

## CZECH NATIONAL REPORT ON OPTIONAL CHOICE OF COURT AGREEMENTS

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**Abstract:** *The national report for the purpose of the 20th International Congress of Comparative Law Fukuoka 2018 deals with the optional choice of court agreements from the perspective of the Czech law. The report answers the questions if the Czech national legislation allows the parties to conclude the optional choice of court agreements in international cases, what is the character of these clauses and if they are expressly stated in the Czech Private International Law Act. The authors deal also with the asymmetrical choice of court agreements, especially their legal effect. In the end of the report, the authors evaluate the efficiency of the national regulation and propose for the necessary modifications.*

**Keywords:** *asymmetrical choice of court agreement, Czech law, international cases, jurisdiction, party autonomy, optional choice of court agreement*

### I. THE TREATMENT OF CHOICE OF COURT AGREEMENTS IN GENERAL

#### Introduction

Agreements on jurisdiction are and have been regulated in the Czech Republic by a number of legal norms of domestic, European and international origin. Despite the existence of a favourable legal environment (and professional legal literature recommendations), parties' agreements on jurisdiction do not constitute the preferred manner of establishing court jurisdiction, either at the national or international level. This is due to several reasons, some of which are historically conditioned and the outcome of a certain force of habit.

Legal limits when the parties conclude an agreement on jurisdiction may be assessed as follows:

The prorogation of a foreign court is only possible in case an international element is present. Czech doctrine specifically emphasizes the need for the existence of a legally significant international element.<sup>1</sup> However, as this is not defined by the Private International Law Act,<sup>2</sup> its qualification is a matter of discretion in each particular case (*ad hoc*).

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<sup>1</sup> More to the determination of a legally significant international element and discussions with regard to this issue see: KUČERA, Z., TICHÝ, L. *Zákon o mezinárodním právu soukromém a procesním: komentář*. Prague: Panorama, 1989, pp. 24–25; PAUKNEROVÁ, M., PFEIFFER, M. § 1 Předmět úpravy. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, p. 5; KUČERA, Z., PAUKNEROVÁ, M. Pojem a předmět mezinárodního práva soukromého. In: Z. Kučera – M. Pauknerová – K. Růžička et al. *Mezinárodní právo soukromé*. 8<sup>th</sup> edition. Pilsen–Brno: Aleš Čeněk–Doplňek, 2015, pp. 23–25; ROZEHNALOVÁ, N. *Instituty českého mezinárodního práva soukromého*. Prague: Wolters Kluwer, 2016, pp. 202–206.

<sup>2</sup> Act No. 91/2012 Coll., on Private International Law, as amended (“Private International Law Act”).

Prorogation (or derogation) applies only to territorial jurisdiction, i.e. not to matters of material or functional jurisdiction. This is applicable to both national<sup>3</sup> and international<sup>4</sup> prorogation agreements.

While only entrepreneurs may enter into prorogation agreements at the national level, no such limitation exists at the international level. Limitations at the international level are associated with the scope of the subject matter: an agreement on jurisdiction may only be concluded with respect to issues associated with obligation law and property law and in matters linked to employment.<sup>5</sup> Restrictions associated with the so-called weaker parties will be addressed later on.

Form also imposes some limitations: in accordance with Czech law, in both national<sup>6</sup> and international<sup>7</sup> cases an agreement on jurisdiction must be concluded exclusively in writing. No other forms are allowed.

Regional as well as international instruments binding for the Czech Republic also impose their own jurisdiction limitations or delineations. As described further on, a central role in the legal regulation of prorogation agreements is played by the Brussels I Recast Regulation.<sup>8</sup>

The overview provided in part II of this document lists the many sources of legal regulation of parties' agreements on jurisdiction. Leaving changes at the European and international levels aside, let us concentrate purely on the level of Czech law. In 2012, the Private International Law Act was adopted. It was first implemented on 1 January 2014.<sup>9</sup> In comparison with previous regulations, the regulation of the parties' agreements on the jurisdiction of courts underwent certain changes, in part thanks to the significant influence of the Brussels I Regulation<sup>10</sup> and the Brussels I Recast Regulation. The new regulation may be described as follows:

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<sup>3</sup> JIRSA, J. Komentář k § 89a. In: J. Jirsa – M. Doležal – K. Vančurová et al. *Občanské soudní řízení: soudcovský komentář*. 2<sup>nd</sup> edition. Prague: Wolters Kluwer, 2016, p. 69.

<sup>4</sup> KUČERA, Z., TICHÝ, L. *Zákon o mezinárodním právu soukromém a procesním: komentář*. Prague: Panorama, 1989, p. 224; ROZEHNALOVÁ, N. § 85 Pravomoc. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, p. 578; BŘÍZA, P., BŘICHÁČEK, T. § 85 Pravomoc. In: P. Bříza – T. Břicháček – Z. Fišerová et al. *Zákon o mezinárodním právu soukromém: komentář*. Pilsen: C. H. Beck, 2014, p. 502.

<sup>5</sup> KUČERA, Z., TICHÝ, L. *Zákon o mezinárodním právu soukromém a procesním: komentář*. Prague: Panorama, 1989, pp. 221–222; ROZEHNALOVÁ, N. § 85 Pravomoc. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, pp. 572–573; BŘÍZA, P., BŘICHÁČEK, T. § 85 Pravomoc. In: P. Bříza – T. Břicháček – Z. Fišerová et al. *Zákon o mezinárodním právu soukromém: komentář*. Pilsen: C. H. Beck, 2014, p. 499.

<sup>6</sup> § 89a (Dohoda sporných stran o příslušnosti soudu). In: L. David – F. Ištváněk – N. Javůrková et al. *Občanský soudní řád: komentář: I. díl (§ 1 až 200za)*. Prague: Wolters Kluwer, 2009, p. 414.

<sup>7</sup> ROZEHNALOVÁ, N. § 85 Pravomoc. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, pp. 576–577; BŘÍZA, P., BŘICHÁČEK, T. § 85 Pravomoc. In: P. Bříza – T. Břicháček – Z. Fišerová et al. *Zákon o mezinárodním právu soukromém: komentář*. Pilsen: C. H. Beck, 2014, pp. 501–502.

