Inovatívne formy vzdelávania v transformujúcom sa univerzitnom vzdelávaní

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INTERNATIONAL PRIVATE LAW

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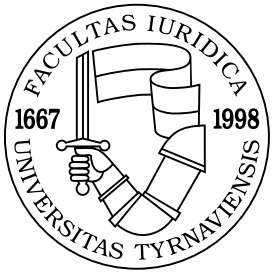

International Private Law

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Natalia Stefankova (JUDr., PhD.), born in Presov (1978), graduated from the University of P. J. Safarik, Faculty of Law in Kosice, joined the Trnava University in Trnava, Faculty of Law in 2002, where she in 2009 awarded the PhD. after completing her doctoral study at the Department of Civil Law and Commercial Law. She is a lecturer at the Department of International Law and European Law. Her professional focus is Private International Law, International Trade Law and Comparative Law. She leads lectures and seminars on Private International Law, European Procedural Law, International Sales Law and Comparative Law. She takes active part in national as well as international conferences, seminars and professional academic meetings and participates in a number of research projects granted by the national and international institutions. She is author and co-author of a number of academic and scientific writings, monographs and textbooks.

Content

Foreword

Hereby I would like to present a new textbook related to the Private International Law designated to all, who are interested in the science of this very special branch of law. The opportunity to create this short description of a basic definition, methods and analyses of legal cases with a foreign element emerged thanks to a special research project…...

The purpose of this book is to present the Private International Law as an opportunity of the homogenous and scientifically constructed body of law, suitable to the changing needs of society, can be a way how to approach foreign legal cultures, without providing the lack of respect to the domestic national law.

The publication include the short outline of the most important issues relating to the Private International Law cases, such as the methods of conflict of law solution, party autonomy, conflict rules, order public, as well as the procedural thesis designated to cross-border dispute solution.

The legal basis for this short guide flows from the Slovak perspective how to achieve the solution of the conflict of law problems, as well as the new European Private International Law approach set down in many significant regulations.

I. Introduction to Private International Law

Private international law (PIL), also known as conflict of laws in more common law-oriented jurisdictions, is the body of law that seeks to resolve certain questions that result from the presence of a foreign element in legal relationships. Examples of such relationships include contractual disputes between parties located in different jurisdictions, the marital status of partners of different nationalities, the legal status of real estate located in a foreign jurisdiction. PIL is generally considered to consist of two major branches. The first branch seeks to determine which nation's courts have jurisdiction over disputes involving a foreign element and which conditions need to be met for decisions of foreign courts to be recognized and enforced within a country ("jurisdiction and the recognition and enforcement of judgments"). The second branch seeks to determine which nation's laws are to be applied to govern the substance of legal relationships involving a foreign element ("applicable law"). It is, contrary to what the label suggests, not international law *strictu sensu*, i.e., it does not constitute a set of rights and obligations between States. To the contrary, private international law is municipal law and essentially aims to regulate conduct between private parties. Its only "international" dimension results from the fact that it comes into application because of the presence of a foreign element. One consequence of the inherently municipal nature of private international law is that each country has its own set of private international law rules. As there is relatively little harmonization or coordination of these various rules at the international level, and as they tend to be complex and therefore hard to apply consistently, there is no guarantee that the same dispute involving a foreign element will be decided upon in the same manner from one jurisdiction to another (each jurisdiction reaching different results, on the basis of different rules of private international law). Another peculiar feature of private international law rules, in particular those concerning applicable law, is that they are neither substantive, nor procedural in nature. For instance, according to most private international law rules, questions concerning the legal status of real property are to be determined by reference to the substantive law of the country where the real property at issue is located. The private international law rules concerned thus do not purport to resolve the substance of the question, but merely function as a rule of attribution (or allocation) which allows to determine from among the laws of all countries in the world, which is to govern the matter.

Private international law has a long tradition in legal systems. Cross-border movements of persons and goods, typically in commerce, have been with us for millennia and are the primary catalysts of private disputes involving foreign elements. Such disputes require some form of private international law rules, however crude, to be

resolved. The origins of private international law thus can be traced to ancient Greece and Rome, and the discipline flourished in Europe during the Middle Ages. With the huge increase in international trade and other, less commercial, interactions between citizens (e.g., marriages between persons of different nationalities) across the globe during the last century, private international law has developed into an indispensable component of the legal apparatus of each nation.

Private International Law (PIL) is the body of conventions, model laws, legal guides, and other documents and instruments that regulate private relationships across national borders. PIL has a dualistic character, balancing an international consensus with the domestic recognition and implementation, as well as balancing sovereign actions with those of the private sector.

PIL is the law that regulates which courts should take charge, which law should apply and whether judgments should be recognised and enforced across borders in cases with an international dimension. It also includes mechanisms for co-operation and exchange of the information between governments and courts in different countries, where these are designed to support mutual recognition of each other's laws and judgments. Some part of the PIL is made by the EU, and this is a growing area of work. Some comes from other international organisations such as the Hague Conference on the Private International Law and the Council of Europe. It consists of the rules of law which govern legal relationships of the private law nature (family law, inheritance law, contract law, company law etc.) featuring an international aspect.

To achieve the PIL means to concern all specific aspects of the human behaviour in the society, including the differences among legal orders, relations among their citizens or inhabitants, as far as the recognition of different legal orders in a certain way. This branch of law is an independent part of the legal order of every state which deals with cases containing a foreign element. There are two fundamental bases in order to determine widely a private international social relation – first is the basis of **internationality**, which indicates the correlation with the public international law; second is the basis of **horizontality** described in the foreign element cases, which are not cases of a vertical relation to the state or other subjects of public law, indeed are these relations characterised through legal equality towards the status of subjects.

Contrary to the public international law which achieves a certain grade of universality, the rules provided by the PIL are more national than international. Every nation, every sovereign state has its own system of PIL. A certain kind of unification and harmonisation is accomplished through the legal activities of the above mentioned international organisations. The differences between public and private international law stay the same, although the rapidly increasing harmonisation activities were detect by the legal bodies of the European Union, especially the European Commission.

Usually, it is not permitted to use the domestic law for the regulation of relations with a foreign element. This domestic law is set up only for that kind of legal relations, which does not include the connection to a foreign state. Every relevant legal element of such a legal relation connects to a single state with its domestic law. The presence of a foreign element signify, that under any condition there can be used the domestic law. The strong influence of the domestic law would cause an unjustified result for subjects, and it would be contrary to the expectations of subjects. Private law relations

with a foreign element do not belong to the standard classification of international relations set up by the public international law. The main difference between them is in subjects, the private law relations are established by natural and legal persons, not by states as the sovereign subjects of the public international law.

The determination whether a specific case involves a relationship with an international element or not is essential both for the assessment of such a relationship and the determination of the method of the resolution of any disputes arising from such a legal relationship. An international element exists, if one of the parties is of a foreign nationality, or a foreign legal entity, as well as if such a party is domiciled abroad; furthermore, an international element also exists whenever the object of the present legal relationship is movably or immovably situated abroad and in cases where the creation, alternation or extinguishment of the legal relationship occurred abroad. In principal, such a definition is correct, although it is relatively very narrow and, as such, quite unsatisfactory, because of the obligation relationships, especially in the legal relationships established in connection with the execution of a commercial exchange now, that is in time of globalization trends, which are escalating remarkably.

