IDENTIFICATION OF DOMESTIC LAW IN RELATION TO FACULTATIVE CONFLICT OF LAWS

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Abstract: *This paper deals with the procedural treatment of foreign law. Particularly whether the conflict of laws is obligatory or facultatively applied. In the case of facultative conflict of laws, this paper aims to identify certain positions of returning to domestic law.*

Keywords: *facultative conflict of laws, Czech law, lex fori, treatment of foreign law*

INTRODUCTION

The treatment of foreign law is a fundamental issue that falls under the general part of private international law. Private international law deals with three primary areas; the *determination of applicable law, the determination of jurisdiction,* and *the treatment of foreign ruling*s.[1] The first major field is the determination of the applicable law, i.e., to determine which applicable law will be applied to the question at issue. This process has a direct connection to the court of jurisdiction. The chosen court affects several matters: one of them is the treatment of foreign law. To fulfil the fundamental objective of private international law, ensuring external decisional harmony, resolving the procedural treatment of foreign law is appropriate. Although the EU law is used in a sundry of areas, this issue is not unified. The evaluation and treatment of this issue vary from one law to another due to the absence of unified legislation. Therefore, how foreign law is dealt with depends on the designated court.

The article deals with one area that belongs to the procedural treatment of foreign law. It is a question of the treatment of the conflict of laws rule; whether the conflict of laws rule is applied obligatorily or facultatively. In the case of a facultative conflict of laws regime, it is interesting to identify certain positions of returning to one's domestic law. The aim of the article will therefore be to indicate the models of treatment of the conflict of laws rule in general and analyse the possibility of applying the conflict of laws rule at the parties' suggestion or the court's discretion. The Czech approach to the issue at hand will not be omitted. The paper aims to answer the questions posed below, which must be addressed in their mutual context:

1. "Is it possible in certain circumstances to conclude that the duty to allege and prove the existence of an international element lies with the parties to the proceedings in Czech law? "

2. "Should the conflict of laws norms of the forum (and foreign law based on those norms) be applied ex offo, or can those conflict of laws criteria be ignored and the lex fori applied instead? Can elements of the facultative conflict of laws also be found in Czech law?"

3. "Can it be said that in the case of the approach taken to the facultative nature of the conflict of laws rule, there is an increased return to domestic law?"

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[1] ROZEHNALOVÁ, N. et al. *Mezinárodní právo soukromé Evropské unie*. Prague: Wolters Kluwer, 2018, p. 43.

1. MODEL OF HANDLING FOREIGN LAW

In the world of law, we are unlikely to find a universal approach that can be applied across national legal systems – of course, setting aside the possibility of adopting a universal legal regulation that states have already adopted or may adopt in the future. The same applies in the case of the treatment of foreign law, through which each country regulates according to its customs and approach to the matter. To distinguish the different approaches to the treatment of foreign law, we can use the questions formulated by *Rozehnalová*.[2]

- Is the judge required to apply the conflict of laws standard of the forum ex offo or only on the suggestion of a party?
- Is foreign law treated as law or as mere fact?
- Does the judge have to determine the content of the foreign law; is the principle of iura novit curia shared in this case or not?
- Is it possible to submit an objection against the wrong interpretation and application of foreign law or not?
- How are imperative norms treated in cases that are part of the applicable law?

The above questions reflect different approaches to whether foreign law should be treated as a right or as a fact to be proved. The solution to this question determines whether the foreign law will be applied ex offo, who must verify the content of the foreign law, or whether the incorrect application of the foreign law can be subject to appeal. Approaches to foreign law can be distinguished into different categories reflecting the applied models advocated in legal systems.[3] The division into active, passive, or discretionary concerns the role of the judge.[4] Approaches to the issue reflect national understandings of the meaning and purpose of civil procedure.[5] It is clear from the above list of topics that the article will take a closer look at the judge's obligation to apply the conflict of laws rule of the forum ex offo or on the parties' proposal. This issue does not lie in isolation; therefore, where appropriate, I will touch on other issues impacting the treatment of foreign law.

In the passive model, the parties (or at least one of the parties) must invoke the foreign law – Using it creates some kind of freedom. This model is sometimes characterised as

[2] ROZEHNALOVÁ, N. et al. *Mezinárodní právo soukromé Evropské unie.* p. 44.

[3] The division is diverse, for example, the division into active, passive, or discretionary. BOGDAN, M. *Private International Law as Component of the Law of the Forum: General Course on Private International Law. Recueil des Cours 348 (2010). Collected Courses of the Hague Academy of International Law.* Leiden/Boston: Martinus Nijhoff Publishers, 2011, p. 94; division into common law, civil law, and middle ground. See HALFAR, F. Zacházení s cizím právem a vyhlídky pro unifikaci. In: N. Rozehnalová – K. Drličková – J. Valdhans (eds.). *Dny Práva 2015 – Days of Law 2015. Část IV. Kodifikace obecné části kolizního práva – cesta či omyl?* Brno: Masarykova univerzita, 2016, pp. 37–42; another division into foreign law as a fact, foreign law as a law or foreign law of a hybrid nature. Or countries that oblige judges to apply the conflict of laws rule ex offo, other countries allowing the parties to deal with foreign law or a variant of the so-called dual system. See ROZEHNALOVÁ, N. *Instituty českého mezinárodního práva soukromého.* Prague: Wolters Kluwer, 2016, pp. 206–207.

[4] BOGDAN, M. *Private International Law as Component of the Law of the Forum: General Course on Private International Law. Recueil des Cours 348 (2010). Collected Courses of the Hague Academy of International Law.* p. 94.

[5] HALFAR, F. Zacházení s cizím právem a vyhlídky pro unifikaci. In: N.Rozehnalová – K. Drličková – J. Valdhans (eds.). *Dny Práva 2015 – Days of Law 2015. Část IV. Kodifikace obecné části kolizního práva – cesta či omyl?* p. 36.

one in which domestic law is superior to foreign law.[6] This approach usually treats the foreign right as a fact to be proved. At the same time, the party to the dispute is obliged to establish the content of the foreign right itself. The judge will not, on his initiative, raise the question of the possible application of foreign law. England is given as a typical example.[7] In the active model, on the other hand, the judge must raise the question of the application of foreign law on their initiative. Conflict of laws rules are applied ex officio. In these cases, the judge must determine the content of the foreign law, and the foreign law is treated as law. The foreign law then applied is on an equal status with domestic law. The active model is advocated by Germany, Austria, the Czech Republic,[8] Belgium, and others.[9] In the third model, the judge has the right, not the obligation, to object to the possible application of foreign law and is allowed to determine the content of the foreign law.[10] It may also be ordered to apply the foreign law in some instances, while in other cases, the foreign law is applied at the party's request. This is a hybrid model[11] that combines both above ap-

[6] JÄNTERÄ-JAREBORG, M. *Foreign Law in National Courts: A Comparative Perspective. Recueil des Cours 304 (2003). Collected Courses of the Hague Academy of International Law*. Leiden/Boston: Martinus Nijhoff Publishers, 2004, p. 229.

[7] Other countries can be, for example, Cyprus or Malta. See C. Esplugues – J. L. Iglesias – G. Palao (eds.). *Application of Foreign Law*. Munich: Sellier, 2011, pp. 265–266; Section 29 para (1) (c) Cypriot National Courts of Justice Law (Law No. 14/1960). It is also required to mention the influence of English law, which has a unique position in those countries.

[8] Rozehnalová also analyses the issue of the system applied in the Czech Republic. It states that the Swiss Institute's report differs from that approach. Rozehnalová states that the Czech Republic is included in the so-called dual system. This is because in the area of contract law, there is a strong position of autonomy of the will of the parties, i.e. the choice of law. However, in the Czech Republic, it is not possible to completely abolish the conflict rules regime; it is necessary to use conflict rules ex officio. The choice of law is made possible within the system of conflict-of-laws rules. A possible choice of law means a disposition with a choice of law, not a disposition with a conflict of law rule. See ROZEHNALOVÁ, N. *Instituty českého mezinárodního práva soukromého*. p. 207; even though the principle of party autonomy is globally recognised and at the same time contributes to the unification of private international law, either in the form of unification or harmonisation. The Court of Justice of the European Union has also enshrined the right of the parties to choose the applicable law for the given contractual relationship. See MALACKA, M. Kodifikace, unifikace, divergence a autonomie vůle stran. In: N. Rozehnalová – K. Drličková – J. Valdhans (eds.). *Dny Práva 2016 – Days of Law 2016. Část V. Princip autonomie vůle ve vztazích s mezinárodním prvkem*. p. 70; Judgment of the Court (Second Chamber) of CJEU of 24 January 1991, Case C-339/89. In: *curia.europa.eu* [online]. 24. 1. 1991 [2022-07-02]. Available at: <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=96983&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=214008>.