<sup>8</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (“Brussels I Recast Regulation”).

<sup>9</sup> Section 125 of the Private International Law Act.

<sup>10</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Brussels I Regulation”).

The general regulation applicable to the jurisdiction of Czech courts by parties' agreement is stipulated in section 85 of the Private International Law Act. A written agreement is explicitly required. Jurisdiction may be established in this manner for matters of obligation law and property law.<sup>11</sup> No distinction is made between business and consumer disputes. Labour disputes are subject to special regulations. Following the implementation of the Brussels I Recast Regulation and in view of the existence of international conventions,<sup>12</sup> this provision has become practically obsolete.<sup>13</sup>

The provisions of section 86 of the Private International Law Act specifically permit the establishment of the jurisdiction of a foreign court in matters of obligation law and property law. These provisions regulate the derogation of Czech courts, including conditions under which, on the contrary, regardless of the existence of an agreement on the jurisdiction of a foreign court, a submitted case is processed by a Czech court. In consumer and insurance matters an agreement on the establishment of the jurisdiction of a foreign court may be negotiated only after a dispute has arisen. Alternatively, this also applies to cases where a policyholder, insured person, another beneficiary, an injured party or a consumer is entitled to launch proceedings before the court of another country (i.e. a so-called asymmetrical agreement<sup>14</sup>).<sup>15</sup> These restrictions were adopted in accordance with the Brussels I Recast Regulation.<sup>16</sup>

The jurisdiction of Czech courts in labour matters (section 88 of the Private International Law Act) may also be based on an agreement between parties. Again, limitations in line with the Brussels I Recast Regulation apply: the agreement may be negotiated only after a dispute has arisen or in case the arrangement allows employees to independently initiate proceedings before the court of a foreign country. The agreement must be conducted in writing.<sup>17</sup>

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<sup>11</sup> ROZEHNALOVÁ, N. § 85 Pravomoc. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, pp. 566-580; BRÍZA, P., BŘICHÁČEK, T. § 85 Pravomoc. In: P. Bríza – T. Břicháček – Z. Fišerová et al. *Zákon o mezinárodním právu soukromém: komentář*. Pilsen: C. H. Beck, 2014, pp. 499-504.

<sup>12</sup> Convention on Choice of Court Agreements (Hague, 30 June 2005) ("Hague Choice of Court Convention of 2005"); Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Lugano II Convention"); Treaty between the Czechoslovak Socialist Republic and Mongolia on the provision of legal assistance and legal relations in civil, family and criminal matters (Ulan Bator, 15 October 1976) ("bilateral treaty with Mongolia").

<sup>13</sup> ROZEHNALOVÁ, N. § 85 Pravomoc. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, pp. 571-576; BRÍZA, P., BŘICHÁČEK, T. § 85 Pravomoc. In: P. Bríza – T. Břicháček – Z. Fišerová et al. *Zákon o mezinárodním právu soukromém: komentář*. Pilsen: C. H. Beck, 2014, pp. 498, 500, 504.

<sup>14</sup> BRÍZA, P. *Volba práva a volba soudu v mezinárodním obchodě*. Prague: C. H. Beck, 2012, p. 180.

<sup>15</sup> ROZEHNALOVÁ, N. § 86 Sjednání příslušnosti zahraničního soudu. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, pp. 580-594; BRÍZA, P. § 86 Sjednání příslušnosti zahraničního soudu. In: P. Bríza – T. Břicháček – Z. Fišerová et al. *Zákon o mezinárodním právu soukromém: komentář*. Pilsen: C. H. Beck, 2014, pp. 512-519.

<sup>16</sup> ROZEHNALOVÁ, N. § 86 Sjednání příslušnosti zahraničního soudu. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, p. 585.

<sup>17</sup> ROZEHNALOVÁ, N. § 88 Pravomoc. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, pp. 609-615; BRÍZA, P. § 88 Pravomoc. In: P. Bríza – T. Břicháček – Z. Fišerová et al. *Zákon o mezinárodním právu soukromém: komentář*. Pilsen: C. H. Beck, 2014, pp. 544-546.

Following the implementation of the Brussels I Recast Regulation and in view of the existence of international conventions,<sup>18</sup> the above described provisions are seldom utilized. This is especially true of the provisions of sections 85 and 88 of the Private International Law Act, which became practically obsolete after 10 January 2015. Any application outside of the EU (and the Lugano II Convention and the Hague Choice of Court Convention of 2005) thus only remains open to the provision of section 86 of the Private International Law Act.

### The influences of multilateral, regional, and bilateral instruments

As an EU member state, the Czech Republic is bound by EU legislation and by international conventions concluded by the European Union (e.g. the Lugano II Convention, the Hague Choice of Court Convention of 2005 and the EU–Denmark Agreement). EU legislation and specifically its Brussels I Regulation and Brussels I Recast Regulation were of fundamental importance with respect to implemented changes in the provisions of the Private International Law Act. Other international conventions concluded by the Czech Republic, which include the option to establish agreements on court jurisdiction, did not have extensive influence on Czech legislation. The new Czech regulations on jurisdiction agreements, as set out in the Private International Law Act, were fundamentally influenced by the Brussels I Recast Regulation (and, of course, by previous modifications) with respect to the issue of the position of the weaker party and, in certain cases, the utilization of asymmetrical agreements.<sup>19</sup>

Finally, it is necessary to provide a comment on terminology as well as a comment on the concept of jurisdiction agreements from the point of view of Czech law. Neither the term “optional” (or an equivalent) nor the term “exclusive” (or an equivalent) were ever in use in Czech doctrine and legislation.<sup>20</sup> This explanation is significant for an understanding of the handling of some issues described in part II, explicitly focusing on the optional choice of court agreements. The above listed terms only begin to appear once the Czech Republic joined the European Union, i.e. with the application of the Brussels I Regulation and subsequently the Brussels I Recast Regulation and Lugano II Convention. Within the framework of Czech law (i.e. from the point of view of the Private International Law Act) only the simple term of “parties’ agreement on the jurisdiction of courts” has been and is being used in reference to prorogation or derogation agreements.