II. Who creates Private International Law?

States

The most significant role as a creator of the PIL is held by the sovereign states with their legislative bodies. Every state decides which private law relationships will be included in provisions of the PIL, whether the legal order needs a sole legal act which would provide the regulation of cross border relationships or not, whether it will agree the international conventions or not, etc. The main goal of legislative activities of nations concern the establishment of an adequate model or legal regulation, which will respect the sovereignty of the other states and will protect the citizens and the national interests, even if a certain legal case includes a foreign element. There is no general approach for making the PIL by the states. It depends only on the state interests how the PIL will work which relationships it will regulate and how many social traditions and values it will respect. There is only one global principle related to the existence of national PIL systems. This principle expresses, that every state has its own system of PIL and there is no conformity needed among these different systems of national legal orders.

International Organization

Some matters are regulated by the international treaties which were drafted by international organizations like the Hague Conference on Private International Law, the UN Commission on International Trade Law (UNCITRAL) or the Council of Europe.

The contribution of the legislative activities provided by the international organisation is a higher level of unification on the field of PIL. There are two possible ways in which the lack of unanimity among the various systems of PIL may be ameliorated.

The first is to secure by international conventions the unification of the internal law of the various countries on as many legal topics as possible. When attention is paid to the fundamental and basic differences in principle that distinguish one legal system from another, especially in contrast between civil law and common law system, it is obvious that this form of unification holds out no great prospect of success. Nevertheless, a certain amount of progress has been made.

As important example of unification is the Warsaw Convention of 1929 as amended at The Hague, 1955, and supplemented by the Guadalajara Convention, 1961, which

makes the international carriage of persons or goods by aircraft for reward subject to uniform rules as regards both jurisdiction and the law to be applied. It also provides any agreement by the parties purporting to alter the rules on these matters shall be null and void.

Mention may also be made of the Berne Convention, 1886, since amended several times, by which an international union for the protection of the rights of authors over their literary and artistic work was formed.

The Council of the League of Nations entrusted to the Institute for the Unification of Private Law (UNIDROIT), established by the Italian Government in Rome, the task of indicating the lines along which further unification might be attained. An important result of its labours, in conjunction with those of Hague Conference, was the conclusion at The Hague in 1964 of the convention which establishes a uniform set of rules on international sales of goods and also on the formation on contracts for such sales. The successor to these conventions is the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG), prepared under auspices of another body concerned with the unification of law, the United Nations Committee on International Trade Law (UNCITRAL).

The second method by which the inconvenience that results from conflicting national rules may be diminished is to unify the rules of PIL, so as to ensure that a case containing a foreign element results in the same decision irrespective of the country of its trial. Several attempts have been made in the Hague Conference on Private International Law to reduce the number of topics on which the rules for choice of law in different countries conflict, thus indicating the desirability of having a code of PIL common to the civilised world.

A modern feature of private international law is the Europeanization of the subject, by which is meant the assimilation of Member States´ PIL rules, and the creation of the European "area of freedom, security and justice".

III. Conflict of Laws

PIL is that part of law which comes into operation whenever we are confronted by a legal problem which has a foreign element. Foreign elements can be of many kinds. For example, a contract may be made in France; it may require delivery of the goods to Canada. An accident may occur as a result of negligence in Italy: the driver comes from Paris, the injured from England and they wish to pursue litigation in an English court. A painting may be stolen from an art gallery in Dresden and sold by the thief to an art dealer in Switzerland; the painting is now to be auctioned in Bratislava and not surprisingly, the Dresden gallery, having traced the painting, wants it back. A Slovak woman has gone through a ceremony of marriage in Pakistan; the marriage is in polygamous form and she subsequently discovers her husband has two other wives. She wants to know her status: is she married or not and is her marriage polygamous or monogamous? If he attempts to divorce her using a method acceptable within his religion (the talaq), she wants to know what effect this will have in Slovakia. These are just a few examples of foreign elements.

Three questions – methodological approach to the conflict of law

Conflict of laws poses three questions; or to put it another way, there are three main aims of this subject. They are the following:

First, to set out the conditions under which a court is competent to hear an action. This is the question of **jurisdiction**.

Second, to determine by which law the rights of the parties are to be ascertained. In a contract dispute, for example, it is necessary to determine the law governing the contract (its 'applicable law'). This is the question of **choice of law**.

Third, where a dispute has been litigated in another country, to specify the circumstances in which the foreign judgment can be recognised and enforced by action. This is the question of **recognition and enforcement of foreign judgments**.

The first two questions must be asked and answered every time we are faced with a problem which has a foreign element. The third question only arises when there is a foreign **judgment (decision).**

IV. Foreign element

The determination whether a specific case involves a relationship with an international element or not is essential both for the assessment of such a relationship and the determination of the method of the resolution of any disputes arising from such a legal relationship. An international element exists, if one of the parties is of a foreign nationality, or a foreign legal entity, as well as if such a party is domiciled abroad; furthermore, an international element also exists whenever the object of the present legal relationship is movably or immovably situated abroad and in cases where the creation, alternation or extinguishment of the legal relationship occurred abroad. In principal, such a definition is correct, although it is relatively very narrow and, as such, quite unsatisfactory, because of the obligation relationships, especially in the legal relationships established in connection with the execution of a commercial exchange now, that is in time of globalization trends, which are escalating remarkably.

A foreign element can be established primarily in relation to a party to a legal relationship; a fact legally significant for the creation or an existence of a legal relationship; an object of a legal relationship (i.e. the subject of rights and duties); or in the case of legal relationship, which is related to or dependent upon (accessory to) another legal relationship, should this other relationship be governed by the foreign law.

The foreign element is an element which appearance in legal cases is necessary for determining the case as a PIL case. What does this element need in order to determine whether or not we are looking at a PIL relation? By a foreign element is meant a relation to another state´s law. Such a contact may exist, for example, because the place of performing of the contract parties is situated in a state different from that one, which nationalities the contract parties have. The foreign element would also appear in a tort relation, if the tort was committed in a state different from the state where the relevant subject has his/her habitual residence, or which nationality s/he has.

V. Classification, Conflict of Law Rules

In a case containing a foreign element the Slovak court will have to examine different matters in sequence. There will have to be determined if the Slovak court has the jurisdiction, after that the court must determine the juridical nature of the question that requires decision. It is, for instance, the question of breach of the contract or the commission of the tort? Until this is determined, it is obviously impossible to apply the appropriate rule for the choice of law and thus to ascertain the applicable law.

The determination of the juridical nature is a matter of **classification**. It stands for the allocation of the question raised by the factual situation before the court to its correct legal category. The object of classification is to reveal the relevant rule for the jurisdiction and for the choice of law.

Classification is necessary in order to find out the true basis of the claim made. In order to do so, the court should not confine itself to the concept and categories of its national law, it should rather take into account accepted rules and institutions of foreign legal systems. Therefore, the court may not disregard some foreign concepts merely because they are unknown to its own national law.

For example, concepts of the PIL, such as "marriage", "contract", "tort", "corporation" must be given a wide meaning in order to embrace analogous legal relations of the foreign type. Classification of the notion and legal rules become relevant in domestic conflict rules (including unified conflict rules) as well as in foreign law.

