to which the company transfers its seat (Section 139 of the Civil Code, Section 384f of the Transformations Act).

Provisions on a cross-border transfer of a seat apply accordingly also to the establishment and transfer of branches of legal persons (Section 143 of the Civil Code).

A compromise between the incorporation principle and the real seat principle in cross-border transfer of companies

In my opinion, if it is necessary to change the law governing a company upon the transfer from another state to the Czech Republic and from the Czech Republic to another state in favour of law of the place where a new seat of the transferred company will be situated, in practice the real seat principle is promoted to which also the applicable law must conform. These provisions modify the initial incorporation principle and Czech law is thus to be regarded as law providing for a combined principle.²¹ However, it is apparently the incorporation principle that dominates.

¹⁹ Act No. 90/2012 Sb., Business Corporations Act (hereinafter 'Business Corporations Act').

²⁰ This opinion is shared by BRODEC, J. Osobní statut obchodní společnosti v kontextu přeshraničního přemístění sídla. *Obchodně právní revue*. 2016, No. 10, p. 273 (275), while other authors take a different view, see LASÁK, J. In: P. Lavický et al. *Občanský zákoník I. obecná část. Komentář*. Praha: C. H. Beck, 2014, p. 278 and DVOŘÁK, T. *Přeměny a přeshraniční přeměny obchodních společností a družstev*. Praha: Wolters Kluwer, 2013, p. 361.

²¹ PAUKNEROVÁ, M., BRODEC, J. Czech Republic. In: C. Gerner-Beurle – F. Muciarelli – E. Schuster – M. Siems. *Private International Law of Companies in Europe*, Munich: C. H. Beck, 2019, p. 340-365 (344).

Personally, I find this solution a “European compromise” between the incorporation principle and the real seat principle: In a cross-border company transfer, the identity of the company and its legal personality are maintained but the applicable law changes in favour of the law of the destination state. A combination of both these principles in connection with the seat transfer is enshrined also in Regulation no 2137/85 on the European Economic Interest Grouping (EEIG), Regulation no 2157/2001 on the Statute for a European Company (SE) and Regulation no 1435/2003 on the Statute for a European Cooperative Society (SCE). As a matter of fact, Article 8 of the European Company (SE) Regulation inspired the wording of Sections 384a ff. of the Transformations Act.²²

3.2. China – Chinese PIL Act

Chapter II of the Chinese PIL Act is entitled “Civil Subjects” and provides for, among others, the determination of personal statute of legal persons.

Article 14 of the Chinese PIL Act:

Matters such as the civil legal capacity, the capacity to engage in civil juristic acts, organizations and institutions of a legal person and its branches, as well as shareholders’ rights and duties, are governed by the law of the place of registration. If the principal place of business of a legal person differs from the place of registration, the law of the principal place of business may be applied. The place of habitual residence of a legal person is its principal place of business.²³

While this provision is based on the incorporation principle as the main criterion with the law of the place of registration being decisive, there is a possibility to use the law of the principal place of business for the definition of which the term “habitual residence” is used.

A habitual residence is a modern criterion which is an important connecting factor also in the Czech PIL Act and in the European private international law. However, the question remains of how this criterion will be interpreted in relation to legal persons. It can be mentioned that under the Rome I Regulation, for the purposes of this Regulation, the habitual residence of companies and other bodies is the place of central administration.²⁴ Within the EU it is necessary to consider the habitual residence always on an individual basis, it is not possible to simply use only information entered in a public register.

Provided the connecting factor of habitual residence of legal entities is applied to determine the applicable law, the data in the relevant public registry should not be identified with its habitual residence without further consideration. Statutory seat of a legal entity, a branch or an establishment should not be automatically considered as its habitual residence. In practice these data will generally be the first information available but it is always necessary to investigate whether it corresponds with the factual place of central ad-

²² See Act No. 355/2011 Sb. Amending the Transformations Act.

²³ The English translation of the Chinese PIL Act was published in the *Yearbook of PIL*, 2010, vol. XII, pp. 669-674.