However, the assessment of the concept of an agreement from the point of view of Czech law is rather more complex. This question was not discussed in connection with

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<sup>18</sup> The Hague Choice of Court Convention of 2005; the Lugano II Convention; the bilateral treaty with Mongolia; Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 19 October 2005 (“EU–Denmark Agreement”).

<sup>19</sup> ROZEHNALOVÁ, N. § 86 Sjednání příslušnosti zahraničního soudu. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, pp. 585–586.

<sup>20</sup> ROZEHNALOVÁ, N. § 85 Pravomoc. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, p. 570.

the adoption of the Czech Private International Law Act and that no explanation was provided in the Explanatory Report to this Act. If we compare the features and effects of exclusive or optional agreements with the Czech regulation, it may be said that the Czech regulation, i.e. as stipulated in the Private International Law Act, constitutes a regulation of exclusive agreements, or, rather, that we proceed from the presumption that the regulation focuses on exclusive agreements.<sup>21</sup> The Czech regulation presupposes a choice of a court belonging to a single jurisdiction (either a specific court or a jurisdiction as a whole). In the case of the prorogation of Czech courts (section 85 of the Private International Law Act), a Czech court cannot reject jurisdiction established by a validly concluded agreement. The situation is similar in the case of derogation in favour of Czech courts and prorogation of a foreign court's jurisdiction. The explicit exclusion of the jurisdiction of Czech courts where the jurisdiction of a foreign court has been negotiated (section 86, paragraph 2 of the Private International Law Act) constitutes evidence of the concept of exclusivity.<sup>22</sup> Exceptions to this rule are limited and explicitly stated in the Act (section 86, paragraph 2 of the Private International Law Act). The first exception refers to the utilization of an agreement whereby the parties withdraw from a negotiated agreement. Additional reasons include: situations where a decision issued abroad could not be recognized in the Czech Republic; situations where a foreign court refused to deal with a matter and situations where an arrangement on the jurisdiction of a foreign court would be contrary to public policy.<sup>23</sup> With respect to Czech courts, the prorogation agreement thus has binding positive and as well as binding negative effects.

## II. OPTIONAL CHOICE OF COURT AGREEMENTS

### Legal sources relevant to the determination of the effect of optional choice of court agreements

In the Czech Republic court selection agreements are generally regulated by regional, i.e. European, sources and by international and domestic sources. With respect to optional choice of court agreements, relevant sources include European sources (Brussels I Regulation, Brussels I Recast Regulation) and international sources associated with these European regulations (the Lugano II Convention, the EU–Denmark Agreement, the Hague Choice of Court Convention of 2005). These include an explicit assumption of the exclusivity of such agreements, i.e. the agreement may be qualified as optional only in case the

<sup>21</sup> BŘÍZA, P., BŘICHÁČEK, T. § 85 Pravomoc. In: P. Bříza – T. Břicháček – Z. Fišerová et al. *Zákon o mezinárodním právu soukromém: komentář*. Pilsen: C. H. Beck, 2014, p. 504.

<sup>22</sup> ROZEHNALOVÁ, N. § 86 Sjednání příslušnosti zahraničního soudu. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, p. 587.

<sup>23</sup> ROZEHNALOVÁ, N. § 86 Sjednání příslušnosti zahraničního soudu. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, pp. 587–588; BŘÍZA, P. § 86 Sjednání příslušnosti zahraničního soudu. In: P. Bříza – T. Břicháček – Z. Fišerová et al. *Zákon o mezinárodním právu soukromém: komentář*. Pilsen: C. H. Beck, 2014, pp. 517–519.

parties agree to do so.<sup>24</sup> In the case of other sources, in particular domestic regulations included in the Private International Law Act, agreement type – as previously mentioned – is not specifically identified. However, doctrine does tend to qualify these agreements as exclusive agreements, i.e. to support the argument in favour of exclusivity.

In summary, legal regulations relevant to the choice of court agreements applicable to the Czech Republic include the following:

**The Brussels I Recast Regulation** along with its predecessor, the Brussels I Regulation (the Czech Republic was not bound by the Brussels Convention<sup>25</sup>). As the Brussels I Recast Regulation extends the scope of this regulation in terms of affected persons (article 6), its temporal scope is of interest both in relation to the preceding Brussels I Regulation and the Czech regulation stipulated in the Private International Law Act. The use of this Act has become rather limited following the application of the Brussels I Recast Regulation and, in the case of prorogation according to section 85 of the Private International Law Act, in fact entirely obsolete.<sup>26</sup> With respect to agreements on jurisdiction, two fundamental moments appear to be decisive for any consideration of the application of the new regulation: the conclusion of the agreement and the initiation of proceedings.<sup>27</sup> The Brussels I Recast Regulation is applicable (article 66) to proceedings instituted on or after 10 January 2015. The possible validity of agreements included under section 85 of the Private International Law Act and their invalidity under the Brussels I Recast Regulation was discussed in Czech literature also with the respect to the solution in *Sanicentral GmbH v René Collin* (Case 25/79)<sup>28</sup>. The author holds a position in favour of respecting the principle of autonomous will and the principle of legal certainty.<sup>29</sup> On the other hand, it must be said that such a solution was never required throughout the duration of the applicability of the Private International Law Act (1 year) and that the Brussels I Recast Regulation is significantly more benevolent than the Czech regulation.

**The Lugano II Convention**, binding for EU member states, Denmark, Switzerland, Iceland and Norway.

**The EU–Denmark Agreement** on jurisdiction and the recognition and enforcement of judgements.

**The Hague Choice of Court Convention of 2005**. The Czech Republic, as an EU member state, is bound to non-EU contracting parties within the framework of this international convention.

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<sup>24</sup> KEYES, M., MARSHALL, B. A. Jurisdiction agreements: exclusive, optional and asymmetrical. *Journal of Private International Law*. 2015, Vol. 11, No. 3, p. 350, [2017-10-22]. Available at: <<http://dx.doi.org/10.1080/17441048.2015.1106718>>.