Classification of the cause of action /notion

The classification of the cause of action means the allocation of the question raised by the factual situation before the court to its correct legal category. Its object is to reveal the relevant rule for the conflict of law. The rules of any given system of law are arranged under different categories, some being concern with the status, other with succession, procedure, contract, tort and so on, and until a judge, faced with a case involving foreign element, has determined the particular category into which the question before him falls, he can make no progress, for he will not know what conflict of law rule to apply. The judge must discover the true basis of the claim being made. He must decide, for instance, whether the question relates to the administration of assets or to succession, for in the case of movables left by a deceased person, the former is governed by the law of the forum, the latter by the law of the domicile. Whether undertaken consciously or unconsciously this process of classification must always be performed. It is usually done automatically and without any difficulty. If, for instance, the defendant is sued for the negligent damaging in France of the claimant´s goods,

the factual situation before the court clearly raises a question of tort.

Classification of a rule of law

Once the main legal category has been determined, the next step is to apply the correct conflict of law rule in order to ascertain the governing law. As we have seen, the correct rule will depend on some connecting factor, such as nationality or the situation of immovable, which links the question to definite legal system. The allotment of certain meaning to the terms used by the conflict rules is the second step towards the determination of the governing law.

Subject W, for instance, dies intestate domiciled in France, leaving movables in Slovakia. Since he has been connected by the nationality with Slovakia, the operative conflict rule is, therefore, that the question of intestate succession must be governed by the Slovak law. However, at this stage the second process of classification, has to be gone through. It may be necessary to identify the legal category into which some particular rules falls, in order to discover whether it falls within a category with regard to which law selected by our conflict rules is paramount. That law has a certain sphere of control – it governs some, but not all, aspects of the juridical question as classified by the Slovak court in the sense already indicated. Thus, for instance, in an action brought in Slovakia for breach of a contract made and performable in France, the French law governs matters of formal and essential validity, but all questions of procedure are subject of the Slovak law. A French procedural rule is outside the sphere of control of the chosen French law relating to matters of substance. If, therefore, a particular French rule is pleaded and if it is doubtful whether it relates to procedure or to substance, its true nature must obviously be determined. It must be ignored if it is procedural in character, otherwise it must be applied. Likewise, a Slovak domestic rule is excluded if it relates to form or substance, but is applicable if it is procedural in nature.

The court having classified the factual question, as well as appropriate conflict rule must next select the legal system that governs the matter. This selection will be conditioned by what has aptly been called a connecting factor – some outstanding fact which establishes a natural connection between the factual situation before the court and the particular system of law.

Conflict of law rules

The PIL rules are a specific group of legal rules which has a special purpose – to connect the legal orders of foreign states on the basis of the regulation of legal relations with a foreign element. It was said, that every sovereign state has its own system of legal rules, which regulates the legal relations (cases) with foreign elements. The conflict rules are used solely by this specific type of legal cases with a foreign element. The application of these conflict rules by domestic legal relations would be useless because of the lack of the foreign element.

Structure of conflict rule

There are some special attributes regarding this type of legal rule, although some scholars would not agree with the provided description of the conflict rule like a kind of legal rule as whole. The conflict rule does not have a common structure of the legal rules. There is a lack of social behaviour rule in the conflict rule indeed. That is why some scholars do not assort the conflict rule to the common category of legal rules. As we said, the structure of the conflict rule is one of the main differences in comparison to the legal rule. There are two parts of the conflict rule – the extent and the attachment.

Extent of conflict rule

The extent of the conflict rule is that part which describes the scope of the conflict rule, the sphere of legal cases and factual situations which need to be classified. The extent of the conflict rule is an answer to the question "What does the conflict rule serve for?" The expression of this part of the conflict rule reflects the domestic law of the country. The terms used in the extent of some conflict rules correspondent to the national law. There are any foreign terms or legal questions, which would be unknown by the domestic law.

Attachment of conflict rule

The attachment of the conflict rule serves to determination of governing law. Without this part of the conflict rule it would be impossible to know the applicable law. The working method of attachment is a method by which a legal question is attached to a point of attachment (connecting factor). For example the Rome I Regulation in the Article 4 attaches the contract to the seat of the debtor of the characteristic performance, and thereby the contract is governed by the law of the seat of the debtor of the characteristic performance.

There are some types of attachments:

Alternative attachment is the attachment to one or more points of attachments which are alternatively available (either to the judge who must decide the case or to the parties who can choose). For example, the form of the contract can be attached to the law applicable to the contract (lex causae) or to the law of the place where the contract is concluded.

Cumulative attachment is the attachment to more than one point of attachment. For example, the validity of a marriage is primarily attached to the nationality of both

spouses.

Objective attachment is the attachment to the one point of attachment provide for by the law, when the parties did not or could not agree upon the applicable law.

Subjective attachment is the attachment according to the choice of law by the parties.

Subsidiary attachment is the attachment, if the primary attachment cannot be used because a lack of some conditions; for example - attachment to the habitual residence of the parties if they have no nationality.

Fix attachment is if the legal question is governed by the law determined at a specific time, whereby a subsequent change in the law is in general of no effect. For example – wills are governed by the law of the nationality of the testator as it existed at the time of his/her death.

Mobile attachment is the attachment to a point of attachment as it exists at the time of attachment.

Point of Attachment (Connecting factor)

Connecting factors are facts which tend to connect a legal extent of the conflict rule with the particular law (applicable law).

The following facts are mostly used connecting factors in conflict rules:

1. Domicile, residence, nationality or place of incorporation of the parties;
2. The place of conclusion or performance of the contract;
3. The place where the tort/delict was committed;
4. The flag or country of registry of the ship;
5. The ship owner's base of operations.

Connecting factors have to be taken into consideration in determining the proper law to apply in deciding the case or dispute.

The main personal connecting factor is **lex patriae** (the law of nationality) although there is also increasing use of residence, particularly **habitual residence**, as a personal connecting factor. The personal connecting factor is dominant in many questions of the family law, for example where someone has the capacity to marry. Not all family law questions are governed by it: for example, if the question arises as to the formal validity of a marriage which does not comply with the local law, this is referred to by a different connecting factor, the **lex loci celebrationis** (the law of the place where the marriage is celebrated). Other connecting factors include **lex fori** (the law of the court in which the trial is taking place); for example, questions of procedure are governed by the lexfori.

With regard to contractual relationships and torts there are often used some connecting factors;

lex loci delicti (the law of the place where the tort was committed)

lexsitus (the law of the place where land or some other thing is situated)

lex loci actus (the law of the place where a transaction was carried out)

lex incorporationis (the law of the place of incorporation): this governs assignments of registered shares

lex protectionis (the law under which legal protection of an intellectual property right is conferred).

VI. Renvoi, Incidental question, Depeçage

The function of the conflict rule is to determine the applicable law. The reference of the conflict rule is the tool to the determination of the governing law. The purpose of each conflict reference is to create a relation to the foreign legal order as whole; the partial reference to a certain branch of foreign legal order is not common. There is a specific relation between conflict rules of the domestic law and that of the foreign legal order. In case, if the domestic conflict rule refers to a foreign legal order and the conflict rule included in the foreign law refers back to the domestic law, arise the renvoi. The existence of the renvoi results from the differences between diverse extents of conflict rules in various legal orders. There is no common approach to the renvoi. Some states permit the existence of the renvoi; the law of other countries forbid it. The Slovak perspective regarding the renvoi permits it only if it is a reasonable and fair-minded in respect to the subject matter. Some PIL statues have a basic rule, stating that the reference to the foreign law is a reference to the conflict rules (Slovakia, Austria), few statues provide that the reference to the foreign law is to the internal law (Belgium). There is a new forbidding perspective of the harmonized European regulations (the Rome I and Rome II Regulations), which permits the renvoi with regard to the contracts and torts under no circumstances. The reference of conflict rules of the Rome I and Rome II Regulations is always a reference to a substantial part of applicable legal order, regardless of conflict rules of applicable law. Renvoi is inapplicable also in cases where the law of the PIL says so or where diligent interpretation leads to the exclusion of the renvoi. If the renvoi is excluded, the reference of the conflict rule to a foreign rule of law is a reference to the substantive law of the county.

