RENVOI AS A VALUE-LADEN TECHNIQUE OF CONFLICT OF LAWS

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Abstract: *Although the multilateral conflicts method has undergone a significant paradigm shift in its value orientation, the same cannot be said at first glance of the institutes of its general part. Classification, incidental questions and renvoi are still largely viewed as isolated instruments that lack any connection to the values pursued by choice-of-law rules. This paper, nevertheless, uses the example of renvoi to refute the idea that it can be applied mechanically as a value-neutral institute designed to justify a return to the legis fori. On the contrary, I propose to perceive this institute as a complex technical solution, the application of which is determined by the values pursued. This is illustrated, inter alia, on the example of the Succession Regulation and its relation to regulations adhering to the principle of scission.*

Keywords: *renvoi, values, balancing, conflicts technique*

INTRODUCTION

For a long time, under the influence of Savigny's doctrine, the multilateral conflicts method applied on the European continent was characterized by rigid and mechanically applied rules that were logically derived from abstract, universally valid principles.[1] This entailed the belief in value neutrality of conflict of laws. Coordination of legal diversity as a core function of conflict of laws thus seemed to consist in a mere delimitation of the scope of legal orders, regardless of the differences in their value orientation. The whole process of conflicts resolution was thus conceived in a blind, mechanical way.[2] Over time, however, this mechanical and abstract dogmatics became the target of criticism, which resulted in changes at both the legislative and doctrinal levels.[3] These began to manifest themselves in an increased emphasis on values that lay behind choice-of-law rules and which could be advanced by their means.[4]

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[1] HEILMAN, R. J. Judicial Method and Economic Objectives in Conflict of Laws. *Yale Law Journal*. 1934, No. 7, p. 1082.

[2] Thus, for example, a choice-of-law rule stipulated that the formal validity of a contract is governed by the law of the place where the contract was signed, since it is in that state that the "seat" of the legal relationship is located. In devising such a rule, there was no attempt to ensure that the formal validity as a material value would be promoted.

[3] ROZEHNALOVÁ, N. *Instituty českého mezinárodního práva soukromého [Institutes of Czech Private International Law]*. Praha: Wolters Kluwer, 2016, p. 15.

[4] For example, legislators gradually began to use multiple connecting factors for choice-of-law rules governing the formal validity of a contract. The connecting factor of the place of contracting was joined, for example, by the law applicable to the contract (*lex causae*) or the law of the habitual residence of the contracting party. All of this has been aimed at minimising situations of invalidity of contracts in terms of form and thus promoting the material value of the validity of legal acts. Another example is the adoption of special choice-of-law rules for consumer or individual employment contracts, the design of which reflects the substantive value of providing a certain level of protection to consumers and employees as weaker parties to these relationships.

The general institutes of conflict of laws, however, appeared as if they remained outside the reach of this value transformation. Classification, incidental questions and renvoi were still largely viewed as isolated instruments that lacked any connection to the values pursued by choice-of-law rules.[5] This might give the impression that the general institutes represent the remains of the blind mechanics that resist the development of the discipline and prevent it from fulfilling its regulatory potential.

This paper, nevertheless, uses the example of renvoi to refute the idea that it can be applied mechanically as a value-neutral institute designed to justify a return to the *legis fori*. On the contrary, I propose to perceive this institute as a complex technical solution, the application of which is determined by the values pursued. In fact, a true understanding of the doctrine of renvoi requires a link between its legal-technical and legal-philosophical dimensions.[6]

I aim to demonstrate this first and foremost by looking at the way this institute has been approached by the Czech legislator. At first glance, the legislative grasp of renvoi has undergone several changes that could indicate a shift from flexible value-based solutions to its blind mechanical application. However, I submit that the Czech doctrine has never perceived renvoi as a mechanical, value-neutral institute.

A similar value-based approach to renvoi is also sought to be presented in the approach of the EU legislator. Although the application of renvoi is generally excluded at this regional level, the Succession Regulation[7] represents a significant exception to this rule. This Regulation is based on the principle of unity of succession, whereby the designated applicable law applies to the succession as a whole, i.e., to the succession of both movable and immovable property. One of the value-oriented questions therefore arises as to whether renvoi can be applied even if this would lead to a scission of succession. Following a value-based analysis of the Succession Regulation in the light of the case law of the Court of Justice, I submit that there is no obstacle to the application of renvoi in such cases.

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[5] For instance, justification for the acceptance or rejection of renvoi mostly revolved around arguments based on logic, state sovereignty, considerations of better law, international decisional harmony or the increased potential for the application of *legis fori*. For details, see VON HEIN, J. Renvoi in European Private International Law. In: Stefan Leible (ed.). *General Principles of European Private International Law*. Alphen aan den Rijn: Kluwer Law International, 2016, pp. 229 *et seq*. Similar approach can be traced in the Czech doctrine. See, for example, ROZEHNALOVÁ, N. *Instituty českého mezinárodního práva soukromého [Institutes of Czech Private International Law]*.; KYSELOVSKÁ, T. Zpětný a další odkaz [The Renvoi]. In: Klára Svobodová (ed.). *[Private International Law. Proceedings of the workshop held on 11/12/2008 at Masaryk Law faculty]*. Brno: Masarykova univerzita, 2008, pp. 74–90; ZAVADILOVÁ, L. Zpětný a další odkaz a alternativní hraniční určovatel [The Renvoi and Alternative Connecting Factor]. In: Naděžda Rozehnalová – Klára Drličková– Jiří Valdhans (eds.). *Dny práva 2015. Část IV. Kodifikace obecné části kolizního práva – cesta či omyl?* [Days of Law. Part IV. The Codifikaction of General Part of Conflits of Law - Path or Mistake?], Brno: Masarykova univerzita, 2016, pp. 236–253; ČERMÁK, K. Zpětný a další odkaz v mezinárodním právu soukromém [The Renvoi and International Private Law]. *Právník*. 1998, Vol. 137, No. 10, pp. 857–873.