²⁴ Regulation No. 593/2008 on the law applicable to contractual obligations (Rome I Regulation). Cf. a detailed analysis in PFEIFFER, M. Kde bydlí právnická osoba (Where does a legal entity live?). *Právník*, 2014, No. 7, at p. 526 ff.

ministration, or, if appropriate, whether a contract was concluded through a branch or whether the agreed performance was provided through the branch.²⁵ However, this is a solution under the European Union law.

Under the Chinese jurisprudence, pursuant to the Interpretation (1) of the Supreme People's Court on Several Questions Relating to the Application of Laws to Civil Relationships Involving a Foreign Element,²⁶ the place of “habitual residence” of a natural person is the place where he or she has continually resided for one year or more at the time of the creation, alteration and termination of a certain civil relationship involving a foreign element, except that it belongs to situation of seeking medical advice or treatment, labour dispatch or official business. For a legal person, the place of habitual residence is its principal place of business (sentence 2 of Article 14(2) of the Chinese PIL Act). The question remains of how courts in China deal with this issue, should there already be in relation to such provision on habitual residence of legal persons any case-law available. It is important to note that in China, interpreting the law has not been recognized as an integral component of judicial power, at least not until recently and for a long time “judicial interpretations” were conceived as normative documents issued by the supreme judicial organs for general application, while the interpretation and application of law in specific decisions by judges are to a large degree ignored.²⁷ Hence, the only source are, so far, the Interpretations which do not indicate any new access to this issue.²⁸

Undoubtedly, also the definition of the term “registration” plays its role in interpreting Article 14 Chinese PIL Act, as this term can be understood in different ways.

A combination of the incorporation principle and the real seat principle

The main criterion is the place of incorporation (registration) which may be overlapped by the law of the principal place of business. Conditions for the use of this additional connecting factor will probably depend on a specific situation as there is no obligation but only an option to apply this additional criterion. Thus, the provision of Article 14 of the Chinese PIL Act is a combination of the incorporation principle and the real seat principle allowing a flexible approach. *Tao DU* speaks about this solution in a slightly critical tone as a “typical Chinese middle way”²⁹ but I think that this critical view is not necessary as such is the approach of many other national laws.

However, the problem with these combined solutions is determining how to proceed in border-line cases, i.e. when a company is registered in one state and its principal place of business is located in another state. The decision on which criterion is to be

²⁵ PFEIFFER, M. *Kde bydlí právnická osoba*, p. 536.

²⁶ Interpretation (1) of the Supreme People's Court on Several Questions Relating to the Application of Laws to Civil Relationships Involving a Foreign Element, adopted by the Supreme People's Court in 2012, Gazette of the Supreme People's Court of China no 8/2013, p. 3-4, see CHEN, W. Selected Problems of General Provisions in Private International Law: The PRC Perspective. In: J. Basedow – K. Pišler. *Private International Law in Mainland China, Taiwan and Europe*. Tübingen: Mohr Siebeck, 2014, at p. 56.

²⁷ TOMÁŠEK, M. Introduction by the scientific editor., In: M. Tomášek – G. Mühlemann (eds.). *Interpretation of Law in China – Roots and Perspectives*. Prague: Karolinum Press, 2011, p. 9.

²⁸ At least their translations available to the author of this paper.

²⁹ DU, T. *The New Chinese Conflict-of-Law Rules for Legal Persons: Is the Middle Way Feasible?* p. 342.

used should be foreseeable and predictable which is probably not in this case as it will depend on the judge's discretion whether or not he or she will accept the additional criterion of habitual residence. In this respect the Chinese system differs from Czech law which is clearly based on the incorporation principle and lays down an exception in favour of the real seat principle only in connection with a cross-border seat transfer to the Czech Republic.

In addition, under Chinese law the place of registration expressly applies in determining the *lex societatis* not only for legal persons but also for their branches (Article 14 *in fine* Chinese PIL Act). The Chinese Companies Act³⁰ permits the establishment of branches of foreign companies in China. Such branches do not have the status of Chinese legal persons and foreign companies are liable for the business activities carried out in China by their branches (Art 195 of the Chinese Companies Act). Cross-border seat transfer is regulated neither under the PIL Act nor under the Companies Act. It can only be inferred from the provisions on the incorporation (“registration”) principle and from the provisions on branches of foreign companies that cross-border transfers of legal persons are probably not completely banned but they should be subject to an approval procedure.