[9] For example:
Austria: Section 3 of the Austrian Federal Code of Private International Law Act. In: *Rechtsinformationssystem des Bundes* [online]. [2022-02-10]. Available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002426>; Belgium: Section 5 Art. 15 of the Belgian Code of Private International Law from 16 July 2004. In: *ejustice.just.fgov.be* [online]. 16. 7. 2004 [2022-02-10]. Available at: <https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2004071631&table_name=loi>; Slovakia: Section 53 para (1) Act No. 97/1963 Coll., on Private and Procedural International Law.
See Italy: Section 14 of the Italian Law No. 218 of 31 May 1995 on Private International Law. In: *Normattiva* [online]. [2022-02-10]. Available at: <https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=1995-06-03&atto.codiceRedazionale=095G0256&atto.articolo.numero=0&atto.articolo.sottoArticolo=1&atto.articolo.sottoArticolo1=10&qId=&tabID=0.36226414030681653&title=lbl.dettaglioAtto>.

[10] BOGDAN, M. *Private International Law as Component of the Law of the Forum: General Course on Private International Law. Recueil des Cours 348 (2010). Collected Courses of the Hague Academy of International Law*. p. 94.

[11] For example, see JÄNTERÄ-JAREBORG, M. *Foreign Law in National Courts: A Comparative Perspective. Recueil des Cours 304 (2003). Collected Courses of the Hague Academy of International Law*. p. 198.

proaches. In a way, the foreign right is neither treated as a right nor as a fact but is instead treated as a hybrid form, thus becoming a tertium genus.[12] Here, France is typically mentioned as an example.[13] This issue will be addressed in more detail below. Although countries may adopt, for example, an active model, the practice may be quite different.[14]

1.1 Czech approach

Issues concerning the treatment of foreign law have been discussed in the past, both at national and European levels.[15] These divide not only the continental approach from the Anglo-American approach but also the different legal areas of each one. Opinions on how to treat foreign law also vary according to the period in which the issue is being examined.[16] The different approaches to the question can also be shown in the light of several studies. This is discussed in more detail in a publication, for instance, by *Rozehnalová*.[17] In the past, there have been unification efforts within the European Union to create a general part of the conflict of laws. These unifying tendencies in the form of a general regulation would also unify the procedural treatment of foreign law on a European scale. Currently, however, these ambitious-looking tendencies have faded away.[18] Even though we do not yet have a unified regulation on how to deal with foreign law at European[19] or international levels, we find solutions to this issue in national law. And this is where the different treatment of an otherwise unified law lies. National procedural law plays a significant role in this, as *Hausmann* notes in his article when he begins by emphasising the role of procedural law in its interaction with private international law.[20] Procedural law also has an irreplaceable function in international civil proceedings. Not only does procedural law regulate the proceedings themselves, but it can also limit the scope of private international law by creating specific procedural rules for applying private international law. For example, the obligation of the parties to apply foreign law. Procedural law goes

[12] ESPLUGUES, C. General Report on the Application of Foreign Law by Judicial and Non-Judicial Authorities in Europe (November 1, 2011). In: C. Esplugues – J. L. Iglesias – G. Palao (eds.). *Application of Foreign Law*. p. 5.

[13] Hungary and, in the past, Spain, where foreign laws are currently applied ex officio, are also cited as examples. See JÄNTERÄ-JAREBORG, M. *Foreign Law in National Courts: A Comparative Perspective. Recueil des Cours 304 (2003). Collected Courses of the Hague Academy of International Law*. pp. 240, 249.

[14] Ibid., p. 230.

[15] Rozehnalová outlines the discussions taking place throughout history. See ROZEHNALOVÁ, N. *Instituty českého mezinárodního práva soukromého*. p. 200.

[16] Ibid., p. 201.

[17] ROZEHNALOVÁ, N. *Instituty českého mezinárodního práva soukromého*. p. 201. For example, see as well PAUKNEROVÁ, M. Aktuální otázky používání zahraničního práva v soudním a rozhodčím řízení. *Právník*. 2012, Vol. 151, No. 12, p. 1276.

[18] BASEDOW, J., RÜHL, G., FERRARI, F., DE MIGUEL ASENSIO, P. *Encyklopedia of Private International Law. Vol. 1*. Cheltenham: Edward Elgar Publishing, 2017, p. 769.

[19] In the last decade, this issue has been addressed in the discussions of leading European experts in Madrid in 2010. The result was the elaboration of the so-called Madrid Principles (February 2010). See C. Esplugues – J. L. Iglesias – G. Palao (eds.). *Application of Foreign Law*. pp. 95–97; MOTA ESPLUGUES, C. Harmonization of Private International Law in Europe and Application of Foreign Law: The "Madrid Principles" of 2010. *Yearbook of Private International Law*. Sellier European law publishers & Swiss Institute of Comparative Law, 2011, Vol. 13, p. 297.

[20] HAUSMANN, R. Pleading and Proof of Foreign Law – a Comparative Analysis. In: *The European Legal Forum Forum iuris communis Europae*. 2008, Vol. 1, [online]. 2008 [2022-04-05]. Available at: <http://www.simons-law.com/library/pdf/e/878.pdf>. p. 1.

even further in this regard and addresses the question of the extent and means by which a judge may examine the content of foreign law.[21]

The Czech Republic is an illustrative example of a country whose legal system is based on the continental legal system.[22] Czech law is based on the fact that conflict of laws rules are binding for judges.[23] This means that if the conflict of laws rule refers to applying foreign law as the applicable law, the Czech judge is obliged to apply this foreign law. *Kučera* states that the conflict of laws rule contains an order to use foreign law in some instances.[24] This obligatory nature of Czech norms is based on the very perception of our legal system. It is the will of the legislator to apply conflict of laws norms that lead us to use the law of a foreign state. The parties can't exclude the treatment of conflict of law norms. In cases where foreign conflict of laws rules are applied, we speak of exceptions that our legal system foresees.[25] The approach of using conflict of laws rules ex offo has not been questioned on its merits.[26, 27] On the legislative level, we find the regulation of the treatment of foreign law in the Private International Law Act, namely in section 23.[28] The current legislation is thus based on applying foreign law as perceived by Czech case law.[29] Section 23 sets out the obligation to apply foreign law and the manner of its application. In the case of the application of foreign law, the Czech judge is not obliged to know the law, but he is obliged to discern the content of the foreign law.[30] It is then a matter of the judge's decision which

[21] Ibid.

[22] PAUKNEROVÁ, M. Proof and Information about Foreign Law. *The Lawyer Quarterly*. 2015, Vol. 5, No. 4, p. 246.

[23] PAUKNEROVÁ, M. Czech Republic – Treatment of Foreign Law in the Czech Republic. In: Yuko Nishitani (ed.). *Treatment of Foreign Law – Dynamics towards Convergence?* Cham: Springer, 2017, p. 113; see KALENSKÝ, P. *Podstata a povaha aplikace cizího práva. Studie z mezinárodního práva*. Prague: Nakladatelství Československé akademie věd, 1968, Vol. 13, p. 56.

[24] KUČERA, Z. et al. *Mezinárodní právo soukromé. 8th edition*. Pilsen – Brno: Aleš Čeněk – Doplněk, 2015, p. 184.

[25] Foreign conflict of laws rules can be applied in cases of renvoi and transmise or incidental question – lex causae. However, for applying foreign conflict of laws, rules must be given in the domestic one. See Section 21 and 22 Act No. 91/2012 Coll., on Private International Law.

[26] ROZEHNALOVÁ, N. *Instituty českého mezinárodního práva soukromého*. p. 201.

[27] The stability of applying the conflict of laws rule ex officio has already been the subject of several discussions. In the past, for example, see Ledler emphasises the function of the conflict of laws rule in stating that the foreign law used due to the conflict of laws rule remains a foreign law. The legislature, which allows the application of foreign law by the conflict of laws rules, thus proves that its legal system has gaps. *Donner* argues that the courts, in some cases, reject the application of foreign law, even though the conflict of laws rule requires them to apply foreign law. He adds that the world literature has primarily taken the same view, stating that in such cases, the judge is obliged to apply the foreign law to which his conflict of laws rule refers. See LEDRER, E. *Promlčení ve vztazích mezinárodně právních. Studie z mezinárodního práva III*. Prague: Nakladatelství Československé akademie věd, 1957, p. 100; DONNER, B. *Důkaz a použití cizího práva. Studie z mezinárodního práva III*. Prague: Nakladatelství Československé akademie věd, 1957, p. 107. See as well LEDRER, E. Použití a důkaz cizího práva. *Právník*. 1945, Vol. 84, No. 2, pp. 44–45, 55; KALENSKÝ, P. *Podstata a povaha aplikace cizího práva. Studie z mezinárodního práva*. pp. 56–57; STEINER, V. Cizí právo v občanském soudním řízení. *Časopis pro mezinárodní právo*. 1968, Vol. 12, No. 1, p. 95.