[6] ROZEHNALOVÁ, N. Kolize kolizních norem – aneb k úpravě kvalifikace a zpětného odkazu v zákoně o mezinárodním právu soukromém [Conflict of laws – or to adjust the qualification and renvoi in Private International Law Regulation]. *Časopis pro právní vědu a praxi*. 2014, Vol. 22, No. 4, p. 311.

[7] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

I. CZECH NATIONAL APPROACH TO RENVOI

1.1 Origins of the Legislative Approach

Due to the failure of the 1937 Draft Civil Code, the origins of the Czech (or rather Czechoslovak) legislative approach to renvoi can be traced back to the adoption of the Act No 41/1948 Coll., on Private International and Inter-regional Law and on the Legal Status of Foreigners in the Field of Private Law (hereinafter "PILA48"). However, none of its provisions explicitly addressed this institute in general terms. The first value-oriented question therefore is whether the application of renvoi was even an option, or whether the Czechoslovak legislator considered its choice-of-law rules as a strict expression of its value perspective on conflict of laws, which could not be substituted by the views of foreign law.

This question was not clearly addressed even by the explanatory report, which defined the function of choice-of-law rules as *"the delimitation of legal systems, determining which legal system is to be used for the assessment of certain facts (...) The legal consequences with regard to the given facts are then to be sought in the legal system which is so indicated"*.[8] This wording allowed for a twofold interpretation both in favor of a total reference, including foreign choice-of-law rules, and in favor of a mere reference to the substantive law of the foreign State.

Elucidation of the legislator's approach cannot be inferred with certainty neither from the fact that the PILA48 introduced several special provisions which anticipated the adoption of renvoi in specifically defined cases. On the one hand, this could suggest that the legislator was not willing to allow its adoption in other cases, as this could lead to an unacceptable conflict with the values embodied in the choice-of-law rules. On the other hand, however, it cannot be ruled out that this was merely a specific legislative technique, whereby the adoption of renvoi was mandatory, whereas in other cases it was necessary to proceed in the light of the objectives and values on which the PILA48 or the relevant choice-of-law rule were founded. The decision whether to accept renvoi in cases other than those envisaged by the PILA48 would then have to be left to the discretion of the court.[9]

In favor of a total reference, one can refer to the doctrinal work of Bystrický in particular, according to whom renvoi to Czechoslovak law should always have been accepted.[10] It should be noted, however, that he mitigated the rigidity of this conclusion when he stated that considerations on the application of renvoi should be guided by the idea of a reasonable ordering of legal relationships.[11] This shows that Bystrický perceived this institute in a value-based, not mechanical, way.

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[8] PILA48 Explanatory Report, Part A. Introduction, II. Historical Outlook.

[9] ČERMÁK, K. *Zpětný a další odkaz v mezinárodním právu soukromém [Renvoi in Private International Law]*. p. 869.

[10] BYSTRICKÝ, R. *Základy mezinárodního práva soukromého [The foundations of Private International Law]*. Praha: Orbis, 1958, p. 89.

[11] Ibid., p. 90. It should be noted at this point that the function of a choice-of-law rule cannot be confused with the reasons for adopting a renvoi. A reasonable ordering of legal relationships is not a reason for stating that one should perceive the reference of a choice-of-law rule to a foreign legal order as a whole, but a reason why a renvoi to Czechoslovak law should be accepted in certain cases.

A certain risk of confusing the value-based and mechanical approaches to renvoi exists should one seek to explain the latter in the light of the values pursued. This could, for example, result in the interpretation that whenever one can arrive at the application of one's own (e.g., Czechoslovak) law, it is a reasonable and just ordering of the legal relationship. However, this is clearly not a generally valid assumption that could be extended to all conceivable cases, especially if one takes seriously the premise that conflicts resolution expresses the degree of openness, tolerance, and respect towards foreign legal orders. I therefore submit that the only practically acceptable solution relies on a value-based approach towards renvoi, where its application will be assessed in the light of the particular case and values at stake.

Contrary to this view, one may note the decision of the Supreme Court of the Czech Republic, which addressed the issue of damages arising from tort under the PILA48.[12] With respect to renvoi, the Supreme Court stated: *"In view of the subject matter of the proceedings, which is the right to performance of an obligation in tort, it was not necessary to deal with the question of so-called renvoi under the rules of German conflict of laws."*

This conclusion of the Supreme Court can be interpreted from several perspectives. On the one hand, in view of the conclusion on the application of renvoi, it can be assumed that the reference of a national choice-of-law rule was to be seen as a reference to the foreign legal order as a whole, i.e., including its choice-of-law rules, even if the PILA48 did not expressly so stipulate. On the other hand, however, the Supreme Court at the same time *en bloc* refused to consider the possibility of renvoi with reference to the fact that the subject matter of the proceedings was a right to performance arising from a tort obligation.

This may be seen as a general tendency to reject renvoi in the realm of the law of obligations, which is explicitly enshrined, for example, in the currently effective Czech Private International Law Act (hereinafter "PILA"). It is, however, important to note that the PILA48 did not provide for any explicit exclusion of renvoi in these cases. I therefore argue that the correct approach should have been rather to examine whether the choice-of-law solution expressed in Section 48 of the PILA48 was an expression of a reasonable and just ordering of the legal relationship, as envisaged by Section 46 with respect to contracts. If we were to conclude in the affirmative, we would indeed be precluded from considering renvoi of foreign choice-of-law rules. However, it would not be due to the nature of the subject matter of the case, but rather due to the nature of the applicable connecting criterion, which generally does not allow for a departure from the legislator's view of a reasonable and just ordering of legal relationships. If, however, we were to perceive this choice-of-law rule as a mere territorial delimitation of the scope of legal orders, consideration of renvoi would be appropriate, and only then the reference of the foreign legislator would be assessed in the light of its consistency with the values of the Czechoslovak conflict of laws.

[12] Judgment of the Supreme Court of the Czech Republic of 6 September 2013, Case No 25 Cdo 4050/2011. The harmful event occurred on 17 November 1953, which is why the choice-of-law and substantive regime of the case was assessed in accordance with the law in force and effective at that time, i.e., the PILA48.