The doctrine of the renvoi is exemplified in the famous **Forgo case**, decided by the French Court of Cassation ("Cour de cassation") by the end of the 19th century. The Forgo case concerned Forgo, a national from Bavaria, who died intestate in France, where he had lived since the age of five. A French court had to decide whether the movables should be distributed according to the French or the Bavarian law. The Bavarian law provided for the succession by collaterals, whereas the French law provided that the property should pass to the French Government, excluding collaterals. The French PIL referred the matter of succession to the Bavarian law, but the Bavarian PIL referred it to the French law. The French Court of Cassation accepted the renvoi back to the French law and applied the French succession law.

Incidental question

A case involving PIL may place a subsidiary issue, as well as many questions, before the court. Once the relevant conflict of law rule has been applied and the law governs the main issue thereby determined, a further choice of law rule may be required to answer the subsidiary question affecting the main issue.

An incidental question properly so-called presumes the existence of tree facts. The main issue should, under the Slovak rule of PIL, be governed by a foreign law. There should be a subsidiary question involving a foreign element which could have arisen separately and which has its own independent conflict of law rule. This conflict rule should lead to the conclusion different from that which would have been reached, had the law governing the main question been applied. Without these prerequisites there is no incidental question, and in most of the cases where a true problem has arisen the court has not appreciated that a determination of the law to govern the incidental question is required. This is an issue on which the support of jurists may be found for a variety of solutions. Some support the law governing the main issue, others the conflict rule of the forum and others consider that the determination of the problem will depend on the nature of the individual case and the policy of the forum thereto.

An incidental question (preliminary question) on a subsidiary issue influences the main question. Possibly, but not necessarily, the law applicable to the main question will govern the incidental question.

Depeçage

Depeçage is similar, but not equal to the incidental question – means that a PIL issue may involve different conflict rules. It may be relevant under the legal conflict rules governing the case or also when choosing the applicable law.

A problem related to that of the incidental question is the "picking and choosing" or depeçage. A case involving foreign elements may rise to issues which involve different choice of law rules.

To take the simplest case – if a husband and wife, both the Slovak nationals, marry in France, then any dispute as to the validity of their marriage may have to be referred to the Slovak or French law. In fact, the dispute is as to the formal validity of the marriage, reference will be made to the French law as to the law of the place of celebration, and if the issue is one of capacity, it will be determined according to the Slovak law as the law of the nationality of the parties. Here it is clear that one general issue of the validity of the marriage has to be analysed into two separate sub-issues referable to the different laws. The court will pick and choose between these two sub-issues.

A similar example is provided in the law of contract where the parties are free to choose different laws to govern different parts of their contract.

VII. Public Policy (order public)

The influence of foreign applicable law through its application in the rule of a domestic law may cause some negative results. There are many different provisions setting up the conditions of a certain human behaviour which are included in the legal rules. The variety of legal orders is the main factor for necessity to protect some domestic values and objects against the influence of a foreign rule of law. The most important remedy, which protects the domestic law against the negative influence of foreign legal rules, is the public policy.

The public policy (order public) contains all that is needed to be protected by the state and its legal power. There are various concepts of the public policy every state has its own conception of values, objects and rules which shall be protected against the negative influence of a foreign law.

If the Slovak conflict rule for divorce of marriage sets down the application of a foreign law – for example law of the country which charge a divorced woman with a corporal punishment (mostly a woman), in respect with the protection of the human rights and fundamental freedoms, we would resolutely refused the application of that law. The remedy for such a refusal is called reservation of the public policy. The Slovak conception of public policy includes and protects the values and principles of the social and governmental system of Slovak Republic and its legal order which must be complied with any exception.The consequence of applying the public policy reservation is a refusal of a foreign applicable law. Instead of that, the domestic law (lex fori) is the law governing a certain legal case with a foreign element.There are two types of public policy reservation depending on the consequences of the rejection of a foreign law and its effect in the domestic jurisdiction.

The **absolute reservation** of the public policy means, that the rejection of foreign law caused not only the refusal of foreign rule of law, but also the refusal of legal effect of the judicial decisions made by the foreign court according to the foreign rules.

Contrary to that, the **relative reservation** of the public policy reject the foreign rule of law, but the effect of the judicial decisions made according to the foreign law is awarded.

For example, the establishing of polygamous marriage in Slovakia would be refused according to the absolute reservation of the public policy, although the applicable law would have awarded such a marriage. If the wives of a polygamous marriage should come into the husband´s inheritance, the effect of this marriage for the purpose of succession in the territory of Slovakia would be permissible (by the relative reservation of the public policy).

VIII. Party Autonomy in Private International Law

Conflict rules help identifying an applicable law when a conflict of laws arises. In respect of contracts, the party autonomy is the main conflict rule designating the applicable law. Other conflicts rules apply only if the parties have not made a choice of law. The applicable law governs the specific transaction and sets the standards for the parties' contractual relationship. The parties' behaviour is therefore often a result of their understanding of this law (and which law this is).

For that reason it is preferable that the parties know in advance which substantive law the arbitrators or judges will apply. It is further advisable that the parties know which conflict rules will be used (in the event of a conflict of laws), since this will help them to predict which substantive rules will be considered when resolving the dispute.

For a conflict rule, to ensure predictability it is important that it is clear and easy to apply. The party autonomy is a good example of a conflict rule which provides for a rather high degree of predictability (even if the party autonomy is subject to restrictions which in some sense undermine the predictability). As the predictability of applicable law is essential, it is recommendable that the contracting parties use their right to choose an applicable law; if they do not, other conflict rules than the party autonomy may apply.

In a situation where the parties have not agreed on an applicable law the court must apply conflict rules to be able to identify which substantive law to apply. However, even if the parties have agreed on an applicable law, a system of PIL has to be used to determine the degree to which the court must comply with the choice made by the parties, i.e. to determine the scope of the party autonomy. The fact that a dispute is subject to a judicial (or arbitral) proceeding does not in itself assure a full application of the chosen law as the scope of party autonomy is subject to restrictions which are determined by a legal framework of the PIL. Even if the principle of party autonomy is widely recognised it exists independent from all national legal systems.

The party autonomy is a conflict rule and like for all the other conflict rules, its scope is determined by the PIL. As the extent of the parties' freedom to choose substantive law is determined by the system of the PIL, it is necessary to establish which system governs the party autonomy in every specific case.

For example, in most international commercial arbitrations the parties have made a choice of law when signing the contract. In these situations there will be no need to apply PIL to identify an applicable law. However, party autonomy is in itself a conflict rule, designating the applicable law, and therefore PIL must be applied to determine its scope even if a choice of applicable law is made.

In PIL, the "party autonomy" in relation to a contract is generally taken to refer to the entitlement of parties to select the law under which their contractual terms will be interpreted and the jurisdiction in which those terms will, in the event of a dispute, be enforced.