<sup>25</sup> Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

<sup>26</sup> BRÍZA, P., BRÍCHÁČEK, T. § 85 Pravomoc. In: P. Bríza – T. Brícháček – Z. Fišerová et al. *Zákon o mezinárodním právu soukromém: komentář*. Pilsen: C. H. Beck, 2014, pp. 498, 500, 504.

<sup>27</sup> To this debate see: MAGNUS, U., MANKOWSKI, P. *European Commentaries on Private International Law: Commentary: Vol. I: Brussels Ibis Regulation*. Köln: Otto Schmidt, 2016, pp. 1014–1016.

<sup>28</sup> See also solution given by European Court of Justice in *Sanicentral GmbH v René Collin* (Case 25/79 of 13 November 1979).

<sup>29</sup> ROZEHNALOVÁ, N. § 85 Pravomoc. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, p. 574. To this question see also: BRÍZA, P. *Volba práva a volba soudu v mezinárodním obchodě*. Prague: C. H. Beck, 2012, pp. 130–131.

**Other multilateral international conventions** no longer directly linked to the EU also include provisions allowing or restricting prorogation agreements. The Czech Republic is bound by the Montreal Convention,<sup>30</sup> Warsaw Convention,<sup>31</sup> and the CMR Convention.<sup>32</sup>

**Bilateral treaties** – in some cases agreements on judicial cooperation concluded by the Czech Republic prior to joining the European Union – also include adjustments to prorogation agreements. A currently valid convention has also been concluded with Mongolia.

**Act No. 91/2012 Coll.**, on Private International Law, as amended, a key standard governing the area of private and procedural international law, includes relevant regulations in sections 85, 86 and 88. As previously mentioned, this arrangement is residual and applies only where no European (EU) or international standards apply.

### The applicable law to characterization of a choice of court agreement as optional or exclusive

Firstly, it is necessary to inspect the nature of such agreements as viewed by Czech doctrine. The answer to this question also determines what law is applicable to the qualification of a prorogation agreement. Under Czech doctrine, prorogation agreements are classified as agreements with procedural effects or as procedural agreements. The primary consequence of this designation is the dominance of the forum law.<sup>33</sup> The same applies to derogation agreements (or derogation effects) in favour of foreign courts.<sup>34</sup>

Although this view has been and continues to be dominant, views reflecting not only the procedural aspects of such agreements (shifts in jurisdiction) but also the private law aspects of prorogation agreements establishing the rights and obligations of the parties to such agreements have gradually emerged. As a result of this view, prorogation agreements should also “bear” a material law aspect. In accordance with the principle of the autonomous will of the parties, the parties should be able to choose the governing law applicable to the material validity of a prorogation agreement (especially with respect to issues of party will and consensus). However, the admissibility of prorogation agreements is always governed by the forum law.<sup>35</sup> The application of choice of law

<sup>30</sup> Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May 1999), exhaustively listed fora in article 33.

<sup>31</sup> Convention for the Unification of Certain Rules to International Carriage by Air (Warsaw, 12 October 1929), article 28.

<sup>32</sup> Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva, 19 May 1956), article 31.1.

<sup>33</sup> BĚLOHLÁVEK, A. J. Procesní smlouvy a kvalifikace rozhodčích a prorogačních smluv. Aplikace hmotněprávní úpravy na smlouvy s procesním účinkem pro futuro. *Právník*. 2012, No. 9, pp. 971 etc.; ROZEHNALOVÁ, N. Smlouva o příslušnosti soudu z pohledu Úmluvy o soudní pravomoci a příslušnosti a výkonu rozhodnutí v občanských a obchodních věcech z roku 1968. In: *Ročenka evropského práva*. 1996, Vol. 2. Brno: Masarykova univerzita, 1997, p. 91; KUČERA, Z., TICHÝ, L. *Zákon o mezinárodním právu soukromém a procesním: komentář*. Prague: Panorama, 1989, p. 223; BRÍŽA, P. *Volba práva a volba soudu v mezinárodním obchodě*. Prague: C. H. Beck, 2012, pp. 169, 179; ROZEHNALOVÁ, N. § 85 Pravomoc. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, p. 568.

<sup>34</sup> KUČERA, Z., TICHÝ, L. *Zákon o mezinárodním právu soukromém a procesním: komentář*. Prague: Panorama, 1989, p. 224.

<sup>35</sup> BRÍŽA, P. *Volba práva a volba soudu v mezinárodním obchodě*. Prague: C. H. Beck, 2012, p. 179; BRÍŽA, P., BŘIČÁČEK, T. § 85 Pravomoc. In: P. Bříza – T. Břicháček – Z. Fišerová et al. *Zákon o mezinárodním právu soukromém: komentář*. Pilsen: C. H. Beck, 2014, p. 503.

rules would only be relevant with respect to the contractual elements of prorogation agreements.

While some progress in doctrine with respect to prorogation agreements is visible, their procedural character and emphasis on the transfer of jurisdiction continue to prevail. Their nature thus also allows us to unequivocally infer the dominance of forum law with regard to the issue of qualification.<sup>36</sup>

**The principles applicable to determine whether a choice of court agreement is characterized as optional or exclusive.** The general legal principle governing private law is the autonomous will of the parties. The range and scope of this principle is determined by law. As a result, the common will of the parties is only capable of influencing a limited range of issues. The key issue is whether or not the parties decide to conclude a prorogation agreement. The will of the parties does not come into play in any other areas. It cannot alter e.g. the form of the prorogation agreement, which is instead stipulated by law. The parties cannot directly influence whether the prorogation agreement is negotiated as exclusive or optional. This option is not legally provided for. They only have disposal of the territorial jurisdiction of the agreement, i.e. any agreement made between them cannot alter either material or functional jurisdiction. This is in accordance with Czech domestic law. While Czech legislation does not comment on the exclusivity or non-exclusivity of prorogation agreements, the presumption of exclusivity is prevalent in its doctrine. The situation is different where the Brussels I Recast Regulation or international instruments are applied.