Branches of foreign companies are primarily governed by foreign law of their foreign parent company but at the same time they must comply with Chinese law. Pursuant to Article 196 of the Chinese Companies Act, the business activities engaged in within China by foreign companies' branches that have been established upon approval must comply with the law of China and may not harm China's social public interests. The lawful rights and interests of such branches are protected by the laws of China. However, these provisions do not regulate a seat transfer of a company but only the status of foreign companies' branches in China, including provisions on closing a branch.³¹ These provisions on branches can be characterised as standard modern provisions: however, they do not say anything about whether it is possible to transfer a foreign company to China while maintaining its identity and whether such company will be still permitted to be governed by its original law of incorporation.

3.3. Bilateral Investment Treaty between the Czech Republic and the People's Republic of China

The Agreement between the Czech Republic and the People's Republic of China on the Promotion and Protection of Investments (BIT) defines “investors” as (a) natural persons who have nationality of either contracting party and (b) legal entities, including companies, associations, partnerships and other organizations, incorporated or constituted under the laws and regulations of either contracting party and have their seats in that con-

³⁰ Company Law of the People's Republic of China of 1993 (revised in 2013). In: *Invest in China* [online]. [2020-01-03]. Available at: <http://www.fdi.gov.cn/1800000121_39_4814_0_7.html_-_Toc381707457>.

³¹ Under Article 197 of the Companies Act, when a foreign company closes its branch in China, it shall pay its debts in full according to the law and carry out liquidation in accordance with the provisions of the Law concerning company liquidation procedure. Such foreign company may not transfer its branch's property out of China prior to full payment of its debts.

tracting party whether they are profitable or non-profitable and whether their liability is limited or not (Article 1(2) of the BIT).

This definition of an investor is based on the incorporation principle in combination with the real seat principle³² and thus it differs from some other BITs which both these countries have concluded with other countries such as, taken from the Chinese perspective, Germany, Sweden and others, which apply either the real seat principle, the control principle, or another combination of the incorporation and the real seat principle. There is a similar situation with older BITs concluded by the Czech Republic or formerly Czechoslovakia. For example, the BIT between Czechoslovakia and Germany of 1990 defines “investors” as natural persons having their permanent residence or legal persons having their seat within the territory of applicability of this Agreement that are authorised to act as investors.³³ Apparently, the latter BIT definition is based on the real seat principle.

Definitions might be crucial; however, recently, “thanks” to the *Achmea* judgment, the importance of the intra-EU BITs has been rather weakened as the CJEU concluded that the Netherlands-Slovakia BIT is not compatible with EU law.³⁴ This CJEU judgment may have consequences not only for investment treaties between the EU Member States but also for investment treaties between the EU and third countries.³⁵

The regime for BITs between EU member states and third countries currently follows from Article 3(1)(e) and Article 207 of the Treaty on the Functioning of the European Union (“TFEU”), with respect to the exclusive competence of the EU in common commercial policy, including foreign direct investment. A special EU Regulation on transitional arrangements for bilateral investment agreements between member states and third countries of 2012³⁶ addresses the status under EU law of bilateral investment agreements of the EU member states signed before 1 December 2009, thus including the BIT between the Czech Republic and the People’s Republic of China dated 8 December 2005. Pursuant to the Regulation, older bilateral investment agreements remain binding on the EU member states under public international law and will be progressively replaced by agreements of the EU relating to the same subject matter. It can be expected that in defining an investor as a legal person in the envisaged future BITs, European Union will resort to a compromise solution between the incorporation principle and the real seat principle. Further, it will be necessary then to coordinate such a proposal with a third- country counterparty.

³² Tao DU characterises this provision as based on the incorporation principle, see DU, T. *The New Chinese Conflict-of-Law Rules for Legal Persons: Is the Middle Way Feasible?* p. 343.

³³ Treaty between Czechoslovakia and Federal Republic of Germany on support and mutual protection of investments of 1990, Article 1(3), No. 573/1992 Sb.

³⁴ See in particular the reasoning of the CJEU in the judgment no C-284/16 *Achmea v Slovak Republic*, ECLI:EU:C:2018:158, paras 54, 56-58.