[28] Act No. 91/2012 Coll., on Private International Law ("PILA").

[29] For example, see Opinion of the Supreme Court of the Czech Republic of 27 August 1987, Case No. Cpjf 27/86; Resolution of the Supreme Court of the Czech Republic of 26 September 2007, Case No. 25 Cdo 1143/2006; Resolution of the Constitutional Court of the Czech Republic of 3 April 2012, Case No. PI ÚS 2/11-1; Judgment of the Supreme Court of the Czech Republic of 17 December 2013, Case No. 23 Cdo 1308/2011; Resolution of the Supreme Court of the Czech Republic of 10 December 2015, Case No. 33 Cdo 4334/2014; Resolution of the Supreme Court of the Czech Republic of 5 April 2017, Case No. 30 Cdo 4883/2016; Judgment of the Supreme Court of the Czech Republic of 30 December 2019, Case No. 29 ICdo 96/2016.

[30] DONNER, B. *Důkaz a použití cizího práva. Studie z mezinárodního práva III*. pp. 108–109; Section 23 para 2 PILA.

resources to use to determine the content of the foreign right.[31] The judge may therefore discern the content of the foreign law on his/her own if he/she has the necessary documentation. They can use the cooperation of the parties, the opinion of experts from the relevant state, and/or ask for the opinion of the Ministry of Justice of the Czech Republic on the content of the foreign law, which, however, is not binding on the court.[32] The regulations in bilateral or multilateral international agreements also contribute to determining the content of foreign law.[33] An essential means is informal cooperation between courts through the European Judicial Network in civil and commercial matters.[34] Crucial to the court's ability to use information about foreign law is the court's belief that the data is reliable.[35] At this point, the judge applies foreign law ex offo without applying the principle of reciprocity.[36]

In the continental understanding of Czech law, which implies the obligation to apply foreign legislation ex offo, we can connect with the principle of iura novit curia.[37] From this principle, we conclude that the judge is obliged to find out the content of the foreign law but is not obliged to know the foreign law. The principle of iura novit curia thus applies only to domestic law.[38] The same principle was also the subject of a report on the European activities initiated by the University of Valencia.[39] The report shows that a softening is taking place even in states that treat foreign law as law and where the judge is obliged to apply foreign law ex offo. This softening is reflected in the well-founded claim that judges cannot know all the world's law; therefore, the principle of iura novit curia does not apply to foreign law.[40] If we claimed otherwise, we would require judges to have an encyclopedic knowledge of foreign legal systems. Therefore, instead of the principle of iura novit curia,

[31] KUČERA, Z. et al. *Mezinárodní právo soukromé. 8th edition.* pp. 184–185; see Opinion of the Supreme Court of the Czech Republic of 27 August 1987, Case No. Cpjf 27/86; Judgment of the Supreme Court of the Czech Republic of 30 December 2019, Case No. 29 ICdo 96/2016.; I also refer to the other decisions cited in footnote 28.

[32] See Section 23 para 3 PILA.

[33] See Bilateral Agreement between the Czech Republic and Russia, or the London Convention. BŘÍZA, P., BŘICHÁČEK, T., FIŠEROVÁ, Z. et al. *Zákon o mezinárodním právu soukromém. Komentář.* Prague: C. H. Beck, 2014, p. 147.

[34] Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, in consolidated version from 2009 (Council Decision was amended by Decision No. 568/2009/EC of the European Parliament and of the Council of 18 June 2009 amending Council Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters).

[35] BŘÍZA, P., BŘICHÁČEK, T., FIŠEROVÁ, Z. et al. *Zákon o mezinárodním právu soukromém. Komentář.* pp. 146–147; Resolution of the Supreme Court of the Czech Republic of 26 June 2012, Case No. 33 Cdo 3117/2010.

[36] PAUKNEROVÁ, M. Czech Republic – Treatment of Foreign Law in the Czech Republic. In: Yuko Nishitani (ed.). *Treatment of Foreign Law – Dynamics towards Convergence*? p. 115; KUČERA, Z. et al. *Mezinárodní právo soukromé.* p. 185.

[37] HALFAR, F. Zacházení s cizím právem a vyhlídky pro unifikaci. In: N. Rozehnalová – K. Drličková – J. Valdhans (eds.). *Dny Práva 2015 – Days of Law 2015. Část IV. Kodifikace obecné části kolizního práva – cesta či omyl?* p. 40.

[38] See arbitration award No. RSp 78/92. In: KUČERA, Z. et al. *Mezinárodní právo soukromé. 8th edition.* p. 186.

[39] ESPLUGUES, C. General Report on the Application of Foreign Law by Judicial and Non-Judicial Authorities in Europe (November 1, 2011). In: C. Esplugues – J. L. Iglesias – G. Palao (eds.). *Application of Foreign Law.*

[40] See KALENSKÝ, P. *Podstata a povaha aplikace cizího práva. Studie z mezinárodního práva.* p. 56; STEINER, V. *Cizí právo v občanském soudním řízení.* p. 95; as well see JÄNTERÄ-JAREBORG, M. *Foreign Law in National Courts: A Comparative Perspective. Recueil des Cours 304 (2003). Collected Courses of the Hague Academy of International Law.* p. 196; see ESPLUGUES, C. General Report on the Application of Foreign Law by Judicial and Non-Judicial Authorities in Europe (November 1, 2011). In: C. Esplugues – J. L. Iglesias – G. Palao (eds.). *Application of Foreign Law.*

looking for a solution in the ability and obligation to obtain information about foreign law is much more effective.[41] The arbitral tribunal, in its decision, also reached this statement.[42]

Another question must be answered the issue of the application of foreign law. Section 23 para (1) PILA states that the foreign law shall be applied as it would be used in the home state. This means that in its interpretation and application, it must be treated in the same way as it would be treated by the decision-makers in the state of origin. A conflict of law rules that refer to the application of foreign law not only imposes an obligation to apply the foreign law but also commands its application in the same way as in the particular state. *Kučera* states that foreign law is to be applied as it is used in the legal life of its state.[43] This means that it is necessary to consider all sources of the foreign law in question, including court decisions in that state.[44] If the decision-making authorities did not proceed in the described manner, the order of the conflict of law rule would be violated. This would result in incorrect treatment of foreign law and a violation of the domestic conflict of laws rules.[45] The court is limited by only two conditions in dealing with foreign law. The judge must not exceed the extent of the conflict of law rules. The foreign law determined by the conflict of laws rule may only regulate the subject matter defined by the conflict of laws rule. Thus, a court dealing with the question of the validity of a marriage cannot deal with the parties' independence. The second limitation is the application of foreign law provisions that would conflict with mandatory rules.[46] In such cases, the foreign law provision is not applicable.[47] As stated above, in the Czech Republic, foreign law is treated as law, i.e., it is not treated as a fact to be proved (res facti).[48] The judge must determine the content of the foreign right, ex officio. At the same time, he is obliged to do so since the relevant conflict of laws rule requires the application of foreign law.[49] However, if it is not

[41] See LEDRER, E. *Použití a důkaz cizího práva*. p. 85; as well DONNER, B. *Důkaz a použití cizího práva. Studie z mezinárodního práva III*. p. 111.

[42] See arbitration award No. RSp 78/92. The principle of iura novit curia is not applied to foreign law, it applies to national law. See ROZEHNALOVÁ, N. *Závazky ze smluv a jejich právní režim (se zvláštním zřetelem na evropskou kolizní úpravu)*. Brno: Masarykova univerzita, 2010, p. 185.

[43] KUČERA, Z. et al. *Mezinárodní právo soukromé. 8th edition*. pp. 184–186.

[44] See Judgment of the Supreme Court of the Czech Republic of 30 December 2019, Case No. 29 ICdo 96/2016.

[45] Commentary on Section 23 of the Explanatory Memorandum to Act No. 91/2012 Coll., on Private International Law.

[46] See Section 23 para 1 PILA.

[47] BŘÍZA, P., BŘICHÁČEK, T., FIŠEROVÁ, Z. et al. *Zákon o mezinárodním právu soukromém. Komentář.* pp. 145–146.

[48] STEINER, V. *Cizí právo v občanském soudním řízení*. p. 95.