### The applicable law to determine the legal effect of an optional choice of court agreement

As explained above, Czech legislation does not expressly mention agreement type. In view of the character of agreements regulated by the Private International Law Act, it is, however, possible to assume a tendency towards their exclusive nature. Nevertheless, it is impossible to say how Czech law might react to a hypothetical situation where parties concluding an agreement explicitly classified it as optional.

In the event that a Czech court should be asked to assess the derogation effects of an agreement on the jurisdiction of a court whereby the parties explicitly “non-exclusively” opt for the jurisdiction of a foreign court (i.e. outside the scope of European or international instruments), the issue of the effects of such an agreement would be settled in accordance with Czech law. This point of view, if considered further, allows us to model the following situations:

The jurisdiction of a Czech court may apply despite the existence of a prorogation agreement in case the parties affirm, in accordance with section 86, paragraph 2 of the Private International Law Act, that they do not insist on the prorogation of jurisdiction of a foreign court. This constitutes the application of a legally explicitly stipulated exemption from the statutory derogation of jurisdiction of Czech courts. It also comprises an exception to the written form of the agreement – an affirmative statement of the parties, included in the protocol, is sufficient. Submission by itself is not sufficient.

<sup>36</sup> ROZEHNALOVÁ, N. § 85 Pravomoc. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, p. 568.



Despite the existence of an agreement explicitly described as optional, proceedings will be initiated before a Czech court. The court is under an obligation to investigate *ex offio* the conditions of such proceedings, i.e. including its jurisdiction. The outcome in this case is entirely uncertain, with all variants being conceivable. An outcome in favour of maintaining the validity of such an agreement may be based either on the principle of the autonomous will of the parties or the severability of invalid provisions. The court may also reject jurisdiction, in which case the issue of exclusivity or non-exclusivity would not be processed. Alternatively, the court may declare such an agreement invalid.

From the point of view of Czech law this is not a choice of law issue but rather a question of procedural law dominated by the forum law. Procedural standards relevant to jurisdiction are used, as applicable.

### The legal effect of an optional choice of court agreement in favour of the courts of the forum and in favour of a foreign court

Legal regulation relevant to the prorogation of Czech courts in accordance with section 85 of the Private International Law Act is obsolete. In this case, we are proceeding in accordance with the Brussels I Recast Regulation (or according to international instruments, if applicable to a given situation), specifically article 25 thereof. This is not a matter of submission to jurisdiction, but one of establishing jurisdiction on the basis of an agreement between parties. This situation is thus different from submission regulated by article 26.

From a domestic regulations perspective, it may be said that the Private International Law Act operates with the concept of the exclusive nature of agreements on jurisdiction. We may however ask what the effects of an optional choice agreement (an agreement expressly determining the jurisdiction of a foreign court) would be, i.e. whether they would be identical to the effects of an agreement not based on this concept. Or, on the contrary, whether the absence of this aspect of the prorogation agreement might result in a derogation effect with respect to the Czech courts.

**The legal effect of an optional choice of court agreement in favour of foreign courts after the option has been exercised by commencing proceedings in a nominated foreign court.** In general, in case a valid agreement on the jurisdiction of a foreign court is concluded, the jurisdiction of the Czech courts is thereby derogated. This modification of the resulting effects is explicitly stipulated in section 86 of the Private International Law Act. Whether these effects are also triggered by the optional choice of court agreement remains uncertain, as stated above on several occasions. Naturally, the situation is quite different under the Brussels I Recast Regulation, which resolves this situation in accordance with general *lis pendens* rules.

**Comparing the treatment of optional choice of court agreements in favour of forum courts, and in favour of foreign courts.** This issue cannot be considered from the point of view of domestic legislation as set out in the Private International Law Act, because it is based on the presumption of exclusive prorogation. However, this is relevant in connection with the application of article 25 of the Brussels I Recast Regulation, which allows parties to negotiate an optional prorogation agreement. Nevertheless, not even the provisions of the Brussels I Recast Regulation distinguish between prorogation in favour of forum courts or, on the other hand, in favour of the courts of other member states. Given

the principle of mutual trust between member states, it may be assumed that member states will not distinguish between the prorogation in favour of forum courts or in favour of those of other member states.

### Optional choice of court agreements involving presumptively weaker parties

Following the example of regional regulations, Czech national legislation set out provisions for the protection of weaker parties. The adoption of protection for weaker parties was led in particular by efforts designed to balance the economic, legal and factual inequalities in society.<sup>37</sup> Simultaneously, Czech legislation also enables weaker parties to litigate in their home jurisdiction and to facilitate better access to the courts as such.<sup>38</sup>

The nature of the parties is not decisive in the case of prorogation of Czech courts in accordance with section 85 of the Private International Law Act. However, weaker parties are protected when negotiating agreements on the jurisdiction of foreign courts in accordance with sections 86 and 88 of the Private International Law Act.<sup>39</sup> In the case of insurance and consumer agreements, the jurisdiction of a foreign court in accordance with section 86 of the Private International Law Act may only be established after a dispute has arisen, or in case it allows a weaker party (policyholder, insured, another beneficiary, injured party or consumer) to initiate proceedings before the court of another country. Likewise, in accordance with section 88, paragraph 2 of the Private International Law Act, the jurisdiction of a foreign court may be established in labour matters only after a dispute has arisen or in case it allows the employee to initiate proceedings before the court of another country.<sup>40</sup> The provisions of section 86, paragraph 2 of the Private International Law Act (as well as section 88, paragraph 2 thereof, which refers to it) expressly provides for a derogation of jurisdiction of Czech courts.<sup>41</sup>

Although we generally proceed from the concept of exclusivity, the Private International Law Act does apply the concept of optional prorogation in connection with asymmetrical agreements in favour of weaker parties.<sup>42</sup> In cases where the provisions of the Brussels I Recast Regulation are prioritized, special provisions for the protection of weaker parties established in articles 15, 19 and 23 of this Regulation must be respected. These provisions

<sup>37</sup> ROZEHNALOVÁ, N. § 85 Pravomoc. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, p. 569; ROZEHNALOVÁ, N. § 86 Sjednání příslušnosti zahraničního soudu. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, pp. 585–586.