Numerous stories have been told of the nineteenth-century enthronement of private parties as primary "legislators" for their contractual relations.

For all the rigor and force of the legal-realist critique, the idea that contractual choices of law and forum properly arise from the unfettered will of contracting parties (at least in the first instance), and the idea that a principled commitment to uphold "party autonomy" yields predictable outcomes across private-international-law cases, each retain considerable purchase in the private international law. These ideas prevail, moreover, both as a matter of legal doctrine and scholarly analysis.

In 2005, for example, the Commission of the European Community proposed a regulation to the European Parliament and the Council of Europe to clarify and "modernise" the Rome Convention of 1980 on the Law Applicable to Contractual Relations, while transforming it into an instrument of the European Community. Article 3.1 of the Rome Convention already provided that "a contract shall be governed by the law chosen by the parties." This proposal sought to "further boost the impact of the parties' will" in relation to choice of law and choice of forum, permitting, for example, parties' selection of codified bodies of non-state law to govern their contractual relations. At the same time, scholars in many jurisdictions continue to champion the cause of party autonomy. Invoking economic-efficiency arguments and political-rights criteria, commentators have rallied periodically to contest the perceived winding-back of contractual freedom under mandatory rules of the PIL or by recourse to governmental-interest analysis. There are, of course, a wide variety of ways in which courts across the common-law world can and do avoid application of the law and devolution to the forum expressly chosen by contracting parties. Courts may find that the contract at issue was so formed as to exclude a clause setting forth that choice that the choice was not bona fide, not legally permissible, or was contrary to forum public policy.

As one can conclude from the foregoing discussion, it is not enough to know what the parties of an international contract have agreed upon, it is also essential to know which law governs the parties' contractual relationship. The **general principle** is that the parties have the **freedom to choose** which law shall govern the substance of their contract.

The primary advantage of the party autonomy is that the parties can choose a law that they are familiar with and which provisions are suitable for the agreement in question. The parties can further avoid the application of a law with a close connection to the transaction, and which therefore would apply, by choosing another applicable law. By making a clear choice of law the parties will know what they can expect from each other and the judicial tribunal. Party autonomy is therefore often argued to

provide for certainty and predictability. However, as will be discussed later, the scope of party autonomy is limited and subject to restrictions. In fact, a choice of law may not set the legal standards the parties thought it would.

Parties to a contract will in most cases make a choice of law by including a choice of law clause in their contract. Even if the parties have not made an explicit choice of law, the court may conclude that the parties have made a so-called implied or tacit choice of law. This is done by inferring a choice of law from the contract or the surrounding circumstances. However, according to the Rome Convention a choice of law "must be expressed or demonstrated with a reasonable certainty by the terms of the contract or the circumstances of the case".

Hence, an implied choice of law can only be identified where it is reasonably clear that it is an authentic choice made by the parties. In this context it is worth mentioning that the maxim qui indicem forum elegit ius ('a choice of forum is a choice of law') is rejected by most scholars and is almost totally abandoned in arbitral practice. The choice of a particular forum is at present generally only considered to be one of many factors which may be relevant when trying to identify an implied choice of law.

In the absence of an explicit or implied choice of law, one approach is to apply more than one law. According to this doctrine the arbitrators must avoid applying the national law of one of the parties and instead apply the common parts of both parties' national laws – this being closer to the intentions of the parties.

The Absence of a Choice of Law

As mentioned earlier, the parties in a majority of foreign element agreements use their right to choose a substantive law. In the few situations where the parties have not made a choice of law, there are different options open to the judges when trying to determine which substantive law or rules of law to apply. The judges can either focus on the silence of the parties and try to interpret the absence of a choice of law (the so-called subjective approach) or they can apply conflict rules of the PIL and consider relevant connecting factors (the so-called objective approach). The subjective approach has clearly lost ground even if occasionally applied by the court. The objective approach is more commonly used. It offers a "magic tool" for the judges (mostly for arbitrators) to use when deciding which substantive law to apply.

Even where the objective approach, referring to conflict rules, is used, the question -which conflict rules should be applied? - remains. This topic has been widely discussed and examined by legal scholars. It is also the main discussion point of this study: namely, which system of the PIL should govern the party autonomy and be applied to determine its scope?

The Effect of Party Autonomy

Party autonomy is a conflict rule designating which law the judicial tribunal shall apply. It localizes a legal relationship within the legal framework chosen by the parties and precludes the application of rules of law other than the ones chosen.

When the parties choose an applicable law, their legal relationship is moved from the framework of an otherwise applicable law to the framework of the chosen law. Party autonomy designates the governing law of the contract but does not regulate the substance of the contract; hence the principle of party autonomy is not equivalent to the principle of freedom of the contract.

The principle of freedom of the contract is more limited than the party autonomy and does not allow the parties to "escape" a whole system of applicable rules of law.

When establishing the effect of the parties' choice of law, one must assume that the parties' choice of law has put their legal relationship in the sphere of a certain legal system. Further, one must make the assumption that this prevents the application of any other rules of law than the one chosen. However, today the number of substantive rules that override conflict rules, such as party autonomy, is both numerous and increasing. As these rules apply regardless of the parties' choice of law, the parties' choice of law not always prevent the arbitral tribunal from applying other rules of law. Therefore, the effect of party autonomy is difficult to predict with a hundred per cent certainty. Parties and other actors trust that once the applicable law is chosen no other rules of law are relevant in respect of the legal relationship between the parties. It is true that parties have a far reaching freedom to choose which law shall govern their contractual relationship and disputes related thereto. However, although in principle the consequence of a choice of law is that all other potential laws are excluded from governing the parties' contractual relationship, the rejection of all other rules of law but the one chosen by the parties is not total. The principle of party autonomy is subject to a number of restrictions e.g. overriding mandatory rules and ordre public restrictions.

Restrictions

As the parties' freedom to choose applicable law is not without limitations and one must therefore raise the question of which restrictions party autonomy is subject to. This is not the place for a detailed examination of which types of restrictions the party autonomy may be affected by. However, to achieve a full understanding of the following discussion one must at least have a basic knowledge of the subject; if party autonomy was not subject to any restrictions, a discussion regarding how to determine the scope of the principle would be unnecessary. A rather common approach when trying to restrict the parties' freedom to choose substantive law is to designate certain fields of law where private parties have no right to choose a law. These fields will set the outer limits for party autonomy and a choice of a foreign law will not affect the application of the national law in these fields. One way to do this is to adopt con-

flicts rules which exclude the application of party autonomy in those specific areas of law. Examples of such areas are the competition law, the labour law and the consumer law. Another method is to give the substantive rule an overriding character. National interests which are often given an overriding character include rules protecting the weaker contractual party, rules protecting a third party, rules adopted to regulate the national economics and rules protecting the community interests.

There are numerous different methods available to national legislators to restrict the scope of party autonomy and the applicability of the rules of law chosen by the parties. Legal scholars have tried to classify and define these methods. However, there is yet no universally accepted classification. The general understanding, however, appears to be that the applicability of the chosen law, i.e. party autonomy, may be restricted due to ordre public, overriding mandatory rules and other conflict rules. Also, it seems to be a common opinion that the chosen law must be bona fide and legal. According to the scholars' opinion it may be permissible to restrict party autonomy on **three different grounds**:

1. the choice of a foreign law must be rejected if its application violates the fundamental principle of the public policy (ordre public);
2. the choice of applicable law is further inadmissible when other conflict rules apply; and,
3. the application of the chosen law may be limited because of overriding mandatory rules.