[49] In the past, the Supreme Court of the Czech Republic commented on this issue. The opinion was different, stating that the party must assert the applicable foreign law. Otherwise, the court has no incentive to apply this foreign law. See Decision of the Supreme Court of the Czech Republic of 10 February 1925, Case No. Rv I 1704/24; Decision of the Supreme Court of the Czech Republic of 10 February 1925, Case No. Rv I 1704/24; Decision of the Supreme Court of the Czech Republic of 2 November 1926, Case No. Rv I 210/26; Decision of the Supreme Court of the Czech Republic of 26 October 1933, Case No. Rv I 1482/33. In Decision of the Supreme Court of the Czech Republic of 30 April 1936, Case No. Rv I 1404/34, the court relaxed its opinion by stating: *"In matters concerning the content of foreign rules, the court is not bound by the evidence offered by the parties, but may itself examine that content appropriately, but must nevertheless be required to ask the party, namely in legal matters which do not occur daily or which are otherwise remote, found and argued before the court a certain content of the standard so that the court knew what should be the subject of the investigation."* In the Decision of the Supreme Court of the Czech Republic of 10 February 1925, Case No. Rv I 1704/24, as well in the Decision of the Supreme Court of the Czech Republic of 31 March 1933, Case No. Rv II 815/31, the question of foreign law was considered a question of fact.

possible to find out the content of the foreign law within a reasonable time or if it is impossible, Czech law will be applied.[50]

2. INTERNATIONAL ELEMENTS AS A PREREQUISITE FOR THE APPLICATION OF CONFLICT OF LAWS RULES

The area we are looking at also touches on the international element, representing one type of focal point in private international law. A touchstone is a starting point for determining whether private international law applies. The international element, therefore, links us to whether a judge must or may apply a conflict of laws rule only on the application of a party. It is a kind of portal that can take us to a different legal order from the one in which the parties are.[51] A prerequisite for applying private international law rules will thus be the existence of an international element.[52] Let's leave aside discussions dealing with subjective internationalisation.[53] It is worth thinking about how the international element is procedurally handled. How to determine the extent to which the parties are to submit their allegations and evidence of the existence of an international element that brings the dispute within the sphere of private international law.[54] Or, it is the judge who is obliged to determine these facts and, if he discovers an international element, to apply the relevant conflict of laws rule. The question is whether the judge must consider the international factor or look for it himself in cases where a party does not mention it. In such cases, it will depend on the overall approach to applying conflict of laws rules and foreign law and the principles governing the procedural procedure.[55] The issue of the procedural treatment of the international element is not legislated in the Czech legal environment.[56] The answer to this question can be found in the regulation of the PILA and the Code of

[50] See Section 23 para 5 PILA.
[51] ROZEHNALOVÁ, N. *Instituty českého mezinárodního práva soukromého.* p. 202.
[52] LEDRER, E. *Použití a důkaz cizího práva.* pp. 44–45.
[53] For example, dealing with the solved question see SYMEONIDES, S. Party Autonomy in Rome I and II from Comparative Perspective. In: K. Boele-Woelki – T. Einhorn – S. Symeonides et al. *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr*. The Hague – Zürich: Eleven International publishing, 2010, p. 526; ROZEHNALOVÁ, N. *Závazky ze smluv a jejich právní režim (se zvláštním zřetelem na evropskou kolizní úpravu)*. Brno: Masarykova univerzita, 2010, pp. 89–90; TRÁVNÍČKOVÁ, S. Subjektivní mezinárodní prvek v rozhodčím řízení. In: *law.muni.cz* [online]. [2022-03-10]. Available at: <https://www.law.muni.cz/sborniky/dny_prava_2010/files/prispevky/10_rozhodci/Travnickova_Simona_(4557).pdf>; Opinion of Advocate General Szpunar delivered on 2 March 2017 Vinyls Italia SpA, in liquidation v. Mediterranea di Navigazione SpA, Case C-54/16. In: *eur-lex.europa.eu* [online]. 2. 3. 2017 [2022-03-10]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62016CC0054&from=CS>.
[54] Ledrer has analyzed the issue in the past and concludes that the parties to the dispute have no more obligations than to state the factual basis, which contains an international element. At the same time, the parties cannot be sanctioned if they do not state the relevant foreign standard. This burden, resp. the duty to find the content of foreign law lies with the judge. Of course, this does not mean that they cannot do so, the activity of the parties is welcome and expedient. See LEDRER, E. *Použití a důkaz cizího práva.* p. 88.
[55] ROZEHNALOVÁ, N. *Instituty českého mezinárodního práva soukromého.* p. 204.
[56] Similarly, international treaties and EU regulations do not mention an international element but refer to the international nature of a legal relationship or conflict of laws. This chosen terminology gives decision-makers a wide margin to consider whether or not a particular legal relationship contains an international element. See Conventions resulting from the work of the Hague Conference on Private International Law. In: *hcch.net* [online]. [2022-07-20]. Available at: <https://www.hcch.net/en/instruments/conventions>; EU regulations, especially the Rome I Regulation and the Rome II Regulation.

Civil Procedure. From the perspective of private international law, we apply the conflict of laws rules ex offo. Although there is no explicit provision for the determination of the prerequisites for the application of private international law rules, I am convinced that there is a type of logic between the obligation to apply conflict of laws rules and the determination of the prerequisites for their application (in general, the rules of the private international law).[57]

The above issues must also be viewed from the perspective of the rules of the Code of Civil Procedure. The question is influenced by the judge's activity, which is determined by the nature of the proceedings. The purpose of civil procedural law is to provide protection and give effect to rights arising in private law relationships. To achieve the desired result, the decision on the matter must correspond to the actual substantive relations.[58] Of course, we must also include proceedings that have an international element. A factually correct decision requires knowledge of the law and its proper application and a decision based on a true and complete factual understanding of the situation[59], unlike the original liberal conception of civil procedure, which served only to protect the individual parties.[60] In Czech law, proceedings are traditionally divided into disputed and undisputed proceedings.[61] This division tells us the degree to which the court and the parties to the proceeding are given the power to make findings of fact.

2.1 Disputed and uncontested proceedings

Dispute proceedings are characterised by the fact that they can only be initiated on application. The establishment of the facts is based on their examination, and the principle of removal governs the actual disposal of the proceedings and their subject matter. The adversarial principle, in its modified form, which is characteristic of today's dispute proceedings, leaves the initiative to the parties. It is the parties on whom the burden of proof lies and who are subject to the burden of proof.[62] The nature of the proceedings at issue leads one to consider whether, in certain circumstances, it is possible to conclude that it is for the parties to allege the existence of an international element. The nature of the principle of review is crucial in these considerations. In its purest form, that principle leaves the clarification of the facts entirely to the parties to the proceedings. The parties must introduce the relevant facts and evidence into the proceedings. The court is limited to the extent that it may not decide based on facts that the parties have not stated.[63] Nor can he, of his own will, make evidence. The allegations of the parties thus constrain the court. In this pure form, the role of the judge is passive. His decision is based purely on a factual basis that corresponds to the activity of the parties. This pure form of the principle of

[57] See ROZEHNALOVÁ, N. *Instituty českého mezinárodního práva soukromého*. p. 206.
[58] LAVICKÝ, P. *Důkazní břemeno v civilním řízením soudním*. Prague: Leges, 2017, p. 13.
[59] Ibid., p. 13.
[60] LAVICKÝ, P. et al. *Občanský soudní řád (§ 1 až 250l). Řízení sporné. Praktický komentář*. Prague: Wolters Kluwer, 2016, p. 3.
[61] LAVICKÝ, P. et al. *Zákon o zvláštních řízeních soudních. Řízení nesporné. Praktický komentář*. Prague: Wolters Kluwer, 2015, p. 1.
[62] WINTEROVÁ, A. et al. *Civilní právo procesní. Díl první: řízení nalézací. 9th edition*. Prague: Leges, 2018, p. 77.
[63] LAVICKÝ, P. et al. *Občanský soudní řád (§ 1 až 250l). Řízení sporné. Praktický komentář*. p. 28.

deliberation also corresponds to the idea of formal truth, which, from today's point of view, is entirely misleading.[64] This form is characteristic of the liberal approach to civil procedure in the 19th century. As already outlined above, the current dispute procedure is characterised by a modified adversarial principle, where the role of the judge is strengthened and, on the contrary, the parties are restricted in their handling of the facts. The role of the judge is now essential- he/she is no longer a passive arbiter of the dispute but has been given the power to intervene in determining the facts actively. The purpose of the present civil procedure is not only to ensure the passage of individual rights but also to protect the rights of all and ensure the general welfare.[65]

When it comes to considering the extent to which either the parties or the judge may possess the international element, I am inclined to the conclusion that in the present conception of civil procedure, the duty to give a decision based on a true and thoroughly explained state of facts lies with the judge. Such a flawless decision must include a finding of the international element and, therefore, a subjection of the case to private international law. It can therefore be concluded that where there is an international element that predisposes the application of conflict of laws rules, the court is obliged to apply those conflict of laws rules and, on their basis, the foreign law ex offo. At this point, it is worth adding that the current Czech literature deals with the international aspects of civil procedure. Judges are obliged to apply the rules of private international law when the case at hand contains an international element. However, not enough space is devoted to whether a judge is obliged to find an international component in civil proceedings.[66] Of course, one cannot ignore the consideration that there may be a situation where the parties of the dispute intentionally withhold the existence of an international element. At the same time, the court is unaware of other facts that would suggest the presence of an international element.[67] In these cases, the court has no way of knowing whether the dispute is purely domestic or whether it has an international aspect. To illustrate this, it is worth mentioning the example of the Scandinavian approach pointed out by *Jänterä-Jareborg*.[68] The way cross-border disputes are resolved is that, in cases permitted by the law, the parties withhold the existence of the international element and thus exclude the application of foreign law. On the other hand, if the parties invoke the international aspect, they cannot prevent

[64] Ibid.