It is thus open to speculation whether this is merely a shorthand conclusion devoid of detailed reasoning, or whether the Supreme Court, in deciding this case, was guided by later approaches that reflect the gradual crystallization of an approach rejecting renvoi in the law of obligations.

1.2 Flexible Approach of the Private International Law and Procedure Act

A substantial shift, at least in terms of legislative technique, was brought about by the adoption of the Act No 97/1963 Coll., on Private International Law and Procedure (hereinafter "PILA63"). Section 35 of the PILA63 expressly provided that *"if, under the provisions of this Act, a legal order is to be applied whose provisions refer back to Czechoslovak law or further to the law of another State, such a reference may be accepted provided that it conforms to a reasonable and just ordering of the relationship in question*".[13]

The language of this provision already makes it clear that the general approach was very flexible.[14] But not in the sense of how to understand the reference of a choice-of-law rule to foreign law. This was strictly understood as a total reference, where the adjudicating authority always had to proceed *ex officio* to search for the choice-of-law rules of the foreign legal order and assess whether they referred back to Czechoslovak (or Czech) or other law.[15] Nevertheless, the use of the words *"such a reference may be accepted"* placed the final decision on whether or not to accept renvoi in the hands of the adjudicating authority.[16] The Supreme Court's Opinion also tends to follow this approach.[17] Kučera, however, opined that, if the requisite conditions were met, renvoi should always be accepted, as such an approach was in the interests of the uniform interpretation and application of the PILA63, as well as the predictability of the decision in a particular case.[18]

The conditions for the acceptance of renvoi are understood to be the fulfilment of the assumption that its acceptance will lead to a reasonable and just ordering of the legal relationship. In this statement, one can find a parallel, and perhaps even a confirmation, of the above approach of Bystrický, who called for a value approach to this institute in the light of this fundamental principle of the national act. It is thus sufficient only to point

[13] Apart from this general approach, it also provided for a provision in Section 11(b) that explicitly excluded renvoi in determining the conflicts regime for rights to securities.

[14] The Explanatory Report justified this by reflecting on the practice, which supposedly showed that it would not be appropriate to give an unequivocal order for accepting or rejecting renvoi.

[15] ZAVADILOVÁ, L. Zpětný a další odkaz a alternativní hraniční určovatel. [The Renvoi and Alternative Connecting Factor]. In: Naděžda Rozehnalová – Klára Drličková– Jiří Valdhans (eds.). *Dny práva 2015. Část IV. Kodifikace obecné části kolizního práva – cesta či omyl?* [Days of Law. Part IV. The Codifikaction of General Part of Conflits of Law - Path or Mistake?] p. 239.

[16] KUČERA, Z., TICHÝ, L. *Zákon o mezinárodním právu soukromém a procesním: komentář [Law of Private International Law. Commentary]*. Praha: Panorama, 1989, p. 200; In Slovakia, where this Act is still in effect with amendments, it is stressed, however, that this flexibility does not allow for arbitrary judicial practice. See LYSINA, P., HAŤAPKA, M., BURDOVÁ, K. et al. *Medzinárodné právo* súkromné *[Private International Law]*. Bratislava: C. H. Beck, 2023, p. 122.

[17] Opinion of the Supreme Court of the Czech Republic of 27 August 1987, Cpjf 27/86R 26/1987. In: *Nejvyšší soud* [online]. [2023-12-11]. Available at: <https://sbirka.nsoud.cz/sbirka/11691/>.

[18] KUČERA, Z., TICHÝ, L. *Zákon o mezinárodním právu soukromém a procesním: komentář [Law of Private International Law. Commentary]*. p. 200.

out that reasonableness and justness are here understood in a conflicts sense, not in a material sense.[19]

Yet, it is a condition whose fulfillment should have been rather exceptional. Kučera advocated this view with reference to the *"task"*,[20] i.e., the function of choice-of-law rules. This he saw in the expression of the State's interests in the conflict of laws and the fair and just ordering of legal relationships with an international element. Hence, a choice-of-law rule should primarily have in mind the application of substantive law. According to him, if such a regulation were left to foreign choice-of-law rules, one could not speak of one's own, actively implemented choice-of-law regulation, but the State would passively leave it to other States, thereby modifying its own idea of the proper choice-of-law regulation.[21]

Kučera nevertheless assumed that the interest in one's own regulation would be waived where the intensity of the interest was so reduced that it was possible to give way to the choice-of-law rules of another State. By way of example, he mentions cases which have no relation to domestic law.[22] I submit, however, that these situations must be distinguished from cases where there is a manifestly closer connection with a different legal order than that designated by the choice-of-law rule. This could lead, provided that the legislator envisages such an option, to recourse to an escape clause or a general escape rule, such as that provided for, for example, by the currently effective PILA in Section 24. By means of these institutes, one would instead promote one's own perception and evaluation of the closest connection, thus not allowing the foreign legislator to express its views on conflicts resolution. There would be no consideration of renvoi at all, since the closest connection presents a criterion which by its nature excludes this institute. Kučera, on the other hand, presents a case where, based on an objective choice-of-law rule of *legis fori*, we designate a foreign law as applicable without the case having any relation to the forum and without there being a manifestly closer connection with another law. In that case, it is then permissible to accept renvoi if a choice-of-law rule of the referred legal order leads to this result.

At the same time, he submits that the intensity of the interest is also reduced in those legal relationships that intimately affect the person of the foreigner, namely in matters of legal capacity, family law and succession law. By using the connecting factor of nationality, the Czechoslovak legislation allegedly intended to make it clear that the regulation of these issues and relationships was primarily a matter for the home State of the person concerned, and therefore the choice-of-law regulation of these issues could be left to that State. I submit, however, that this argument is problematic, since it can be applied in general terms to all the connecting factors whose application refers to a foreign legal order. One could therefore argue along the same lines using the example of the connecting factor of *lex loci delicti*, which could seem to leave the conflicts resolution to the State in whose territory the unlawful act or its consequences occurred, and which thus has an

[19] Ibid., p. 201; PAUKNEROVÁ, M. *Private International Law in the Czech Republic*. Alphen aan den Rijn: Kluwer Law International, 2011, p. 70.
[20] KUČERA, Z., TICHÝ, L. *Zákon o mezinárodním právu soukromém a procesním: komentář [Law of Private International Law. Commentary]*. p. 201.
[21] KUČERA, Z., TICHÝ, L. *Zákon o mezinárodním právu soukromém a procesním: komentář [Law of Private International Law. Commentary]*. p. 201.
[22] Ibid., pp. 201–202.

interest in regulating liability issues. Following such reasoning, we could conclude that it is always possible to yield to a foreign choice-of-law rule, unless it is excluded by an explicit provision of the law. Such a conclusion, however, does not hold up considering the generally accepted position of some choice-of-law rules, where the interest of the legislator in striking a balance of values prevails over the foreign legislator's ideas of a fair conflicts resolution.