The principle of party autonomy is not unlimited. The foregoing has shown that national authorities in some situations restrict the principle e.g. by adopting overriding mandatory rules or referring to the ordre public.

It is understandable that national legislators in some cases have the desire to determine which private actors shall be granted the right to remove themselves from the domestic law. However, one must bear in mind that any limitation of the application of the chosen law opens up a situation of uncertainty. It must be assumed that every choice of applicable law is based on a careful examination of the choice's implications. Furthermore, even if the parties did not make a cautious evaluation when the agreement was signed, it must be assumed that they will evaluate the situation in light of the chosen law when a dispute arises. The reason behind every limitation must therefore be balanced with the parties' interest in the predictable and consistent application of the rules of law. Even if the potential application of mandatory rules and conflict rules (other than party autonomy) creates unpredictable factors this does not mean that the unpredictability cannot be reduced. By knowing which system of law will govern party autonomy and determining its scope, at least the parties can make a high class evaluation regarding whether or not a specific rule, or the ordre public, will limit their choice of law.

IX. Procedural questions, International Jurisdiction

The PIL includes also the procedural relations, which are an integral part of this legal branch. The procedural question is itself the first question, which is concern by the court by private international relation trial. Without solving the jurisdiction problem, any court can set up its legacy to make decision in such a trial. The concept of international procedural relations is parallel to the concept of the PIL relations.

What is substance and what is procedure?

One of the eternal truths of every system of the PIL is that a distinction must be made between substance and procedure, between right and remedy. The substantive rights of the parties to an action may be governed by a foreign law, but all matters appertaining to procedure are governed exclusively by the law of the forum.

At first sight the principle seems almost self-evident. A person who resorts to a Slovak court for the purpose of enforcing a foreign claim cannot expect to occupy a different procedural position from that of the domestic litigant.

The field of procedure constitutes perhaps the most technical part of any legal system and it comprises many rules that would be unintelligible to a foreign judge and certainly unworkable by machinery designed on a different lines. A party to litigation in Slovakia must take the law of procedure as it provided by the lex fori. It is not allowed to apply for the purpose of procedural regulation the law other that is the law of the forum, although the own law of the party would provide a wider and greater range of advantages. The law of the forum is solely possibility how to provide a legal regulation of procedure with foreign element.

Although the principle is certain and universal, its application can give rise to a considerable difficulty, especially when trying to establish a test by which a procedural rule can be distinguished from a substantive one. Unless the distinction is made with a clear regard to the underlying purpose of the PIL, the inevitable result will be to defeat that purpose. So intimate is the connection between the substance and procedure that to treat the Slovak rule as procedural may defeat the policy which demands the application of a foreign substantive law.

International jurisdiction

The jurisdiction, in general, concerns the power of courts to adjudicate the case with respect to a person or thing. If a court has the jurisdiction over a person, for example, it can exercise power over this subject and adjust its legal relations with others. A court, for example, might order that a defendant pay money to a plaintiff for a breach of the contract. To exercise the jurisdiction properly, a court must have enough connection with a problem to satisfy both constitutional and statutory requirements. There must be a sufficient nexus between the defendant or the res on the one hand and the state on the other to justify the exercise of power. This does not mean that the defendant, for example, necessarily must be present in the jurisdiction; it may be that the activities of the party (such as selling goods in the state) will make it reasonable for the state to exercise the jurisdiction even though the party is not within the state's territory.

The international jurisdiction is an attribute of domestic courts to adjudicate the legal disputes containing a foreign element. That means, that the Slovak court may adjudicate the case involving the matter of validity of marriage between two spouses with different nationalities; the breach of contract concluded between parties with their seats in different countries, etc. The PIL set up the conditions regarding to the international jurisdiction of national courts. With other words, the domestic rules will lay down the condition under which the national court may decide the legal case with a foreign element. The Slovak PIL provides the specific conditions for international jurisdiction of the Slovak courts in the Act No. 97/1963 Coll. on private international law and procedural law (Slovak PIL Act).

European perspective of international jurisdiction – Brussels Regime

The Brussels Regime consists of the Brussels 1968 Convention, the Lugano 1988 Convention and the Brussels I Regulation. The Brussels Convention, officially the "Convention of 27th September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters", was agreed in 1968 by the Member States of the EU, with the goal of increasing economic efficiency and promoting the single market by harmonising the rules on jurisdiction and preventing parallel litigation.

The Lugano Convention, officially the "Convention of 16th September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters", is almost identical, and was agreed in 1988 with the then six members of the EFTA. Subsequently the Lugano Convention was ratified by the EC, Denmark, Iceland, Norway and Switzerland. A replacement the Lugano Convention was signed into law on 30th October 2007 by the latter countries.

The Brussels I Regulation officially the "Council Regulation (EC) No 44/2001 of 22th December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters" is directly applicable to all the EU Member States. The Regulation makes some changes to the Brussels Convention, but is generally very similar. The Regulation entered into force on March 1st, 2002.

All three legal instruments are broadly similar in content, but there are some differences. In general, it is the domicile of the defendant that determines which of these instruments applies in a given case. The Brussels I Regulation is applicable where the defendant is domiciled in a member state of the European Union. Until 1st July 2007 this did not include Denmark, however an agreement was made between Denmark and the European Union extending the provisions of the regulation to Denmark.

The Lugano Convention is applicable when the defendant is domiciled in Iceland, Norway or Switzerland. Where the recognition or enforcement of a foreign judgement is concerned, the applicable instrument is determined in analogous fashion by the country of origin of the judgement.

The Brussels Regime covers legal disputes of a civil or commercial nature. There are some exceptions limiting the scope of this; where the principal matter of a dispute is one of family law, bankruptcy or insolvency, social security, or relates to arbitration, the case is not subject to the rules. The Article 2 prescribes that a person (legal or natural) may only be sued in the member state in which he or she is domiciled. Domicile is determined by the law of the national court hearing the case, so that a person can be domiciled in more than one state simultaneously. The Article 4 preserves the traditional rules for defendants who are not domiciled in a member state. That is, if a defendant is domiciled elsewhere, then the regime does not apply and the national court hearing the case is left to determine a jurisdiction based on the traditional rules otherwise governing such questions in their legal system. The Article 4 also allows a person domiciled in any member state to take advantage of another member state's exorbitant bases of jurisdiction on the same basis as a national of that state. This is useful in cases where a member state, such as France, allows its nationals to sue anyone in their courts, so that someone domiciled in a member state like Finland may sue someone domiciled in a non-member state like Canada, in the courts of a third party member state, like France, where the defendant may have assets.

The Brussels Convention and the Brussels I Regulation are both subject to the jurisdiction of the European Court of Justice (ECJ) on questions of interpretation. The Lugano Convention lacks a protocol governing references to the ECJ. Although the interpretations of other national courts, and of the ECJ in the case of the Lugano Convention contracting states, are influential, they are not binding, and so various divergences have arisen between member states in the interpretation of the instruments.

It is also to be noted that the Brussels Regime generally allows jurisdiction clauses, which preserves the right of parties to reach agreement at the time of contracting as to which court should govern any dispute.

The Regime applies only in the courts of signatory states, so there is nothing to prevent a non-party state from allowing parallel proceedings in their courts, although this may contribute to a finding of forum non conveniens, which would in practice halt an action.