<sup>38</sup> ROZEHNALOVÁ, N. § 86 Sjednání příslušnosti zahraničního soudu. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, p. 586.

<sup>39</sup> BŘÍZA, P., BŘICHÁČEK, T. § 85 Pravomoc. In: P. Bříza – T. Břicháček – Z. Fišerová et al. *Zákon o mezinárodním právu soukromém: komentář*. Pilsen: C. H. Beck, 2014, pp. 513–514.

<sup>40</sup> ROZEHNALOVÁ, N. § 88 Pravomoc. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, pp. 612–613; BŘÍZA, P. § 88 Pravomoc. In: P. Bříza – T. Břicháček – Z. Fišerová et al. *Zákon o mezinárodním právu soukromém: komentář*. Pilsen: C. H. Beck, 2014, p. 546.

<sup>41</sup> ROZEHNALOVÁ, N. § 86 Sjednání příslušnosti zahraničního soudu. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, p. 587.

<sup>42</sup> ROZEHNALOVÁ, N. § 86 Sjednání příslušnosti zahraničního soudu. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, p. 586.

do not include a presumption of exclusivity, as is the case with article 25 of the Brussels I Recast Regulation.

The consequences if a party brings proceedings in a court other than that nominated in an optional choice of court agreement

***Lis pendens.*** A general *lis pendens* rule is included in section 8, paragraph 2 of the Private International Law Act. According to this provision, if proceedings before a Czech court are initiated later than related proceedings before a foreign court, the Czech court may suspend proceedings in a justified case. Such an interruption may only be carried out by the court in case the decision of the foreign court is deemed recognizable in the Czech Republic.<sup>43</sup>

Nevertheless, the provision of section 86, paragraph 2 of the Private International Law Act specifically stipulates the derogation of the jurisdiction of Czech courts in the case of the prorogation of jurisdiction of a foreign court. Due to a lack of jurisdiction, the Czech court should stop any proceedings and the *lis pendens* rule would thus not be applied. This is fully in line with the concept of exclusivity utilized in the Czech rule of law. However, whether the autonomous will of the parties would outweigh an explicitly established derogation of jurisdiction of a Czech court in the event of a negotiated optional prorogation agreement is unclear. The authors of this paper believe that it would be up to the court to consider whether it would prefer a restrictive interpretation of the law or whether it would be willing to stand by the autonomous will of the parties.

The issue is of greater relevance in connection with the application of the Brussels I Recast Regulation, which is based on an explicit presumption of exclusivity, but allows also optional prorogation. Exclusive prorogation requires the application of a special *lis pendens* rule as set out in article 31, paragraph 2 of the Brussels I Recast Regulation. In case proceedings were initiated before a court seised in accordance with an exclusive choice of court agreement, the courts of other member states are under an obligation to suspend proceedings. The jurisdiction of a prorogated court prevails even if proceedings were initiated before another court at an earlier date. In relation to optional prorogation, the general *lis pendens* rule stipulated in article 29 of the Brussels I Recast Regulation is applied. In such a situation, proceedings must be interrupted by the court, which initiated proceedings at later date.

**Damages for breach of an optional choice of court agreement.** The possibility of awarding damages for breach of contract if one party commences proceedings in a court other than that nominated in an optional choice of court agreement may be considered problematic within the EU as it violates the principle of mutual trust between EU courts. Furthermore, in the Czech legal environment, the prorogation agreement is considered to constitute a procedural agreement or an agreement with a procedural effect. An opinion

<sup>43</sup> BELLOŇOVÁ, P. § 8 Základní ustanovení. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, pp. 74–75; BŘICHÁČEK, T. § 8 Základní ustanovení. In: P. Bříza – T. Břicháček – Z. Fišerová et al. *Zákon o mezinárodním právu soukromém: komentář*. Pilsen: C. H. Beck, 2014, pp. 68–69.

expressed in literature (and shared by the authors of this paper) states that claims for damages resulting from the breach of an agreement on court jurisdiction cannot be enforced. One of the basic prerequisites for claiming damages is absent in this case: by concluding a prorogation agreement, no subjective substantive law – the breach of which would give rise to damages – was created in the first place.<sup>44</sup>

**Enforceability of a foreign judgment.** Apart from legally stipulated exceptions, a court may not review the jurisdiction of a court whose decision should be recognized and enforced. In accordance with section 15, paragraph 1, letter a) of the Private International Law Act, a Czech court may refuse to recognize a judgement rendered by a foreign court in case a given matter falls under the exclusive jurisdiction of the Czech courts (i.e. jurisdiction established in accordance with Czech legislation).<sup>45</sup> In accordance with article 45, paragraph 1, letter e) of the Brussels I Recast Regulation, a court shall refuse a motion to recognize and enforce a judgement rendered by a foreign court in case doing so would constitute a violation of the rules of exclusive jurisdiction and selected special provisions associated with the protection of weaker parties.

In accordance with the Private International Law Act as well as with the Brussels I Recast Regulation (or other international instruments), the establishment of jurisdiction at odds with the parties' prorogation agreement does not constitute grounds for the denial of recognition and enforcement of a judgement rendered by a foreign court.

### The effect of an exclusive choice of court agreement

The term "*exclusive prorogation agreement*" does not exist and is thus not used in Czech law. Where this aspect is considered in literature, it is based on the presumption or concept of exclusivity. In accordance with this approach, prorogation is associated with two effects, namely prorogation and derogation. The choice of jurisdiction of a court of another country in accordance with section 86 of the Private International Law Act constitutes the establishment of jurisdiction of such a foreign court and, at the same time, the derogation of the jurisdiction of Czech courts.<sup>46</sup> Maintaining the jurisdiction of Czech courts would be contrary to the purpose of the regulation of international relations.<sup>47</sup>

The derogation of the jurisdiction of Czech courts as a result of the establishment of a foreign court's jurisdiction is stipulated in section 86, paragraph 2 of the Private International Law Act. The effect of this provision indicates a preference for the concept of exclusivity. This thus eliminates uncertainty as to whether it is still possible to initiate proceedings before the Czech courts in the event of the existence of a prorogation agreement in favour of a foreign court. The jurisdiction of Czech courts to hear and adjudicate

<sup>44</sup> BRÍZA, P. *Volba práva a volba soudu v mezinárodním obchodě*. Prague: C. H. Beck, 2012, pp. 168-169, 171.