If we now turn our attention to the evolution of the value-based approach to renvoi under the PILA63 regime, one can ask, for the sake of illustration, how this approach affected the law of contractual obligations. Was renvoi applicable also to the choice-of-law regime in this field? From the perspective of the PILA in force today, with reference to the express provisions of that Act, we would conclude that such renvoi is unacceptable. Under the PILA48, the Supreme Court would certainly have reached the same conclusion in the aforementioned case, although it could not rely on any explicit statutory provision in that case. I submit, however, that this latter conclusion is shortsighted at the very least and would have to be reached using a different train of thought.

Section 9(2) of the PILA63 explicitly excluded renvoi in cases where the parties to the contractual legal relationship have chosen the applicable law. However, there was no such provision where the applicable law has been determined based on an objective choice-of-law rule. Kučera, and other authors in agreement with him, nevertheless state in several of their publications that, as far as disputes arising out of contractual relationships are concerned, renvoi is practically not an option.[23] Indeed, the general provision of the PILA63 followed the principle that the law applicable to contractual relationships was the law that conformed to a reasonable and just ordering, while establishing a series of rebuttable presumptions in favor of legal orders determined by means of selected criteria or connecting factors. In the event that the law so referred to did not meet the underlying requirement of achieving a reasonable and just ordering, it may have been departed from. In such cases, the adjudicating authority carried out a comprehensive assessment of the case and concluded for itself which law was most closely connected to the case. In these cases, therefore, it was no longer practically possible to allow the foreign legislator to enforce their choice-of-law ideas, since if they were different, they would probably come into conflict with the values of the *legis fori*, which could be considered unacceptable. Thus, by refusing to accept renvoi, the legislator and the adjudicating authority of the *legis fori* signal that a *"debate"* is not accepted. This also eliminated the conflict which arose by conditioning the acceptance of renvoi upon achieving a reasonable and just ordering of the legal relationship.

1.3 The New Private International Law Act Taking a Mechanical Approach?

The latest stage in the development of the national approach to the institute of renvoi is represented by the Act No 91/2012 Coll., on Private International Law. Section 21(1) of the PILA provides that *"if the provisions of this Act prescribe the application of a foreign law, the provisions of which refer back to Czech law, the substantive provisions of Czech*

[23] KUČERA, Z. *Vybrané otázky srovnávacího mezinárodního práva soukromého [Selected Issues of Comparative Private International Law]*. Praha: Karolinum, 1996, p. 47; PAUKNEROVÁ, M. *Private International Law in the Czech Republic*. p. 70.

law shall apply. Where the provisions of a foreign law refer to the law of another foreign State, the substantive provisions of that law shall apply insofar as it is to be applied pursuant to its choice-of-law rules; otherwise the substantive provisions of Czech law shall apply." In addition, the PILA introduces several special provisions which exclude or, on the contrary, command the application of renvoi in certain specific matters.

The general regime adopted has brought a significant change in the wording compared to the flexible regulation enshrined in the PILA63. Although the obligation to apply the provisions on renvoi *ex officio* remains, the condition that such reference must lead to a reasonable and just ordering of the legal relationship has been removed. The question therefore arises as to what this change says about the approach of the Czech legislator, when viewed through a value-based lens. Is it a more mechanical approach leading to a more open attitude towards foreign law, despite the potential contradiction in values pursued? Or has practically nothing changed and corrective mechanisms must be sought in combination with other institutes?

It is the latter approach that can be traced in Kučera's remark:

"even apart from the express exclusion of renvoi, it will not be correct to accept it where its application would contravene the objectives pursued by the underlying principles of the PILA. These are situations in which the mere acceptance of renvoi would, in particular, cause the legal act to be void, e.g., as regards its form, or to fail to produce its legal effects (…) A law employing the technique of establishing multiple connecting factors, thereby ensuring that the desired result is achieved when at least one of them is used, relegates the occurrence of similar cases in social reality to a negligible minimum. Even if they do occur, the legal basis for their resolution can be grounded in the stated conflict with the underlying principles and objectives pursued by the PILA and, depending on the circumstances, the application of Section 24(1)."[24]

In this approach, one can clearly see the continuity of the value connotations of renvoi, which should not be accepted if its application would lead to results incompatible with the values pursued by the choice-of-law rules of *legis fori*. We can thus conclude that the acceptance of renvoi would be conditional upon the value consistency (or at least acceptability) of the legal orders in question. Should they be value-contradictory to the extent that *legis fori* considers unacceptable, renvoi would not be accepted.

I submit, however, that Kučera's conclusion cannot be taken as an absolute. I agree with it insofar as the law makes use of value-oriented alternatives, for which scholars agree that renvoi is excluded by its very nature.[25] Nevertheless, if we take the question

[24] KUČERA, Z., GAŇO, J. *Zákon o mezinárodním právu soukromém: Komentované vydání s důvodovou zprávou a souvisejícími předpisy [Private International Law Act: Commented edition with explanatory memorandum and related regulations]*. Brno: Doplněk, 2014, p. 61.