[65] Ibid., p. 3.
According to Winterová, the passive role of a judge would be detrimental both in terms of content and speed of proceedings. As she further states, the role of the judge in the dispute proceedings is still under discussion, so this is not a completely resolved issue. See WINTEROVÁ, A. et al. *Civilní právo procesní. Díl první: řízení nalézací. 9th edition*. p. 77, see as well LAVICKÝ, P. et al. *Občanský soudní řád (§ 1 až 250l). Řízení sporné. Praktický komentář*. p. 28.

[66] SVOBODA, K. et al. *Civilní proces. Obecná část a sporné řízení*. Prague: C. H. Beck, 2014, p. 8; ŠÍNOVÁ, R. et al. *Civilní proces. Obecná část a sporné řízení. Second edition*. Prague: C. H. Beck, 2020, p. 9; ŠÍNOVÁ. R. et al. *Civilní proces. Řízení nesporné, rozhodčí a s mezinárodním prvkem*. Prague: C. H. Beck, 2015, pp. 281–283; SVOBODA, K. et al. *Občanský soudní řád. Komentář*. Prague: C. H. Beck, 2017, pp. 21–22.

[67] A starting point would be to assess the international element ex officio in any procedure. However, this is not desirable in management economics, and such an approach would be absurd. See ROZEHNALOVÁ, N. *Instituty českého mezinárodního práva soukromého*. p. 201.

[68] JÄNTERÄ-JAREBORG, M. *Foreign Law in National Courts: A Comparative Perspective. Recueil des Cours 304 (2003). Collected Courses of the Hague Academy of International Law*. p. 252.

the application of foreign law.[69] However, we cannot conclude that the current dispute procedure contains elements of facultativeness, migrating back to the Czech Republic where, despite these facts, we cannot conclude. This conclusion is confirmed by the fact that an objection may be brought in the event of a wrong application of foreign law.

Non-contentious proceedings differ in many aspects from contentious proceedings. This proceeding is characterised by the public interest in regulating legal relations, which a definitive decision must handle.[70] The differentiating criteria between contested and uncontested proceedings are the principles in the proceedings. In the case of uncontested proceedings, the principle of investigation plays one of the critical roles. This means that the court is responsible for clarifying the facts. The court must investigate the matter so that the facts of the case are appropriately established.[71] The very nature of uncontested proceedings and the mandatory application of the conflict of laws rules leads us to the clear conclusion that the judge ex officio shows the international element.

The issue of establishing the international element in individual types of proceedings is not currently regulated by legislation, as *Rozehnalová* points out. If new legislation is adopted, it would also be appropriate to regulate this issue. For inspiration, the Austrian regulation may serve.[72]

3. APPLICATION OF THE CONFLICT OF LAWS RULE – OBLIGATORY OR FACULTATIVE?

Considering how the legal system treats foreign law, we must necessarily reach a point where we ask ourselves a question like what *Jänterä-Jareborg* has already asked: why go through the costly and time-consuming process of applying foreign law in proceedings when the disadvantages outweigh the advantages?[73] The starting point may be the consideration of the facultativeness of the conflict of laws rule. According to *Flessner's* reasoning from 1970,[74] this means applying foreign law at a party's request. *De Boer*[75] also addresses this issue.[76] Let us examine these arguments from a legal-theoretical perspective. *Jänterä-Jareborg* carries out a detailed analysis of the reasoning of *Flessner* and *De Boer*. As *De Boer* argues, the theory of the optional nature of the conflict of laws is predetermined by the strong position of party autonomy and certain procedural freedom given by the legal order.[77] Thoughts on the facultativeness of foreign law, as viewed by *De Boer* and *Flessner*, build on a broader basis than is allowed in some national legal systems. As noted, France is a typical example. The idea builds upon the premise that if parties are free to

[69] Ibid.
[70] ŠÍNOVÁ. R. et al. *Civilní proces. Řízení nesporné, rozhodčí a s mezinárodním prvkem.* pp. 1–2.
[71] WINTEROVÁ, A. et al. *Civilní právo procesní. Díl první: řízení nalézací. 9th edition.* pp. 77–78.
[72] ROZEHNALOVÁ, N. *Instituty českého mezinárodního práva soukromého.* pp. 204–205.
[73] JÄNTERÄ-JAREBORG, M. *Foreign Law in National Courts: A Comparative Perspective. Recueil des Cours 304 (2003). Collected Courses of the Hague Academy of International Law.* p. 197.
[74] Ibid., p. 197.
[75] DE BOER, T. M. *Facultative Choice of Law: The Procedural Status of Choice-of-Law Rules and Foreign Law. Recueil des Cours 257 (1996). Collected Courses of the Hague Academy of International Law.* The Hague/Boston/London: Martinus Nijhoff Publishers, 1997, pp. 223–427.
[76] Ibid., pp. 223–427.
[77] Ibid., p. 336.

decide for themselves whether to sue in a court of competent jurisdiction in the event of a dispute, then those parties should also be able to choose to strip their disputes of their international character and thus avoid the complicated process of applying foreign law. Their consideration of the optionality of foreign law is not dependent on the classification of whether domestic substantive law is mandatory or dispositive. Instead, they alter the form of conflict of laws rules, whether they are ex offo in the regulations that must be presented before a given court will apply them or not.[78] Their reasoning thus extends the scope of a legal order that provides room for party autonomy.[79] The optionality of foreign law is applied in principle to all private law relationships with an international element. This theory may obtain some similarities with party autonomy. However, supporters separate it, arguing that if this theory were limited to cases with no public interest, it would become a form of party autonomy limited to the lex fori. It would thus be more limited than party autonomy itself.[80] Let's consider what *Flessner* and *De Boer* base their reasoning on. They identify and grant the parties to the dispute the possibility of disposition not only of the subject matter of the dispute but also of disposition of any relevant rules applicable to the dispute. In principle, then, a similar case would have a different outcome. Not to mention that one of the fundamental principles of the judicial process, which is legal certainty for the parties, is overlooked. This brings two principles into the picture – party autonomy versus legal certainty. Reasoning over the facultativeness of foreign law is controversial; thus, in its pure form, as stated by *Flessner* and *De Boer*, categorised in legal systems as a hybrid system. In principle, without understanding, it will not find its application in legal systems that rely on the ex offo application of foreign law.[81] In this section, a conclusion can be drawn in the form of the question of whether it is possible to accept, in a modified form, the reasoning over the facultativeness of foreign law. Particularly, can this option bring certain advantages, given that the application of foreign law may be a more complex process than in the case of domestic law? We might agree with considering[82] the possibility of the applicability of the facultativeness of foreign law only in cases where there is a disposition of the parties under certain fulfilled conditions. Specific legal orders find their application.

Let us look at certain manifestations of the facultativeness of foreign law in practical matters from the perspective of legal systems categorised in the group of mixed, dual systems. The application of foreign law ex offo has been and still is strongly applied, for example, in Germany, the Netherlands, and, of course, the Czech Republic. It should also

[78] JÄNTERÄ-JAREBORG, M. *Foreign Law in National Courts: A Comparative Perspective. Recueil des Cours 304 (2003). Collected Courses of the Hague Academy of International Law.* pp. 249–253.

[79] For example, the law of states where the application of foreign law depends on the type of dispute. In the case of disputes where there is a public interest, the party's position would be irrelevant. On the other hand, disputes that are qualified as dispositive would be left to the parties to the dispute, and only foreign law could be applied at their request.

[80] JÄNTERÄ-JAREBORG, M. *Foreign Law in National Courts: A Comparative Perspective. Recueil des Cours 304 (2003). Collected Courses of the Hague Academy of International Law.* p. 252.

[81] From another point of view, however, considering the optional nature of the conflict of laws, the rule seems interesting to these legal systems.