X. Brussels Regulations

If the claim is filed, the court must first of all check whether it has jurisdiction to solve the dispute and to make a decision. In cross border cases the court must have an international jurisdiction. Within the EU the Brussels I and II Regulations are relevant for creating this type of a special jurisdiction of national courts. The third country cases are solved according to their national procedural rules provided for the foreign element cases. The Brussels I Regulations deals with the jurisdiction, recognition and enforcement of civil and commercial cases. The Brussels II Regulations deals with the jurisdiction, recognition and enforcement of divorce judgements and parental responsibility linked to divorce. The structure of both regulations is similar. The provisions dealing with special jurisdictions have priority over the general rules. Regulations make the parties allowed to choose the competent court. The choice of competent court does not imply the choice of the applicable law.

Brussels I Regulation – Rules of Jurisdiction

The Brussels I Regulations rules of jurisdiction have to be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The main principle used in the Brussels I Regulation is that of the domicile of a person. The regulation does not differ between the domicile of natural and legal person. With the aim to achieve the harmonising approach to the principle of domicile setting up in the Brussels I Regulation, it is necessary to interpret the domicile of a legal person autonomously, to make the common rules more transparent and avoid the conflicts of jurisdiction.

The regulation in addition to the defendant's domicile, lays down the alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice. In relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to the party´s interests than the general rules provide for. The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, must be a respected subject to the exclusive grounds of jurisdiction laid down in this Regulation.

The Scope of Brussels I Regulation

The regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. Expressly excluded are:

1. the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
2. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
3. social security; and
4. arbitration procedure.

The territorial extent of this regulation covers all the Member States with the exception of Denmark.

General provisions of jurisdiction

There is one main principle for determining the jurisdiction of the Courts of a Member State. This principle uses a factor of domicile of a suede person for answering the question, if a certain Court of a Member State has a jurisdiction for making the decision over the particular case.

The defendant is domiciled in a Member State

General rule sets up that persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. The nationality plays no role in determining the jurisdiction of a Court of a Member State. The most important factor for the purpose of the jurisdiction is the domicile - the place where has a certain person his/her centre of interests. There is no connection between domicile and nationality using in this regulation.

The Brussels I Regulation rigorously divides between these both factors. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

The defendant is not domiciled in a Member State

If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall be determined by the law of that Member State. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, in the same way

as the nationals of that State.

Special provisions of jurisdiction in matters relating to contracts

The special jurisdiction of the Courts of the Member States depends on application of specific provisions of the Brussels I Regulation. These special provisions set down the jurisdiction rule with respect to the subject matters.

With regard to the scope of application of the Rome I Regulation, it is necessary to notice, that the both European instruments need to be applied in mutual coherence. The means of the terms used by the Rome I Regulation (as contractual performance, place of delivery) are interpreted with respect to the Article 5 of the Brussels I Regulation.

This article provides that a person domiciled in a Member State may be sued in another Member State in matters relating to a contract in the courts of that Member State, which territory is also the place of performance of the requested obligation. The place of performance of the obligation in question is - in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered (in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided).

Special provisions of jurisdiction in matters relating to maintenance

The maintenance claims are included in the scope of the Brussels I Regulation, for its exclusion form the Brussels IIa Regulation related to the family law cases. According to the article 5 of the Brussels I Regulation, in the matters related to maintenance has the jurisdiction the court in the Member State, where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.

Special provisions of jurisdiction in matters relating to torts/delicts

The coherent application of the Brussels I Regulation and the Rome II Regulation (related to the law applicable on torts) is pronounced through the rule setting up the jurisdiction of the court of a Member State in the matters relating to tort, delict or quasi-delict. The jurisdiction has the courts of a Member State where the harmful event occurred or may have occurred.

Special provisions of jurisdiction relating the civil claims in criminal proceeding

As regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seized of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings. In other words, the same court will decide about a civil claim for damages or restitution, as decides about the criminal matters relating to this case.

Special provisions of jurisdiction in matters relating to agency

The jurisdiction to decide the matters relating to a dispute arising out of the operations of a branch, agency or other establishment, has the courts of that Member State, where there is the place in which the branch, agency or other establishment is situated.

Special provisions of jurisdiction in matters relating trusts

Trust does not belong to a traditional legal institution, but in the common law countries it is one of the most used legal titles for providing certain contractual transactions. The disputes arising from the relationship between a settlor, a trustee or a beneficiary of a trust, which was created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, are decided by the courts of the Member State in which the trust is domiciled.

Special provisions of jurisdiction in matters relating to remuneration

The disputes concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:

1. has been arrested to secure such a payment, or
2. could have been so arrested, but bail or other security has been given

are decided by the court of a Member State only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.

Jurisdiction over insurance

In matters relating to the insurance, which belong to that where the special protection of the weaker party is needed, the jurisdiction shall be determined according

to some specific rule laying down in the Brussels I Regulation. This jurisdiction is exclusive so that the provisions relating to general or special jurisdiction are just subsidiary.

An insurer domiciled in a Member State may be sued in the courts of the Member State where s/he is domiciled, or in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled. If s/he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer, the courts in a Member state where s/he has domicile, have also the jurisdiction.

If the insurer is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

In cases related to the liability insurance or insurance of immovable property, the insurer may, in addition, be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property is covered by the same insurance policy and both are adversely affected by the same contingency. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.

Jurisdiction over consumer contracts

In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his/her trade or profession, if it is a contract for the sale of goods on instalment credit terms; or it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities, the jurisdiction is setting up according to the Brussels I Regulation. As we can see, there are specific types of consumer contracts, which are required for applying of the regulation. The consumer is the main subject, who as the weaker party in this contractual relations, need to be more saved.

Where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.

Jurisdiction over individual contracts of employment

Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

An employer domiciled in a Member State may be sued in the courts of the Member State where he is domiciled; or in another Member State in the courts for the place where the employee habitually carries out her/his work or in the courts for the last place where he did so, or if the employee does not or did not habitually carry out her/his work in any country, in the courts for the place where the business which engaged the employee is or was situated. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.

Exclusive jurisdiction

The courts shall have an exclusive jurisdiction, regardless of domicile in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated. However, in proceedings which have as their object tenancies of immovable property concluded for a temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State.

The courts have the exclusively jurisdiction also in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of the private international law.

The same type of jurisdiction have the courts in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept and in proceedings concerned with the registration or validity of patents, trademarks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place.

The important jurisdiction rule setting up the exclusively jurisdiction of the courts of the Member States applies in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.

Prorogation of jurisdiction

If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have the jurisdiction. Such a jurisdiction shall be exclusive unless the parties have agreed otherwise.

Such an agreement conferring jurisdiction shall be either:

1. in writing or evidenced in writing; or
2. in a form which accords with practices which the parties have established between themselves; or
3. in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such a trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

There is allowed to use any communication media by electronic means which provides a durable record of the agreement, it shall be equivalent to 'writing'. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined the jurisdiction.

The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have the exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to the Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude, have exclusive jurisdiction by virtue of the Article 22.

Brussels II bis Regulation

In order to ensure equality for all the children, this Regulation covers all decisions on the parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding.

Since the application of the rules on the parental responsibility often arises in the context of matrimonial proceedings, it is more appropriate to have a single instrument for the matters of divorce and parental responsibility.

As regards judgments on divorce, legal separation or marriage annulment, this Regulation should apply only to the dissolution of matrimonial ties and should not deal with issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures.