[25] ROZENALOVÁ, N. § 21 Zpětný a další odkaz [The Renvoi]. In: Monika Pauknerová – Naděžda Rozehnalová – Marta Zavadilová et al. (eds). *Zákon o mezinárodním právu soukromém: komentář [Private International Law Act: Commentary]*. Praha: Wolters Kluwer, § 21; BŘÍZA, P. § 21 Zpětný a další odkaz [The Renvoi]. In: Petr Bříza – Tomáš Břicháček – Zuzana Fišerová – Pavel Horák – Lubomír Ptáček – Jiří Svoboda (eds). *Zákon o mezinárodním právu soukromém. Komentář [Private International Law Act: Commentary]*. Praha: C. H. Beck, pp. 137–138; HUGHES, D. A. The Insolubility of Renvoi and its Consequences. *Journal of Private International Law*. 2010, Vol. 6, No. 1, pp. 202 *et seq*.

of the formal validity of a legal act as an example, I do not consider that invalidation of a legal act by recourse to renvoi can be remedied by applying the escape rule of Section 24(1) of the PILA. Indeed, two situations must be distinguished.

On the one hand, there may be a choice-of-law rule with alternative connecting factors, whereby the legislator shows an interest in ensuring *favor validitatis* – the validity of the legal act in terms of its form. In these cases, the scholarship is unanimous in concluding that renvoi will not be considered at all, given the function (i.e., the substantive value pursued) of the choice-of-law rule. Thus, renvoi cannot invalidate the legal act in these cases. Another question might be whether, on the contrary, it would be possible to resort to renvoi in cases where none of the alternatively constructed connecting factors would lead to the validity of the legal act, whereas this would be the case if renvoi was invoked.[26]

On the other hand, there may be cases where the choice-of-law determination of the legal regime of the validity of a legal act is based on a simple choice-of-law rule with a single connecting factor. In these cases, I submit that the objective of pursuing the validity of the legal act cannot be inferred at all times. Therefore, considerations of renvoi should not be *a priori* excluded. On the contrary, it would be necessary to first address the objective pursued by the choice-of-law rule in question, i.e., to ask whether its objective is to promote a substantive value of the validity of the legal act or merely to locate the case in a particular legal order. If it were the latter, there would be nothing to prevent the application of renvoi, which could result in the invalidation of a legal act for failure to comply with certain formal requirements.

In my opinion, the remedy for this result should not be sought in the application of the general escape rule under Section 24(1) of the PILA. Kučera himself states in one of his works that the escape rule is motivated by conflicts values and should not be used to remedy materially undesirable results of the application of foreign law. The formal validity of a legal act is however a material value that is projected into choice-of-law rules by various techniques, such as the alternative arrangement of multiple connecting factors. The invocation of the escape rule cannot be justified even in the light of the argument that the choice-of-law rule governing the formal validity of a legal act pursues a reasonable and just ordering of the legal relationship, since that criterion is based on conflicts values, not material ones. However, even if we were to allow for the possibility of applying the escape rule, consideration of this possibility would take place before any consideration of renvoi under the choice-of-law rules of the originally designated legal order. And, as I have noted above, in such cases the adjudicating authority makes a comprehensive assessment of the case and reaches its own conclusion as to which law is most closely connected to the case, thereby excluding the possibility of enforcing foreign legislators' ideas of a just conflicts resolution.

In view of the above, I submit that the change in the wording of the general approach to renvoi in the PILA does not entail a change in its doctrinal approach, which remains based on its evaluation in the light of the values pursued by the *legis fori* legislator. However, the removal of discretion to accept renvoi when there is no unacceptable value

[26] This question is discussed in more detail in the section concerning the Succession Regulation.

divide can be seen as a contribution towards avoiding the use of this institute in favor of achieving material results.[27]

II. RENVOI IN EU PRIVATE INTERNATIONAL LAW

The EU private international law has followed a relatively strict approach of rejecting renvoi since the adoption of the Rome Convention on the law applicable to contractual obligations. This has been justified primarily by reference to the purpose of unification of conflict of laws. Some fields also exclude renvoi due to the very nature and structure of the choice-of-law rules they govern. Last but not least, it is the value aspect that is also mentioned, where acceptance of renvoi would lead to the suppression of the policies and interests underlying the choice-of-law rules or would disrupt the established balance between conflicting values.[28]

The rigidity of this approach can be questioned to some extent in light of the fact that EU regulations are of universal applicability and can thus refer to the law of a third, non-Member State. It is precisely at this point that one can identify a schism within the EU legislator's approach. While the Rome III Regulation, Matrimonial Property Regulation and Registered Partnership Regulation continue to take a negative approach, the Succession Regulation constitutes an exception, as it adopted a rather specific treatment of renvoi. Without delving into the reasons and implications for such divergent solutions in areas that share several common features, I will now examine the approach to renvoi under the Succession Regulation and the way it can be viewed through the values at stake.

2.1 Renvoi under the Succession Regulation

The regulation of renvoi has been incorporated into Article 34 of the Succession Regulation. According to this Article, *"the application of the law of any third State specified by this Regulation shall mean the application of the rules of law in force in that State, including its rules of private international law in so far as those rules make a renvoi to the law of a Member State; or to the law of another third State which would apply its own law"*.[29] However, renvoi shall not apply in relation to the law referred to in Articles 21(2), 22, 27, 28(b) and 30.[30] It is self-evident from the wording of these provisions that the adopted approach to renvoi is rather complex and does not allow for a single solution, as this would ignore the many considerations and values underlying it.

The first manifestation of values is the distinction between whether a choice-of-law rule refers to the application of the law of another Member State or of a third State. The exclusion of renvoi in the case of a reference to the law of another Member State is generally accepted by reference to the purpose of unification of choice-of-law rules. A conflict

[27] ROZENALOVÁ, N. § 21 Zpětný a další odkaz *[The Renvoi]*. In: Monika Pauknerová – Naděžda Rozehnalová – Marta Zavadilová et al. (eds). *Zákon o mezinárodním právu soukromém: komentář [Private International Law Act: Commentary]*. § 21.

[28] MAGNUS, L., MANKOWSKI, P. *European commentaries on private international law (ECPIL): Commentary. Volume II, Rome I Regulation*. Köln: Otto Schmidt, 2017, Art. 20.

[29] Art. 34(1) of the Succession Regulation.