[82] JÄNTERÄ-JAREBORG, M. *Foreign Law in National Courts: A Comparative Perspective. Recueil des Cours 304 (2003). Collected Courses of the Hague Academy of International Law.* pp. 252–253.

not be overlooked that in 1989 the Institute of International Law in Santiago de Compostela adopted the resolution Equality of Treatment of the Law of the Forum and of Foreign Law,[83] which called on states to apply conflict of laws rules and foreign law ex offo. By contrast, in Romania (and earlier in Hungary),[84] we can find advocacy for the facultativeness of foreign law. Let's take a closer look at the case of France. This is a country where, under certain conditions, the judge can apply the lex fori if the parties agree to do so. Secondly, the court can decide to apply the lex fori if the parties are not interested in applying foreign law. This is a manifestation of the facultativeness of the conflict of laws given to the parties (accord procédural) vs the facultativeness of the conflict of laws given to the court.[85] The case of France needs to be further clarified in light of the case law. The case law of France has long been based on the consideration of foreign law as a fact that must be alleged and proved in court.[86] However, French teaching takes the opposite view of French case law.[87] On the issue, *Donner's* past contribution analyses the views of leading French jurists.[88] In his contribution, *Kalenský* analyses the views of *Batiffol,* who leans towards French case law, therefore considering it appropriate to treat foreign law as a fact.[89] *Batiffol* argues that foreign law is an element that is foreign to domestic law (lex fori). This view is justified, among other things, by the fact that applicable foreign law has a contingent nature compared to French law. This is because the French judge does not and cannot know the rules of foreign law and that foreign law is based on the competence of a legislator who does not exist in France. By contrast, the lex fori is intended to be the *raison de nécessité*.[90] *Kalenský* criticises *Batiffolo's* view, stating that it completely overlooks the command contained in the conflict of laws rule legis fori. Conflict of laws norms are crucial, and it is based on them that foreign law is applied. A judge's approach to foreign law depends on how the conflict of laws rule is structured and drafted. Thus, if the conflict of laws rule contains a command to apply foreign law, the judge is obliged to obey its command and apply the foreign law.[91] Even if we admit that conflict of laws rules are not cogent but dis-

[83] Institut de Droit International Resolution in Santiago de Compostela from 1989 on the Equality of Treatment of the Law of the Forum and Foreign law. In: *idi-iil.org* [online]. [2022-03-15]. Available at: <https://www.idi-iil.org/app/uploads/2017/06/1989_comp_02_en.pdf?fbclid=IwAR11UmNSxAdQ8VVJTLRlNPtsx46gmWxGQ6ogkkJcXxMDYOuGhlC2mmBF9DU>.

[84] The Hungarian Private International Law Act of 1979 allowed the parties to choose the law of a court upon a joint request, without this law being limited to a specific category of cases. See JÄNTERÄ-JAREBORG, M. *Foreign Law in National Courts: A Comparative Perspective. Recueil des Cours 304 (2003). Collected Courses of the Hague Academy of International Law.* p. 251.

[85] ROZEHNALOVÁ, N. *Instituty českého mezinárodního práva soukromého.* p. 207.

[86] The case law was relatively constant in this case and held the opposite view. I state that it is intentionally relatively stable, as court decisions have not always been uniform in a given case. It is possible to cite a decision where the foreign law was applied even though the parties did not invoke it themselves; in this case, it can be concluded that the court procedure indicated that it does not consider the foreign law exclusively a fact. See DONNER, B. *Důkaz a použití cizího práva. Studie z mezinárodního práva III.* pp. 122–123.

[87] Decision of the French Court of Cassation did not see any reason to annul the decision of the lower court, which did not apply foreign law, which the parties did not invoke. This case law has been strongly criticized. See KALENSKÝ, P. *Podstata a povaha aplikace cizího práva. Studie z mezinárodního práva.* p. 59.

[88] DONNER, B. *Důkaz a použití cizího práva. Studie z mezinárodního práva III.* p. 122.

[89] The opposite opinion is held, for example, by STEINER, V. *Cizí právo v občanském soudním řízení.* p. 96.

[90] KALENSKÝ, P. *Podstata a povaha aplikace cizího práva. Studie z mezinárodního práva.* p. 55.

[91] KALENSKÝ, P. *Podstata a povaha aplikace cizího práva. Studie z mezinárodního práva.* p. 57; see as well DONNER, B. *Důkaz a použití cizího práva. Studie z mezinárodního práva III.* pp. 108–109.

positive, this statement will not justify the conclusion that they have lost their character as the rule of law and that the judge could treat them as mere facts.[92] *Donner* agrees that the French system can be seen as a middle way between the Anglo-American system, where foreign law is considered a fact, and the Continental system, where foreign law is more likely to be considered a law. It also states that a French judge will not require proof of foreign law if he knows the content of the foreign law, unlike the Anglo-American practice.[93] The French Court of Cassation has a strong role in reviewing the lower courts' decisions to see whether they have correctly applied the relevant law.[94] It will annul the decision if it finds that the law should have been applied but was not. The Court of Cassation, however, no longer examines the content of that foreign law but merely takes the content of that foreign law as a fact. The Court of Cassation, therefore, in a sense, only imposes on the lower courts the formal observance of foreign law.[95] It should be added at this point that, in the past, the French case law was uniform as regards viewing foreign law as a fact; it is possible to find decisions of higher courts that go after this trend.[96] The situation remained unchanged for a long time. A breakthrough occurred in 1986 when the French Court of Cassation stated for the first time that in special cases, the courts are obliged to apply foreign law ex offo.[97] The changes did not end there, and two years later, the Court of Cassation issued groundbreaking decisions stating that courts must decide whether to apply foreign law ex offo.[98] In the event of failure to do so, such a decision may be annulled on appeal.[99] Although the French Court of Cassation took a step toward treating foreign law common in Central Europe, this attitude was quickly eased. The Court of Cassation relaxed its previous decision when it stated that courts of the first instance are not obliged to apply foreign law ex offo if the dispute concerns a matter where the parties freely dispose of their rights. If the parties do not insist on applying foreign law, the court will preferably apply domestic law. On the other hand, the court must apply foreign law ex offo in cases where an international contract governs the parties' legal relationship or where the parties are not free to dispose of their rights in the proceedings.

At present, we can give a scheme in which cases foreign law must be applied. The foreign law must be applied when the parties invoke the foreign law, and at the same time, they must establish the content of the foreign law. Also, foreign law must be applied by

[92] KALENSKÝ, P. *Podstata a povaha aplikace cizího práva. Studie z mezinárodního práva.* p. 57.
[93] DONNER, B. *Důkaz a použití cizího práva. Studie z mezinárodního práva III.* p. 123.
[94] ESPLUGUES, C., IGLESIAS, J. L., PALAO, G. (eds.) *Application of Foreign Law.* pp. 185–186.
[95] DONNER, B. *Důkaz a použití cizího práva. Studie z mezinárodního práva III.* p. 123.
[96] For example, see Bisbal Case of the French Court of Cassation of 12 May 1959. The judgment stated that the French conflict of law rules, in so far as they prescribe the application of foreign law, is not of a public policy nature since it is for the parties to seek their application. After this judgment, the Court of Cassation came up with another decision. In this judgment, he stated that although the court of the first instance is not obliged to apply foreign law ex officio, it is nevertheless empowered to do so, even if neither party has requested its application. See Chemouny Case of the French Court of Cassation of 2 March 1960.
[97] See, for example, Case of the French Court of Cassation of 25 November 1986. HAUSMANN, R. Pleading and Proof of Foreign Law – a Comparative Analysis. In: *The European Legal Forum Forum iuris communis Europae.* 2008, Vol. 1, [online]. 2008 [2022-04-05]. Available at: <http://www.simons-law.com/library/pdf/e/878.pdf>. p. 4.
[98] HAUSMANN, R. Pleading and Proof of Foreign Law – a Comparative Analysis. In: *The European Legal Forum Forum iuris communis Europae.* 2008, Vol. 1, [online]. 2008 [2022-04-05]. Available at: <http://www.simons-law.com/library/pdf/e/878.pdf>. p. 4.
[99] See Rebouh and Schule Case of the French Court of Cassation of 11 and 18 October 1988.

the court where the dispute is one where the parties are not free to dispose of their rights in the court proceedings (there is a public interest, for example, let's take status issues). The application of foreign law is also applied ex offo in cases that, although they are disputes where the parties are free to exercise their rights, they are governed by EU regulations or an international contract. It is an exception to the rule that a judge is not obliged to apply foreign law in disputes where the parties are free to exercise their rights.[100] But still, the parties have a right to conclude a procedural agreement in which they agree to apply French law instead of foreign law based on international conventions or EU regulations. Since the French Court of Cassation judgment on 26 May 1999, the case law has known a period of stability by establishing the criterion of the free or not free exercise of the parties' rights.[101] Still even said above, the procedural status of the conflict of laws is based on whether or not the law at stake is freely available to the parties, irrespective of the source of the conflict of law rule.[102] I may dare say that the question, the exception, of the mandatory application of foreign law based on the conflict of law rules sourced in the EU regulation, which *Hausmann* addressed in his article, is not so clear. Especially from the point of view of the latest decision of the Court of Cassation, which addressed this issue.[103] This latest decision may, in the future, enshrines a new solution for the conflict of law rules.[104]

3.1 Elements of facultativeness in the Czech law

Now we will focus on the Czech reality. Where relevant in this part of the paper, I refer to the passage in chapter 1.2. The question of the factuality and binding nature of applying a conflict of laws rule has been unchanged in Czech legal culture for several decades. Nevertheless, it is an important issue, as there are claims and approaches where the ex offo conflict of laws rule or foreign law is softened or even loosed. If we move away from the purely academic process inherent in settled doctrine[105] and focus on the applied practice,

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[100] HAUSMANN, R. Pleading and Proof of Foreign Law – a Comparative Analysis. *The European Legal Forum Forum iuris communis Europae*. 2008, Vol. 1, [2022-04-05]. Available at: <http://www.simons-law.com/library/pdf/e/878.pdf>. p. 5.