³⁵ See CIEL. Implications of *Achmea*. How the *Achmea* Judgment Impacts Investment Agreements with Non-EU Countries. In: *CIEL* [online]. [2019-11-25]. Available at: <<https://www.ciel.org/wp-content/uploads/2018/04/Implications-of-Achmea.pdf>>.

³⁶ Regulation No. 1219/2012 Establishing transitional arrangements for bilateral investment agreements between member states and third countries.

4. IMPACT OF EU LAW AND CASE-LAW OF THE COURT OF JUSTICE OF THE EU (CJEU)

European Union law in general is of a great importance also to areas in which unification of the Union law has not yet been achieved. In addition to the cited regulations which provide for supranational corporate forms, the case-law of the CJEU has a great importance as well.

4.1. CJEU case-law

Regarding freedom of establishment of companies, the CJEU judgments have already created a set of rules which *inter alia* relate to the relevance of determination of applicable law although each member state still has (and will probably long have) its own conflict-of-law rules under its autonomous national law. Companies may “freely settle” within the EU, in particular take up and pursue their activities and freely move and thus transfer their seats for various reasons, not only due to more advantageous tax legislation but also because of more attractive company law, for instance in terms of capital or organisational requirements or other interests in carrying out business in a particular country.

If we compare legal systems of EU member states, approximately one half of the member states have their law based on the incorporation principle and the other half on the real seat principle; however, in many cases these principles do not occur in their original pure form but are modified in favour of the opposite principle. Thus, the CJEU has an uneasy task to create, if possible, a well-balanced system of basic rules for cross-border relationships of companies until a common binding legal regulation focused on international company law is adopted, if such Union regulation will ever be adopted at all.

Out of the most important decisions of the Court several can be selected relating to the determination of law applicable to companies operating in EU member states. In case 81/87 *Daily Mail* the Court of Justice first cautiously concluded that a company created under national law exists only by virtue of national legislation which determines its establishment and functioning. The conflict-of-law criterion for the determination of applicable law falls within the competence of each member state; the registered office, central administration and principal place of business of a company being placed on the same footing within the meaning of Article 52 of the EEC Treaty (now Article 54 TFEU).³⁷ The idea that companies are creatures of national law was repeated in judgments to follow, namely C-208/00 *Überseering*,³⁸ C-210/06 *Cartesio*,³⁹ and C-378/10 *VALE*.⁴⁰ This idea accents autonomy of national legislations of member states.

Judgment C-212/97 *Centros*⁴¹ is considered to be landmark in terms of deviating somewhat from the real seat principle; this judgment dealt with the question of whether it is possible for a company which was formally established and registered in one member

³⁷ Judgment No. 81/87 *Daily Mail*, ECR 1988, 5483, points 19 and 21.

³⁸ Judgment No. C-208/00, *Überseering*, ECR 2002, I-9919, para 67.

³⁹ Judgment No. C-210/06, *Cartesio*, ECR 2008, I-9641, para 104.

⁴⁰ Judgment No. C-378/10, *VALE*, EU:C:2012:440, para 27.

⁴¹ Judgment No. C-212/97 *Centros*, ECR 1999, I-1459, paras 19 and 38.

state in which it carries out no business, to set up a branch in another member state which imposes more stringent requirements for establishing companies. In the opinion of the Court, such right to establish a company under national law of a member state and to set up and register branches in other member states arises directly from freedom of establishment. That interpretation does not, however, prevent the authorities of the member state concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, or in relation to its members.

Another important judgment is *Überseering* according to which if a company, incorporated under law of a member state on whose territory it has its statutory (i.e. registered) office, exercises its right for freedom of establishment in another member state in which it then actually carries out its business; such a state is then obligated to recognise, under the EC Treaty, the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its state of incorporation.⁴² This judgment is another step towards the incorporation principle.

In contrast, the judgment in the *Cartesio* case did not confirm the expected conclusion, i.e. that the possibility of transferring a company seat from one member state to another can be inferred already from the provisions on freedom of establishment in the EC Treaty. The Court stated that this option is the matter of each state. However, a seat transfer from one member state to another is possible if a company simultaneously changes its applicable law in accordance with law of the state of its new seat.⁴³ In this respect the *Cartesio* case reflected also upon the Czech legislation on cross-border transformations⁴⁴ and I must remark that it strengthened elements of the real seat principle in Czech law in the sense that upon a cross-border transfer of a company seat, the personal statute shall change.