[30] Art. 34(2) of the Succession Regulation.

might arise, however, where that other Member State, if it were to hear the case, would apply a different rule of law due to the principles governing the relationship between the sources, and thus where a different choice-of-law solution might be reached. Even in this case, however, I do not consider this to be problematic in terms of the value relationship between the legal orders concerned. Let us set out the reasons for this conclusion by using an example of hypothetical Member States of the European Union under the Succession Regulation regime.

State X and State Y are both Member States of the European Union. Prior to joining the European Union, they concluded a treaty on legal assistance, which also provides for choice-of-law rules on succession. Both States also have their own choice-of-law rules on succession at national level. In addition, State Y is a Contracting State to a multilateral international treaty of universal application, establishing choice-of-law rules on succession.

Is it problematic from the value perspective to exclude renvoi between Member States under the Succession Regulation if the choice-of-law rule of the Succession Regulation, applied in proceedings by State X, refers to the law of State Y? I argue that it is not.

Any value conflict with State Y's views on just conflicts resolution is ruled out insofar as it relates to its domestic legislation and the bilateral legal assistance treaty concluded with State X. That is because, if the authorities of State Y were to rule in such a case, its national rules would have to give way to the choice-of-law rules of the Succession Regulation due to the primacy of EU law. The bilateral treaty between those States would also have to yield to the Succession Regulation, owing to the explicit provision of Article 75(2) of the Succession Regulation. Should these considerations exhaust all the potentially applicable sources of choice-of-law rules on succession, State Y would also follow the choice-of-law rules of the Succession Regulation, and thus both State X and State Y would follow the same value-based choice-of-law rules. Allowing for renvoi would then lose its potential of an instrument expressing respect for the foreign State's views on a just conflicts solution.

Thus, the only value schism could arise with respect to the multilateral treaty to which State Y and at least one non-Member State of the European Union are parties, since the latter's application would not be affected by the Succession Regulation as a result of Article 75(1). Nevertheless, I consider the exclusion of renvoi in these cases to be justified, since the States concerned (in our hypothetical case, X and Y) are in a direct relationship expressed by an instrument of EU law, whereby the interest in sharing the conflicts values and the notion of a just conflicts resolution between them prevails over the arrangements that one Member State (in our hypothetical case, State Y) has committed itself to in relation to other States, not in relation to the forum State (in our hypothetical case, State X). The fact that renvoi is only considered with respect to non-Member States is thus not a limitation *per se*, but rather a manifestation of unification and the principle of universal application of the Succession Regulation.[31] Moreover, if the forum State (in

[31] FUMAGALLI, L. Renvoi. In: Stefania Bariatti – Ilaria Viarengo – Francesca C. Villata (eds.). *EU Cross-Border Succession Law*. Cheltenham: Edward Elgar Publishing, 2022, p. 155.

our hypothetical case, State X) were also bound by this multilateral treaty, then it would determine the choice-of-law regime of succession in accordance with it, would be in a direct relationship with State Y and would consider the potential renvoi in accordance with this treaty.

In view of all the above, I submit that the exclusion of renvoi in relations between two Member States is justified, but clearly gives rise to a difference in treatment regarding the professed values of conflicts resolution.

The second value aspect of the EU legislator's solution is the admission of renvoi not only in cases where the choice-of-law rule of a third State refers back to the *legis fori*, but also in cases where it refers to the law of any other Member State. The reference back to the law of another Member State can thus be seen as a renvoi *sui generis*.[32] The value foundation of this solution is manifested at two different levels. On the one hand, it is an expression of the EU legislator's respect for the third country's view of a just conflicts resolution. On the other hand, the mere acceptance of a reference to the law of another Member State is an expression of a value relationship to that law at the substantive level. This solution stems from the principle of equivalence between the legal orders of the Member States and the sharing of common values, thereby limiting the scope for the public policy exception.[33]

No departure from the traditional approach to renvoi is implied by the third attribute of the Succession Regulation, namely the acceptance of renvoi should another designated State apply its law pursuant to its own choice-of-law rules.[34] This approach respects both the originally designated as well as the subsequently confirmed law of the third State. This respect for the ideas of foreign legislators, however, ends when there would be yet another subsequent chain of references. In such cases, from the point of view of the EU legislator, this would cause such an imbalance of conflicting values that such a chaining must be rejected. Expressed in value terms, if the legislator does not consider the references to be sufficiently closely linked, the willingness to respect foreign conflicts resolution is undermined and the views of *legis fori* prevail.

The traditional value-based solution entails the explicit exclusion of renvoi in the cases listed in the second paragraph.

The first such case concerns the determination of a choice-of-law regime on the basis of an escape clause. As already mentioned above in relation to the Czech national legislation, where these conclusions can also be applied here, the principle of proximity should in this case override other interests,[35] in particular the interest in international decisional harmony[36] and respect for the conflicts resolution of the foreign legislator.

The same holds true for its exclusion with respect to the choice of law made by the testator, in which substantive considerations typically form an integral part of that choice, thereby precluding the foreign legislator's view of a just conflicts resolution. Respect for

[32] Ibid., p. 157.
[33] Ibid., p. 157–158.
[34] Art. 34(1)(b) of the Succession Regulation.
[35] For example, DOLINGER, J. Evolution of Principles for Resolving Conflicts in the Field of Contracts and Torts. *Recueil des cours*. 2000, Vol. 283, p. 359.
[36] PAMBOUKIS, H. *EU Succession Regulation No 650/2012. A Commentary*. Baden-Baden: Nomos, 2017, p. 408.

that view could in fact lead both to the effective exclusion of choice of law (if the designated law did not allow for a choice to be made and employed the same connecting factor as the Succession Regulation) as well as to the possibility of an indirect extension of potentially eligible laws contrary to what the EU legislator intended to allow.[37] Such an approach would, however, undermine the value balance pursued by the EU legislator, which is unacceptable.[38]