[101] See Case of the French Court of Cassation of 26 May 1995. In: *Légifrance* [online]. 26. 5. 1999 [2022-04-05]. Available at: <https://www.legifrance.gouv.fr/juri/id/JURITEXT000007043649/>.

[102] Which country's law applies? In: *e-justice.europa.eu* [online]. [2022-04-05]. Available at: <https://e-justice.europa.eu/340/EN/which_country_s_law_applies?FRANCE&member=1>.

[103] Case of the French Court of Cassation of 26 May 2021, Case No. 19-15.102. In: *courdecassation.fr* [online]. [2022-04-05]. Available at: <https://www.courdecassation.fr/decision/60af35f210a3048b8b57656c?search_api_fulltext=&date_du=2021-05-26&date_au=2021-05-28&judilibre_juridiction=cc&op=Rechercher+sur+judilibre&page=28&previousdecisionpage=28&previousdecisionindex=5&nextdecisionpage=28&nextdecisionindex=7>.

[104] See Case of the French Court of Cassation of 26 May 2021, Case No. 19-15.102: *"Il résulte de l'article 12 du code de procédure civile et des principes de primauté et d'effectivité du droit de l'Union européenne que si le juge n'a pas, sauf règles particulières, l'obligation de changer le fondement juridique des demandes, il est tenu, lorsque les faits dont il est saisi le justifient, de faire application des règles d'ordre public issues du droit de l'Union européenne, telle une règle de conflit de lois lorsqu'il est interdit d'y déroger, même si les parties ne les ont pas invoquées. Le juge doit ainsi mettre en oeuvre d'office les dispositions impératives de l'article 6 du règlement (CE) n° 864/2007 du Parlement européen et du Conseil du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles («Rome II») pour déterminer la loi applicable au litige."*

[105] Section 23 para 1 PILA.

we find that *Law in books and law in action*[106] can be different.[107] Solid arguments back the voices calling for facultativeness. Whether it is the economics of the proceedings or the misapplication of foreign law, these arguments consider the facultativeness of the conflict of laws rule or foreign law.[108]

We might find certain elements or perhaps specific manifestations of facultativeness. These are appearances in the legal order where the forum's interest is invoked. These are cases where material justice is pursued rather than purely conflictual justice. In this case, domestic and foreign law equality is violated. This may involve institutes in the form of escape clauses, alternative connecting factors, and choice of law by the parties.[109] In particular, the protection of domestic law is provided in the form of public order instruments and imperative norms.[110] If the content of foreign law cannot be determined, Czech law is applied in the alternative.[111] A particular indirect sign of facultativeness can be seen in the case that the application of rules of private international law is possible only when it can be determined that a given private law relationship contains an international element. In the previous section, a reflection was made on the difficulties associated with the qualification of the international element. For example, if it cannot be detected or even directly hidden by the parties, it may affect the application of private international law rules. The moment of allegation and proof of the international element, on the one hand, and the search for the international element ex offo may indirectly affect the application of private international law rules.[112] A conflict of laws rule follows a particular objective, protects a specific value – it may aim at ensuring external decisional harmony and ensuring equality of legal orders – domestic and foreign; if an interest in preserving another value is given, there could be room for discretion over the factuality of the conflict of laws rules. On the other hand, the arguments in favour of ex offo application of the conflict of laws rule cannot be ignored in the case of unified conflict of laws rules within the European Union, where the intended objective is to ensure external decisional harmony.[113]

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[106] See PAUKNEROVÁ, M. Aktuální otázky používání zahraničního práva v soudním a rozhodčím řízení. *Právník*. 2012, Vol. 151, No. 12, p. 1274; as well see JÄNTERÄ-JAREBORG, M. *Foreign Law in National Courts: A Comparative Perspective. Recueil des Cours 304 (2003). Collected Courses of the Hague Academy of International Law.* p. 230.

[107] Pauknerová draws attention to the Decision of the Municipal Court in Prague, where the lex fori law was applied – ie Czech law, despite the fact that foreign law should have been applied. See PAUKNEROVÁ, M. *Aktuální otázky používání zahraničního práva v soudním a rozhodčím řízení.* p. 1274.

[108] ROZEHNALOVÁ, N. *Závazky ze smluv a jejich právní režim (se zvláštním zřetelem na evropskou kolizní úpravu).* Brno: Masarykova univerzita, 2010, pp. 244–245.

[109] Alternative connecting factors are used in the cases when the legislator is interested in the validity of specific legal actions, for example, see Section 42 PILA; or when the legislator prefers the position of particular persons, or in the case when the position of a specific participant is favoured by enabling him to choose law, for example, see Section 54 para 1 and para 2 PILA and see Section 59 para 1 PILA. Alternative connecting factors include so-called materialisation, when a particular group of norms cannot be pushed aside. See Section 87 para 1 and para 2 PILA. Also, concerning escape clauses, see Section 24 and Section 87 para 1 first sentence PILA.

[110] See Section 4 and 15 para 1 (e); Also see Section 3 and 23 para 1 and 25 PILA.

[111] Section 23 para 5 PILA.

[112] ROZEHNALOVÁ, N. *Závazky ze smluv a jejich právní režim (se zvláštním zřetelem na evropskou kolizní úpravu).* p. 247.

[113] The resolution also called on states to apply conflict-of-law rules and foreign law ex officio. See Institut de Droit International Resolution in Santiago de Compostela from 1989 on the Equality of Treatment of the Law of the Forum and Foreign law. In: *idi-iil.org* [online]. [2022-03-15]. Available at: <https://www.idi-iil.org/app/uploads/2017/06/1989_comp_02_en.pdf?fbclid=IwAR11UmNSxAdQ8VVJTLRlNPtsx46gmWxGQ6ogkkJcXxMDYOuGhlC2mmBF9DU>.

3.2 Conclusions on the facultativeness of the conflict of laws rule – the position of the lex Fori

Lex fori can be understood, as *Ledrer* states,[114] as a very strict dogma, forcing judges to apply domestic law in all matters of procedure. If we think about it, the treatment of foreign law is a question of procedure as well.

In reflecting on the starting position of the lex fori, it is necessary to remember that foreign law is applicable based on an imperative – a command contained in the conflict of laws rule legis fori. This fact may determine the relative relationship between domestic and foreign law. If we were to argue over the issue at stake, then domestic law is in a superior position. Foreign law is applied only because of an order included in a conflict of laws rule; it is not applied originally but derivatively. Likewise, foreign law may be rejected, again based on domestic law, e.g., using the public order institute.[115] It must be added that this fact does not change the nature of the foreign right; it is still a right. In the case of application of foreign law to a particular legal relationship, it is on equal standing with domestic law. This shows us that, in the case of the application of foreign law, the judge is to proceed as a judge of a foreign state would proceed. This approach could contradict the idea, as stated in *Kalenský*, that in the case of the application of foreign law, the judge is obliged to look for what is. In contrast, in applying domestic law, he is compelled to look for what should be. In his contribution, *Kalenský* criticises *Batiffol's* theoretical views on the nature of foreign law, stating that *Batiffol* essentially defends the conclusions of the French Court of Cassation, which in its decision found no grounds for annulling the decision of a lower court that did not apply foreign law whose validity was not invoked by the parties.[116] If we look into the past, we find that there have been discussions about whether, in the case of the application of foreign law, the foreign law remains foreign law or becomes part of domestic law.[117] The supporters of this reception theory based themselves on the importance of domestic law. This theory gained its advocates in Italy, which became typical of Italian legal doctrine. It must be added, however, that a large group rejected this theory. *Kalenský* sees some similarities with a theory emerging in the United States called Local law theory. The basis of this theory is that the judge does not apply foreign law but always applies domestic law. Despite the idea advocated by the reception theory, we must not forget that it does not view foreign law as a fact. The parties must prove that.[118] It follows from the above that this theory could lead to absurd situations that could arise in decision-making and denies the basic function of the conflict of laws rule. The boundaries of each state's sovereignty are also a starting point of domestic law, and the conflict of laws rule serves as a tool by which the legislature grants the validity of foreign law within its legal order. Here again, we see the strong position of domestic law. At the same time, we know that the procedural order is governed by a fundamental principle, namely the lex fori.