This rule and other rules following from the CJEU case-law on freedom of establishment of companies⁴⁵ are often cited and applied in practice in EU member states. However, they are not a complete set of rules, sometimes being interpreted in a self-serving manner – after all, these rules are not formulated by a law but only by a court decision which is often difficult to generalise without ambiguities.

4.2. Directives relating to certain aspects of company law

To a certain extent, national laws of the member states have been harmonised by the consolidated Directive (EU) No. 2017/1132 relating to certain aspects of company law which was implemented into Czech business law. Currently, the new Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance) has been adopted, the EU member states should bring into force the

⁴² Judgment *Überseering*, para 70.

⁴³ Judgment *Cartesio*, para 40, paras 104–109, 110–111.

⁴⁴ Cf. Act No. 355/2011 Sb., amending law, on transformations.

⁴⁵ Special attention should also be paid to other judgments as in particular the judgment No. C-106/16 *Polbud*, ECLI:EU:C:2017:804, dealing with the transfer of the registered office of a company from one member state to another member state with respect to the mandatory liquidation of such company in the former member state.

respective laws and provisions necessary to comply with this Directive by 31 January 2023.⁴⁶ However, the Directive remains a mere Directive allowing only for certain, basically limited extent of harmonisation of national legislations.

4.3. Draft Rules on the Law Applicable to Companies and Other Bodies (Rome V)

Needless to say, an EU Regulation is a more effective form of legislation which is, unlike a Directive, directly applicable in the member states. In 2016 the European Group for Private International Law (GEDIP)⁴⁷ submitted Draft Rules on the Law Applicable to Companies and Other Bodies (Rome V) to the European Commission, however, this is only an academic proposal. But it seems appropriate to remind that the European Commission has already used a number of drafts by the GEDIP and reflected them into the EU legislation such as the text of Brussels I Recast Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Rome I Regulation on the law applicable to contractual obligations, Rome II on the law applicable to non-contractual obligations and others.⁴⁸

The Draft of the Rome V Regulation determines the law applicable to companies (*lex societatis*) and other bodies, corporate or unincorporated. It does not apply, in particular, to revenue, customs or administrative matters and further explicitly excludes from its scope contractual and non-contractual obligations of the company itself, and liability in tort of members and directors of a company *vis à vis* third parties; rights *in rem* over shares or other participation rights; insolvency; trusts; and labour relationships and employee rights, including rights of participation in the organs of the company.⁴⁹

Any law specified by this Regulation is to be applied, whether or not it is the law of a member state (Article 2). This means that the regulation is universally applicable and if conflict-of-law rules of this regulation determine Chinese law as the applicable law, judges from EU member states will be obliged to apply Chinese law.

The “General Rule” laid down in Article 3 of Rome V stems from the incorporation principle.

Article 3 General Rule:

A company will be governed by the law of the country under which it has been incorporated or, if it is an unincorporated entity, under which it has been formed.

Article 4 Default Rule:

Where the law applicable cannot be determined under Article 3, a company will be governed by the law of the country within the territory of which its central administration is

⁴⁶ See Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance). In: *EUR-Lex* [online]. 27. 11. 2019 [2020-01-04]. Available at: <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32019L2121>>.

⁴⁷ See Groupe européen de droit international privé (GEDIP), Regulation X on the Law Applicable to Companies and Other Bodies, available at <http://www.gedip-egpil.eu> [5.1.2020]. In GEDIP materials this Regulation is referred to as Rome X, but in literature which makes references to it, it is referred to as Rome V.

⁴⁸ See Regulation No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Recast); Regulation No. 593/2008 on the law applicable to contractual obligations (Rome I); Regulation no 864/2007 on the law applicable to non-contractual obligations (Rome II).

⁴⁹ The text is available at <http://www.gedip-egpil.eu> [5.1.2020].

located at the moment of formation of the company. However, if the company is manifestly more closely connected with the law of another country, that law will apply.

This provision on the default rule is a compromise. It stems from the incorporation principle which in cases of failure to establish the law of incorporation is replaced by the principle of real seat, i.e. law of the place of central administration at the time when a company is formed. Flexibility is enhanced by an escape clause which envisages determination of alternative law if the company is apparently more closely connected with another country.