Recourse to renvoi is also excluded for the alternative choice-of-law rule for determining the formal validity of a written disposition of property upon death and for the choice-of-law rule governing the formal validity of a declaration concerning acceptance or waiver of the succession if it is determined by the law of the State in which the person making the declaration is habitually resident. The reason given for this exclusion is, on the one hand, that allowing renvoi could lead to a limitation of the potentially applicable laws, thereby defeating its purpose of promoting the formal validity of the legal act to the greatest extent possible. According to *Pamboukis*, however, this argument does not fully explain why this institute cannot be applied in cases where its use would, on the contrary, lead to a widening of the range of options in favor of validity. Similarly, *Zavadilová*, with respect to national choice-of-law rules, submits that, exceptionally, foreign choice-of-law rules may be applied if this would preserve the validity of the legal act.[39]

This ambiguity can, however, be explained again by looking at the values pursued by the EU legislator. The EU legislator seeks to achieve the formal validity of these legal acts, but only within the ambit of those legal systems which, based on its view of a just conflicts resolution, it perceives as sufficiently closely connected to the case at hand. Thus, while reference to renvoi would respect the value system of the foreign legislator and might result in the validity of the legal act, it would cause an unacceptable conflict with the conflicts value system of the EU legislator, which overrides that of substance. For that reason, it has decided to exclude the application of renvoi, since the achievement of formal validity is not an absolute value to be pursued at any price.[40]

The foregoing only confirms that the complex solution adopted by the EU legislator within the Succession Regulation presents a clearly value-oriented approach, which cannot be applied mechanically. It is a normative solution that reflects the values of the EU legislator, deviation from which is only allowed in cases which do not substantially undermine the value system of the Succession Regulation. I therefore submit that renvoi must not be perceived as a value-neutral institute.

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[37] FUMAGALLI, L. Renvoi. In: Stefania Bariatti – Ilaria Viarengo – Francesca C. Villata (eds.). *EU Cross-Border Succession Law*. p. 161.

[38] Although the case law of the CJEU indicates that the autonomy of will of the testator is not a value on which the Succession Regulation is founded, therefore a mere reference to the principle of autonomy of will would not be sufficient in this respect.

[39] ZAVADILOVÁ, L. The Renvoi and Alternative Connecting Factor]. In: Naděžda Rozehnalová – Klára Drličková– Jiří Valdhans (eds.). *Dny práva 2015. Část IV. Kodifikace obecné části kolizního práva – cesta či omyl?* [Days of Law. Part IV. The Codifikaction of General Part of Conflits of Law - Path or Mistake?], p. 245.

[40] FUMAGALLI, L. Renvoi. In: Stefania Bariatti – Ilaria Viarengo – Francesca C. Villata (eds.). *EU Cross-Border Succession Law*. p. 162.

2.1.1 The Scission Principle through the Value Perspective of Renvoi

Assuming that renvoi is to be approached in a value-based manner whenever its application is considered, a simple question, yet hard to answer, comes to the fore. Can renvoi be invoked also in cases where its application would lead to a scission of the succession, despite the Succession Regulation being founded on the principle of unity of succession, as provided for in the general choice-of-law rule of Article 21(1)?[41] *Pamboukis* rightly observes that this question can only be answered authoritatively by the CJEU.[42] Nevertheless, I submit that the acceptance of renvoi should in these cases not be ruled out, not least in view of the CJEU's conclusions in other cases in which it has addressed preliminary references concerning the interpretation of the Succession Regulation and in which it has expressed its views on the value orientation of this instrument of EU law.

The status of the unity of succession as one of the principles of the Succession Regulation has been confirmed by the CJEU in a number of cases. For the first time, this was already the case in the first reference for a preliminary ruling on the interpretation of the Succession Regulation in the *Kubicka* case.[43] The question at issue here, however, was whether Article 1(2)(l) allows the acquisition of ownership of immovable property by way of legacy *per vindicationem* to be excluded from the scope of the Succession Regulation. The CJEU based its negative answer, *inter alia*, on the conclusion that such an interpretation would lead to splitting of the succession, which is incompatible with the wording of Article 23 of the Succession Regulation and its objectives.[44]

The status of the unity of succession as a principle of the Succession Regulation is also confirmed by the *Vincent Pierre Oberle* case, in which the CJEU recalled that an interpretation of the provisions of the Succession Regulation leading to a scission of the succession is incompatible with the objectives of that Regulation.[45] However, it is clear from the Advocate General's opinion, to which the CJEU refers in its judgment, that the scission of the succession within the meaning of the above-mentioned *Kubicka* judgment refers to the assessment of certain questions relevant to matters relating to succession by reference to national choice-of-law rules.[46] In the case of renvoi, however, this does not occur when proceeding under the Succession Regulation, since the applicable law will be determined pursuant to a single choice-of-law rule of the Succession Regulation, and only when proceeding under the designated law could a scission occur by reference of a foreign choice-of-law rule. However, as the Advocate General pointed out, the interpretation given in *Kubicka* may nevertheless provide some guidance for the interpretation

[41] For example, VON HEIN, J. Conflicts between International Property, Family and Succession Law – Interfaces and Regulatory Techniques. *European Property Law Journal*. 2017, Vol. 6, No. 2, p. 156; Outside the framework of the Succession Regulation, this issue is also mentioned by *Szöcs*, who refers to the case law of the Spanish courts, whose conclusion is that a renvoi to Spanish law should only be considered provided that the unity of succession is not undermined. – SZÖCS, T. The European Succession Regulation from the Perspective of the First Three Years of Its Application. *ELTE Law Journal*. 2019, No. 1, p. 58.

[42] PAMBOUKIS, H. *EU Succession Regulation No 650/2012. A Commentary*. p. 412.

[43] Judgment of the Court of Justice of 12 October 2017, *Aleksandra Kubicka*, C-218/16, point 43.

[44] Judgment of the Court of Justice of 12 October 2017, *Aleksandra Kubicka*, C-218/16, point 43.

[45] Judgment of the Court of Justice of 21 June 2018, *Vincent Pierre Oberle*, C-20/17, point 56.

[46] Opinion of Advocate General Szpunar of 22 February 2018, *Vincent Pierre Oberle*, C-20/17, point 109.

of the rules of the Succession Regulation which concern other issues.[47] Do these conclusions thus also apply to the determination of the applicable law?