[114] LEDRER, E. *Promlčení ve vztazích mezinárodně právních. Studie z mezinárodního práva III.* p. 90.
[115] KALENSKÝ, P. *Podstata a povaha aplikace cizího práva. Studie z mezinárodního práva.* p. 58.
[116] Ibid., p. 59.
[117] See DONNER, B. *Důkaz a použití cizího práva. Studie z mezinárodního práva III.* p. 112.
[118] KALENSKÝ, P. *Podstata a povaha aplikace cizího práva. Studie z mezinárodního práva.* p. 60.

Look back at historical and dogmatic conclusions about the superior position of domestic law. The importance or strengthened position of domestic law can be found in the concept of the facultative nature of the conflict of laws. Reflections on this concept are more appropriate for states where a dual system approach or a system where foreign law is treated as fact is more preferred. In examining these systems, a solid domestic law position can be found since it will depend (there are exceptions) on the party invoking the application of foreign law. We shall analyse the conflict of laws rules, which are the main actors in considering the facultativeness of conflict of laws. As such, the conflict of laws rule contains a specific obligation for the court – to apply foreign law. This norm does not have a rule of conduct; by its nature, we might compare it to a procedural norm that imposes an obligation on the decision-maker.[119] The impact on the nature of this conflict of laws rule will depend on the legal order of the state in question - in particular; it will lie in the middle between the autonomy of the will and the procedural order of the state. In the Czech environment, applying the conflict of laws rule ex offo can be established. However, let us not forget the elements of the parties' autonomy of will, where the parties can choose the applicable law. I.e. they can select the lex fori law, which is also possible within the system of conflict of laws, both in Czech law as such and under European rules.[120] But let's not forget that this is about autonomy within a system of conflict norms, so it is not a consideration of facultatively as such.[121] It can also be argued that it is, in a way, domestic law preponderant.[122] This happens when it is impossible to determine the content of the foreign law, and it is an emergency solution in the form of a supportive application of domestic law.[123] The example of France has shown us that there is a solid return to domestic law. In a way, we can argue that this is a real choice of law for the parties.[124] The ideas of the facultative application of conflict of laws rules were mainly based on the disadvantages of applying foreign law. The problem with foreign law is that it is foreign.[125] Its application is time-consuming and costly. Therefore, possible considerations of the theory of facultativeness of conflict of law rules will strengthen the procedural position of the parties and, at the same time, overcome the weaknesses of court proceedings in cases where the court does not have enough experience, and information, or willingness to apply foreign law.

CONCLUSION

The question of the application of conflict of laws rules and, on their basis, the application of foreign law is deemed to be the core of conflict of laws. The absence of harmonised regulations on the treatment of foreign law within the European Union results in different approaches and solutions to this issue. All this creates a space for inconsistent,

[119] CISÁR, I. Aplikácia českého práva namiesto práva cudzieho. *Právník*. 2012, Vol. 151, No. 7, p. 724.
[120] See Art. 3 Rome I Regulation.
[121] Rozehnalová shares the same opinion. See ROZEHNALOVÁ, N. *Instituty českého mezinárodního práva soukromého*. p. 207.
[122] LEDRER, E. *Použití a důkaz cizího práva*. p. 99.
[123] Ibid.
[124] JÄNTERÄ-JAREBORG, M. *Foreign Law in National Courts: A Comparative Perspective. Recueil des Cours 304 (2003). Collected Courses of the Hague Academy of International Law*. pp. 251–252.
[125] Ibid., p. 195.

divergent, and possibly diverse treatment of foreign law. This situation weakens the position of ensuring external decisional harmony and the inclination of the courts to apply the lex fori.[126] Conflict of laws rules are applied ex offo in Czech law. The foreign law is treated as law, and thus the determination of the content of the foreign law is ex officio, and the obligation lies with the judge. In other jurisdictions, however, there is a consideration of the facultative nature of the conflict of laws.

Three questions were set at the beginning of the article. In the article, I came to the following conclusions:

1. The conclusion cannot be drawn that in the Czech environment, the burden of alleging and proving the existence of an international element lies with the parties to the proceedings. That obligation lies, in principle, with the judge. The obligatory nature of the conflict of laws rules in combination with the principles that govern the judicial process. It cannot be established that the obligation lies with the parties. This could easily slide into displacing private international law norms and, in a way, domesticating an otherwise international dispute. Of course, if the parties deliberately remain silent and conceal the international element, the situation becomes more complicated. Also, the position may be different in the case of contentious proceedings.[127] It, therefore, obliges the court to identify the international element which is a determinant for the application of foreign law and thus to assess the application of conflict of laws rules. In the case of undisputed proceedings, where the conclusion is quite logical, there is a clear obligation on the court. This follows from the nature of the proceedings and the application of the conflict of laws rules ex offo.

2. Conflict of laws rules are applied ex offo in the Czech legal system. This basic premise is justified by the nature of the Czech legal system. It is the will of the legislator to apply foreign law based on conflict of law norms. In the Czech legal system, it is impossible to displace conflict of laws norms, or it is not possible to dispose of conflict of laws in favour of, for example, the application of Czech law. Considerations of the facultativeness of the conflict of laws rule are more likely to be accepted in jurisdictions where a dual system or a system where the law is treated as fact is advocated. The idea lies in the predisposition of a judge's unfamiliarity, misapplication of foreign law, or a costly process. On the other hand, the fundamental principle of the judicial process, namely the legal certainty of the parties, is coming to the fore. The parties' autonomy plays a vital role here, where it can be accepted, under certain conditions, that in the case of the facultative nature of the conflict of laws, a genuine choice of law by the parties is made.

3. The thoughts on the facultative nature of the conflict of laws are partly based on the escape point of the application of domestic law. The factuality of conflict of laws rules is, in a way, a possible escape in the choice of domestic law. Why else would it have been created? If the legal systems in question did not perceive certain disadvantages over the

[126] BASEDOW, J., RÜHL, G., FERRARI, F., DE MIGUEL ASENSIO, P. *Encyklopedia of Private International Law.* Vol. 1. p. 769; MOTA ESPLUGUES, C. *Harmonization of Private International Law in Europe and Application of Foreign Law: The "Madrid Principles" of 2010.* pp. 286–287.

[127] ROZEHNALOVÁ, N. *Instituty českého mezinárodního práva soukromého.* p. 205.

application of foreign law,[128] it would be evident that considerations over the optionality of conflict of laws rules would not arise. Indeed, the question is whether it is not better to apply domestic law in the right way than to use foreign law in the wrong way when the parties did not insist on or expect its application.[129] On the other hand, one cannot ignore the arguments in applying conflict of laws rules ex offo.[130] Specific signs of facultativeness can be seen in the Czech legal system, but I believe that the consideration of facultativeness is far away.

[128] The argument is that with the application of foreign law, the quality of court decisions decreases because the judge is not able, nor is it possible, to impose an obligation to know the content of foreign law. Judges feel trapped. See DE BOER, T. M. *Facultative Choice of Law: The Procedural Status of Choice-of-Law Rules and Foreign Law. Recueil des Cours 257 (1996). Collected Courses of the Hague Academy of International Law*. The Hague/Boston/London: Martinus Nijhoff Publishers, 1997, p. 317; LEDRER, E. *Použití a důkaz cizího práva*. p. 62.

[129] JÄNTERÄ-JAREBORG, M. *Foreign Law in National Courts: A Comparative Perspective. Recueil des Cours 304 (2003). Collected Courses of the Hague Academy of International Law*. pp. 233–234; ROZEHNALOVÁ, N. *Závazky ze smluv a jejich právní režim (se zvláštním zřetelem na evropskou kolizní úpravu)*. p. 245.

[130] For example, in the form of preference for domestic law; circumvention of external decisional harmony and failure to achieve equality of legal orders; rejection of materialised conflict-of-laws rules – e.g., in the form of protection of the weaker party and non-fulfilment of the result that is monitored in the conflict-of-laws rule; the idea of a procedural advantage of the parties can also be mentioned. If the parties direct the issue of the application of foreign law, then the party may find that according to the law of the lex fori, there are no chances of success so that it can propose the application of foreign law. See Swiss Institute of Comparative Law. The Application of Foreign Law in Civil Matters in the EU Members States and its Perspectives for the Future JLS/2009/JCIV/PR/0005/E4, Part I, Legal Analysis. Lausanne, 11 July 2011, pp. 18–19. In: *studylib.es* [online]. [2022-04-15]. Available at: <https://studylib.es/doc/4993364/the-application-of-foreign-law-in-civil-matters-in-the-eu>; see as well DE BOER, T. M. *Facultative Choice of Law: The Procedural Status of Choice-of-Law Rules and Foreign Law. Recueil des Cours 257 (1996). Collected Courses of the Hague Academy of International Law*. pp. 383, 367, 375–376.