<sup>45</sup> JIRMANOVÁ, M. § 15 (Odepření uznání cizího rozhodnutí). In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, pp. 109-110; BŘICHÁČEK, T. § 15 (Důvody pro odepření uznání cizího rozhodnutí). In: P. Bríza – T. Břicháček – Z. Fišerová et al. *Zákon o mezinárodním právu soukromém: komentář*. Pilsen: C. H. Beck, 2014, pp. 101-105.

<sup>46</sup> ROZEHNALOVÁ, N. § 85 Pravomoc. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, p. 570.

<sup>47</sup> KUČERA, Z., TICHÝ, L. *Zákon o mezinárodním právu soukromém a procesním: komentář*. Prague: Panorama, 1989, p. 225.

in a given matter will be established only in legally enumerated cases. Exceptions to the derogation of Czech courts constitute these situations: where participants unanimously declare that they do not insist on the prorogation of jurisdiction of a foreign court; in case a decision issued in a foreign country cannot be recognized in the Czech Republic; in case a foreign court refuses to hear the case; in case the prorogation of a foreign court would be contrary to public policy (*ordre public*) of the forum.<sup>48</sup>

Although the law mentions the prorogation of a “foreign court”, the derogation of jurisdiction of Czech courts may also be waived as a result of the selection of several courts of a foreign country.<sup>49</sup> An opposing interpretation would be unjustifiably formalistic. In the case of a prorogation agreement in favour of a foreign court, Czech courts are not authorized to investigate whether such an agreement may establish the jurisdiction of a foreign court in a valid manner. This agreement may only be reviewed by the prorogated foreign court.<sup>50</sup>

Differences between the effects of exclusive and optional prorogation agreements are identifiable. However, it is impossible to say how the effects of optional agreements might be perceived by Czech courts. Differences lie mainly in the derogation and *lis pendens* effects of prorogation agreements. Their form depends on the application of specific legal regulations.

Regulations relevant to prorogation in favour of Czech courts in accordance with section 85 of the Private International Law Act are obsolete. In case the parties prorogate the jurisdiction of Czech courts, the provisions of the Brussels I Recast Regulation (or the provisions of international instruments) have precedence.

In case the parties prorogate the jurisdiction of a foreign court, the situation differs with respect to whether the court in question is a court of EU member state or a court in a third state. In the case of the prorogation of a court of another member state, the provisions of the Brussels I Recast Regulation have precedence. The provision of section 86 of the Private International Law Act only applies to situations where parties agree on the jurisdiction of a court in a third state, i.e. non-EU member state court, in matters not regulated by international instruments. The effects of prorogation in favour of foreign courts in accordance with section 86 of the Private International Law Act were analysed above. At this point, it may be summarized that the law associates prorogation with prorogation and specifically also with derogation effects.

<sup>48</sup> ROZEHNALOVÁ, N. § 86 Sjednání příslušnosti zahraničního soudu. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, pp. 587–588; BRÍZA, P. § 86 Sjednání příslušnosti zahraničního soudu. In: P. Bríza – T. Břicháček – Z. Fišerová et al. *Zákon o mezinárodním právu soukromém: komentář*. Pilsen: C. H. Beck, 2014, pp. 517–519.

<sup>49</sup> BRÍZA, P. § 86 Sjednání příslušnosti zahraničního soudu. In: P. Bríza – T. Břicháček – Z. Fišerová et al. *Zákon o mezinárodním právu soukromém: komentář*. Pilsen: C. H. Beck, 2014, p. 517.

<sup>50</sup> KUČERA, Z., TICHÝ, L. *Zákon o mezinárodním právu soukromém a procesním: komentář*. Prague: Panorama, 1989, p. 225; ROZEHNALOVÁ, N. § 86 Sjednání příslušnosti zahraničního soudu. In: M. Pauknerová – N. Rozehnalová – M. Zavadilová et al. *Zákon o mezinárodním právu soukromém: komentář*. Prague: Wolters Kluwer, 2013, pp. 581–582; BRÍZA, P. § 86 Sjednání příslušnosti zahraničního soudu. In: P. Bríza – T. Břicháček – Z. Fišerová et al. *Zákon o mezinárodním právu soukromém: komentář*. Pilsen: C. H. Beck, 2014, p. 517; KUČERA, Z., PFEIFER, M. Závazkové právo. In: Z. Kučera – M. Pauknerová – K. Růžička et al. *Mezinárodní právo soukromé*. 8<sup>th</sup> edition. Pilsen–Brno: Aleš Cenek–Doplňěk, 2015, p. 315.

The Brussels I Recast Regulation is based on an explicit presumption of exclusivity. A prorogation agreement according to this regulation is associated with both prorogation and derogation effects. In case parties specifically agree on optional prorogation, the agreement only carries a prorogation effect. The difference, therefore, is that by utilizing optional prorogation, the parties do not derogate the jurisdiction of courts in accordance with generally valid international jurisdiction rules.<sup>51</sup> The situation is similar in the case of international instruments binding for the Czech Republic.

Another distinction between exclusive and optional prorogation agreements may be identified in connection with *lis pendens*.