An affirmative answer to this question might be suggested by the findings in the *EE* case. There, the CJEU dealt primarily with the question whether a testator may have more than one habitual residence. As already suggested by the Advocate General in his opinion, one of the arguments advanced in support of a negative answer was that a plurality of habitual residences of the deceased would lead to a scission of the succession, since habitual residence is a criterion for the application of the general rules laid down in Articles 4 and 21 of the Succession Regulation.[48] However, it should be noted that this assessment was decisive for the purpose of establishing the existence of a succession with cross-border implications. Consequently, these conclusions cannot be regarded as decisive for the question which is the subject of this section of the paper.

The most relevant for the conclusions relating to the applicable law thus appears to be the decision in the *OP* case, which primarily dealt with the relationship between the Succession Regulation and a bilateral legal assistance treaty concluded by a Member State with a third State before its accession to the European Union. Here again, the CJEU, referring to its earlier case law,[49] confirmed that the general objective of the Succession Regulation, which is the mutual recognition of decisions given in the Member States, is based on the principle of unity of succession.[50] At the same time, however, it held that it is not an absolute principle.[51] The regulation itself envisages several situations where there occurs a scission of the succession, whereby the EU legislature expressly intended to respect, in certain specific cases, the principle of scission, which may be applied in relations with certain third States.[52] I suggest that such a relationship with third States could also be understood to include the issue of renvoi. Since, as stated by the Advocate General in his opinion, the choice in favor of the principle of unity of succession is not an extension of that principle to the international context, given the absence of a substantive EU law of succession, but a technical solution which best suits the integration objectives of the EU.[53] However, it is far from being a rigid principle in any of the areas in which it operates. Thus, while avoiding the scission is something that the Succession Regulation aims at, it is not an absolute imperative.[54]

When projecting the above conclusions of the CJEU onto the question posed above, I submit, in agreement with *Fumagalli*, that the application of renvoi should not be excluded in cases where, despite the principle of unity of succession, it would lead to scission of the succession based on the nature of the assets into the succession of movable and immovable property.

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[47] Opinion of Advocate General Szpunar of 22 February 2018, *Vincent Pierre Oberle*, C-20/17, point 109.
[48] Judgment of the Court of Justice of 16 July 2020, *E. E.*, C-80/19, point 41.
[49] Judgment of the Court of Justice of 21 June 2018, *Vincent Pierre Oberle*, C-20/17, points 53 and 54.
[50] Judgment of the Court of Justice of 12 October 2023, *OP*, C-21/22, point 34.
[51] Judgment of the Court of Justice of 12 October 2023, *OP*, C-21/22, point 34 with reference to the judgment of the Court of Justice of 16 July 2020, *E. E.*, C-80/19, point 69.
[52] Judgment of the Court of Justice of 12 October 2023, *OP*, C-21/22, point 36.
[53] Opinion of Advocate General Campos Sánchez-Bordona of 23 March 2023, *OP*, C-21/22, point 65.
[54] Opinion of Advocate General Campos Sánchez-Bordona of 23 March 2023, *OP*, C-21/22, point 69 with further references.

CONCLUSION

In this paper, I have attempted to change the view of the institute of renvoi as a *"strange weapon in our conflicts arsenal"*.[55] The paradigm shift presupposes that renvoi cannot be viewed in isolation and in a purely mechanical way as a tool leading to the replacement of a connecting factor by another with the aim of finding better conflicts justice or ensuring the coordination of legal orders as an intrinsic value.[56] On the contrary, it must be approached as an integral part of the choice-of-law technique, in which its individual parts form a coherent whole[57] through their interaction and which expresses a relationship to foreign law in which value judgments are reflected.

The coordinating function of conflict of laws can thus be seen as an expression of the degree of openness and relationship of the legislator towards the interests and values of foreign law. However, the degree of this openness is variable and depends on the value links between the legal orders concerned.[58] Renvoi will thus come into play particularly where it is consistent with the values of the conflict of laws of *legis fori*.[59] Where it would lead to a conflict with those values, its application would have to be rejected on the grounds of incompatibility.[60] As a result, a decision for or against renvoi may require balancing of a number of conflicting value considerations.[61]

This is a classic manifestation, in the words of *Symeonides*, of the unilaterality of multilateralism,[62] whereby on the one hand we proclaim neutrality of the conflicts resolution, yet do not accept value judgments that contradict our own perceptions and evaluations. This only reinforces our conviction that the field of conflict of laws as a whole is not value-neutral *per se* but depends on the value congruence of the legal orders in question.

[55] SIEHR, K. Renvoi: A Necessary Evil or is it Possible to Abolish it by Statute? In: Ian F. Fletcher – Loukas Mistelis – Marise Cremona (eds.). *Foundations and Perspectives of International Trade Law*. London: Sweet & Maxwell, 2001, p. 203.

[56] FUMAGALLI, L. Renvoi. In: Stefania Bariatti – Ilaria Viarengo – Francesca C. Villata (eds.). *EU Cross-Border Succession Law*. p. 164.

[57] TORREGIANI, P. C. The Renvoi Debate. *Id-Dritt*. 2006, Vol. 19, p. 328.

[58] TEN WOLDE, M. H. The Relativity of Legal Positions in Cross-Border Situations: The Foundations of Private Interregional law, Private Intra-Community Law and Private International Law. In: Permanent Bureau of the HccH (ed.). *A Commitment to Private International law. Essays in honour of Hans van Loon*. Cambridge: Intersentia, 2013, p. 574.

[59] HOOK, M. Renvoi and Preliminary Questions. In: Paul Beaumont – Jayne Holliday (eds.). *A guide to global private international law*. Oxford: Hart Publishing, 2022, p. 66.

[60] For example, *Bogdan* submits that *"the policy considerations underlying the conflict rule of the forum country should normally be allowed to prevail"*. – BOGDAN, M. Private International Law as Component of the Law of the Forum. *Recueil des cours*. 2011, Vol. 348, p. 163.

[61] HOOK, M. Renvoi and Preliminary Questions. In: Paul Beaumont – Jayne Holliday (eds.). *A guide to global private international law*. p. 67.

[62] SYMEONIDES, S. Idealism, Pragmatism, Eclecticism. *Recueil des cours*. 2017, Vol. 384, pp. 186–187.