The circumstance that the basic principle is the incorporation principle in this case can be certainly appreciated. However, in my opinion, it is precisely this point which becomes an insurmountable obstacle to the adoption of the whole regulation by important EU member states which use the real seat principle as the basis.

Attention should be paid also to provisions on change of applicable law.

Article 8 Change of the applicable law:

In this provision “old law” means the law applicable to a company before the change of applicable law and “new law” means the law applicable to a company after such change.

The law applicable to a company may be changed without the company losing its legal personality if this is possible under both the old law and the new law.

Where such a change takes place, the old law should apply, in particular, to measures for the protection of minority shareholders and creditors and employees of the company.

The new law is to determine the conditions of re-incorporation of the company.

It follows from this provision that a change of law applicable to a company without the company losing its legal personality is conditionally permitted if this is possible by the “old” law as well as by the “new” law. This is a general solution, specified in Article 9.

Article 9 Companies of Member States:

A company governed by the law of a member state may change its applicable law in favour of the law of another member state without losing its legal personality.

A company governed by the law of a member state may change its applicable law in favour of the law of a third country, without losing its legal personality, if this is permitted by the law of the third country.

A company incorporated in a third country may change its applicable law in favour of the law of a member state, without losing its legal personality, if this is permitted by the law of the third country.

Changing the applicable law of a company without losing its legal personality is possible in relation to a third country only if permitted by the law of such a third country in both transfer directions. Article 9 of the Rome V is significant and can be regarded as a great advancement in relation to such legislations in EU member states which are based on the real seat principle, as regulations of this kind do not allow in principle a cross-border transfer while maintaining a company’s identity. Legislation of those states which take the incorporation principle as the basis should not be substantially affected but it depends on the particular legal regulation of each of them. Provisions on “change of the applicable law” support the transfer of the registered office in conformity with the requirement of cross-border corporate mobility in the EU.

In relation to third countries it will depend on the legal regulation of a given third country. It is not quite clear whether China would permit such transfer. It would probably de-

pend on circumstances of a particular case. But the possibility of a cross-border seat transfer in general corresponds to the registration principle on which Chinese law is based.

Provisions on change of applicable law have also an academic importance: in Rome V a seat transfer associated with a change of applicable law is approached purely from the conflict-of-law perspective whilst in other legal systems these seat transfer provisions usually form a part of civil or commercial substantive law.

4.4. Study on the Law Applicable to Companies

In 2016 the European Commission published a Study on the Law Applicable to Companies, Final Report which intends to point at practical problems relating to mobility of companies with regard to insufficient harmonisation of conflict-of-law rules applicable to companies. In its conclusion the study pleads for the adoption of common conflict-of-law rules in the form of Rome V Regulation and a Directive on seat transfers with the protection of third persons.⁵⁰

5. FURTHER DEVELOPMENT PROSPECTS

Given the existing political circumstances, the adoption of the draft of the Rome V Regulation is not quite realistic. However, it is apparent that the discussion will continue. Every little step towards convergence of the principles of determining the personal statute and specification of seat transfer rules enhance legal certainty and foreseeability of law. This naturally applies within the EU but also worldwide.

Business law and private international law take partly differing view of the question of the principle of determining a personal statute. This was seen also during the preparation of the European Commission project on the Law Applicable to Companies in which I participated and during which we, as the experts in private international law, sometimes could not find a common language with the experts in business law. The solution is not black and white – both the principles – the incorporation principle and the real seat principle – have their justifications and both can be elegantly “counterbalanced” in practice, so to speak. Nevertheless, the general trend of supporting cross-border mobility of companies evolves towards gradual promotion of the incorporation principle, with some modifications ensuring proper balance with the protection of employees, creditors and minority members, and thus, within the limits, a fair and smart conduct of all actors.

⁵⁰ Study on the law applicable to companies. In: *Publications Office of the EU* [online]. 4. 4. 2017 [2020-01-03]. Available at: <<https://op.europa.eu/en/publication-detail/-/publication/259a1dae-1a8c-11e7-808e-01aa75ed71a1/language-en/format-PDF>>.