### III. ASYMMETRICAL CHOICE OF COURT AGREEMENTS

The legal effect of a choice of court agreement that combines both exclusive and optional aspects (“asymmetrical choice of court agreement”)

The regulation of asymmetrical agreements in accordance with sections 86 and 88 of the Private International Law Act raises questions about the range of options it covers. The Private International Law Act does not include legislation addressing the issue of asymmetrical agreements in general, i.e. legislation which would regulate their conclusion and effects for all purposes. Furthermore, these agreements did not appear in practice. Instead, we previously encountered asymmetrical clauses regulating the selection among entrepreneurs between litigation and arbitration, with the right to select limited to one party. While these clauses were criticized for lack of clarity in literature, they were being accepted and enforced in practice.

Most likely in connection with the Brussels I Regulation and the Brussels I Recast Regulation, the Private International Law Act includes asymmetrical choice of court agreements applicable to cases involving so-called weaker parties. This option, specifically stipulated by section 86, paragraph 1, sentence two, of the Private International Law Act (similarly section 88 with respect to employment agreements) is linked to the derogation of the jurisdiction of Czech courts and the choice of a foreign court. The application of the provision of section 86 of the Private International Law Act is possible in cases where the jurisdiction of the court of a third country would be prorogated.<sup>52</sup> The option granted to the weaker party is formulated as an explicit exception to the general rule. It may be asked whether or not the wording of section 86, paragraph 1 of the Private International Law Act in fact allows for considerations regarding the possibility of the conclusion of an asymmetrical agreement in additional cases, i.e. where parties have equal standing. Regulating the asymmetrical agreements in favour of

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<sup>51</sup> KEYES, M., MARSHALL, B. A. Jurisdiction agreements: exclusive, optional and asymmetrical. *Journal of Private International Law*. 2015, Vol. 11, No. 3, pp. 353–355, [2017-10-22]. Available at: <<http://dx.doi.org/10.1080/17441048.2015.1106718>>.

<sup>52</sup> I. e. situation which does not fall within the scope of the Brussels I Recast Regulation, the Lugano II Convention, the Hague Choice of Court Convention of 2005, and the EU–Denmark Agreement.

socalled weaker parties as an explicitly amended exception to the general rule on the possible prorogation of foreign courts does not contradict this view. Furthermore, the wording of paragraph 1 allows us to deduce that in the case of parties of equal standing, this option may be available to any contracting party, i.e. with the exception of insurance situations and consumer issues where such treatment would be limited to designated persons. This view has not been discussed in any literature, nor has it been verified in a decision-making process. It is clearly possible to find both arguments for its utilization (principle of autonomous will of the parties) as well as arguments against (unequal standing of the parties, unpredictability and uncertainty with respect to the determination of the forum, in effect destroying all of the benefits of prorogation agreements). The Explanatory Report to the Act which provides guidance in a range of other cases provides no solutions in this specific case. Neither do existing commentaries. The assessment of this solution is thus uncertain. In the future, given the circumstances outlined above, it may be expected that, possibly also thanks to the influence of the Brussels I Recast Regulation, the provision may be interpreted in favour of asymmetrical agreements of parties of equal standing, i.e. with the exception of cases specifically stipulated by law.

**What is the effect of the optional component of such an agreement?** An answer to the question seeking to establish the effects of an optional component of such an agreement is determined by two facts with respect to the analysed Private International Law Act: a) we are analysing a national regulation, i.e. a regulation which defines the jurisdiction of domestic courts and specifies cases respecting the jurisdiction of foreign courts; b) the Czech regulation is based on the presumption of the exclusive nature of agreements regulated by this Act. It should also be borne in mind that the provision of section 86 of the Private International Law Act is limited to cases of derogation of Czech courts and the choice of courts of third countries (i.e. non-EU countries with restrictions where international conventions would apply). The party in whose favour the option is drafted may initiate proceedings both before Czech courts whose jurisdiction is established by law as well as before a court designated in accordance with the option. In the latter case, when the option is exercised, the jurisdiction of the Czech courts is derogated as a result. This effect is explicitly regulated by law. In case proceedings are initiated by the other party, only the jurisdiction of Czech courts is established (determined by law). The derogation of Czech courts does not take place only under conditions specifically set out in the same regulation (agreement of parties, public order dispute, the future decision of a third country court will not be enforced and the foreign court will refuse to handle it). In such a case, the dispute will be processed by a Czech court. Situations outside of the above are regulated by the Brussels I Recast Regulation or by international instruments.

The effect of an asymmetrical choice of court agreement and the position of the party in whose favour the option is drafted

As stated above, the Czech regulation expressly allows for the conclusion of an asymmetrical agreement in the case of specifically enumerated parties. These are considered

the weaker parties (policyholder, insured, another beneficiaries, injured or consumer<sup>53</sup>). This scenario is thus explicitly regulated and explicitly admitted. The choice is specifically in their favour and at their disposal. In case an agreement is concluded in favour of the other party, i.e. the contractual partner in any of the specifically enumerated matters, the agreement is invalid. As a result, the negative effects of the agreement do not occur and the jurisdiction of the Czech courts is not derogated.

In the event of an asymmetrical agreement on jurisdiction in cases where the parties are of equal standing, the standing itself would not be factually investigated. A possible exception could be the case of the so-called adhesion contracts and the potential invalidity of an arrangement concluded in accordance with section 1801 of the Act No. 89/2012 Coll., the Civil Code, as amended, (a clause outside the text of the agreement proposed by the other party grossly contradicts business practices and the principle of fair business practices).

#### IV. CONCLUSION

Modifications at the level of the Private International Law Act would seem to be appropriate in two areas. Firstly, a clarification of the possibility of concluding asymmetrical agreements not only in cases of insurance, employment and consumer matters, but also generally between parties of equal standing is required. The provision of section 86 of the Private International Law Act is not clear in this respect. Secondly, an explicit regulation with respect to the nature of agreements on jurisdiction enshrined in the Czech Private International Law Act would be desirable. The current concept, with all considerations based on an assumption of exclusivity, does not seem satisfactory. In particular, if, under the influence of dominant regulations enshrined in the Brussels I Recast Regulation, the usage of optional agreements becomes more widespread in practice.

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<sup>53</sup> The Explanatory Report to the Act does not expressly mention weaker parties. However, commentaries associate the text with position of a weaker party. Some doubts were expressed with regard to insurance issues.