As regards the property of the child, this Regulation should apply only to measures for the protection of the child, i.e. the designation and functions of a person or body having charge of the child's property, representing or assisting the child, and the ad-

ministration, conservation or disposal of the child's property. In this context, this Regulation should, for instance, apply in cases where the parents are in dispute as regards the administration of the child's property.

Measures relating to the child's property which do not concern the protection of the child should continue to be governed by the Council Regulation (EC) No 44/2001 of 22th December 2000 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters.

Marriage

Article 3 of Regulation Brussels II bis states the principle of general jurisdiction. Jurisdiction shall lie with the courts of the Member State:

1. in whose territory the spouses are habitually resident, or

a) the spouses were last habitually resident, insofar as one of them still resides there, or
b) the respondent is habitually resident, or
c) in the event of joint application, either of the spouses is habitually resident, or
d) the applicant is habitually resident if s/he resided there for at least a year immediately before the application was made,
e) or the applicant is habitually resident if s/he resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of United Kingdom and Ireland, has his/her domicile there;

2. of the nationality of both spouses or, in case of United Kingdom and Ireland, of domicile of both spouses.

The grounds in this article are set out as alternatives. It is apparent that there is some overlap in the provisions of Article 3, there is no need for a basis of jurisdiction on the ground of the spouse's common habitual residence, if jurisdiction can be founded upon the respondent´s habitual residence alone. This overlap is a result of political compromise. The grounds adopted are based on the principle of genuine connection between the person and a Member State. The decision to include particular grounds reflects their existence in a various national legal systems and their acceptance by the other Member States or the effort to find points of agreement acceptable to all.

Maintenance obligation

Maintenance obligations are excluded from the scope of this Regulation as these are already covered by the Council Regulation No 44/2001. The courts having jurisdiction under this Regulation will generally have jurisdiction to rule on maintenance obligations by application of the Article 5(2) of the Council Regulation No 44/2001.

The grounds of jurisdiction in matters of the parental responsibility established in

the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of the parental responsibility.

In the interest of the child, this Regulation allows, by way of exception and under certain conditions, that the court having jurisdiction may transfer a case to a court of another Member State if this court is better placed to hear the case. However, in this case the second court should not be allowed to transfer the case to a third court.

Wrongful removal or retention of child

In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention of 25th October 1980 would continue to apply as complemented by the provisions of this Regulation, in particular the Article 11. The courts of the Member State to or in which the child has been wrongfully removed or retained should be able to oppose his or her return in specific, duly justified cases. However, such a decision could be replaced by a subsequent decision by the court of the Member State where the child has her/his habitual residence prior to the wrongful removal or retention. Should that judgment entail the return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained.

Where a court has decided not to return a child on the basis of the Article 13 of the 1980 Hague Convention, it should inform the court having jurisdiction or central authority in the Member State where the child was habitually resident prior to the wrongful removal or retention. Unless the court in the latter Member State has been seized, this court or the central authority should notify the parties. This obligation should not prevent the central authority from also notifying the relevant public authorities in accordance with the national law.

The hearing of the child plays an important role in the application of this Regulation, although this instrument is not intended to modify national procedures applicable. The hearing of a child in another Member State may take place under the arrangements laid down in the Council Regulation (EC) No 1206/2001 of 28th May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

XI. Recognition and Enforcement of Foreign Judgements under Slovak law

Unsatisfied foreign judgements give rise to complicated questions of the PIL. If a claimant fails to obtain satisfaction of judgements in the country where it has been granted, the question arises as to whether it is enforceable in another country where the defendant is found. It is clear at the outset that owing to the principle of the territorial sovereignty a judgement delivered in one country cannot, in the absence of an international agreement, have a direct operation of its own force in another.

Slovak conception

Decisions of the authorities of another State including settlements approved by them, in matters specified in the Article 1 Slovak PIL Act, provided that in the Slovak Republic they fall within jurisdiction, as well as foreign authentic instruments in such matters (further referred to as "foreign decisions") shall have legal effect in the Slovak Republic if they have been recognised by the Slovak authorities.

A foreign decision can neither be recognised nor enforced if:

1. its recognition is pre-empted by exclusive jurisdiction of the Slovak courts or if in application mutatis mutandis of the Slovak provisions on jurisdiction, the foreign authority would have had no jurisdiction in the matter;
2. it neither has res iudicata effects nor is enforceable in the State of origin;
3. the party, against whom the recognition of the decision is sought, has been deprived by the foreign authority of the possibility to participate in the proceedings before it, in particular s/he was not duly served the summons or the document instituting the proceedings; the court shall however, not review this condition if the decision was duly served on the party and s/he has not appealed it or if the party declared that s/he has not insists on the review of this condition;
4. it is no decision on merits;
5. the Slovak court has issued a decision, which has res iudicata effects in the matter is an earlier foreign decision in the same matter, was recognised or is capable of in the Slovak Republic;
6. the recognition would be contrary to the Slovak order public.

Foreign decisions in the matrimonial matters and in matters involving establishment(determination or contestation) of parentage where at least one of the parties is

a Slovak national and foreign decision on adoption of a child, who is a Slovak national shall be recognised in the Slovak Republic, unless

1. it neither has res iudicata effects nor is enforceable in the State of origin;
2. the party, against whom the recognition of the decision is sought, has been deprived by the foreign authority of the possibility to participate in the proceedings before it, in particular s/he was not duly served the summons or the document instituting the proceedings; the court shall however, not review this condition if the decision was duly served on the party and he has not appealed it or if the party declared that s/he has not insists on the review of this condition;
3. it is no decision on merits;
4. the Slovak court has issued a decision, which has res iudicata effects in the matter is an earlier foreign decision in the same matter was recognised or is capable of in the Slovak Republic;

Foreign decision on the placement of the child in the care of a person or on the contact with the child may neither be recognised nor enforced if:

1. any of the conditions set out in the Article 64 a) – e) Slovak PIL Act is not fulfilled;
2. the child was not given the opportunity to be heard in the proceedings on the substance, unless the court dispensed with hearing of the child for reasons of urgency or the child was not capable to express her/his opinion due to his/her age and maturity;
3. the recognition would, taking into account the best interest of the child, be manifestly contrary to the Slovak order public.

The court shall not recognised a foreign order on placement or contact at the request of a person claiming that such a decision infringes upon her/his parental responsibility if it was given, except in case of urgency, without such a person having been given an opportunity to be heard.

Foreign decisions in the matrimonial matters, in matters involving establishment (determination or contestation) of parentage or adoption of a child shall be recognised by a specific decision of the Slovak court. Foreign decision on the placement of or contact with the child shall be recognised either by a specific decision of the Slovak court or by ordering its enforcement. Any other foreign decision shall be recognised by the Slovak court by ordering its enforcement or issuing a mandate for its execution; if a foreign decision does not require enforcement, it shall be recognised in such a way that a Slovak authority takes account thereof as if it were a decision of a Slovak court. At a request by either the claimant or the defendant from the foreign decision, the Slovak court shall decide on the recognition of a foreign decision always by a specific decision.

A foreign decision recognised by a Slovak court shall have equal legal effect as a decision rendered by a Slovak court. Even without recognition a foreign decision in matrimonial matters, in matters involving establishment (determination or contesta-

tion) of parentage or adoption of a child shall have equal legal effects as a decision of a Slovak court if the parties are not Slovak nationals and if it is not contrary to the Slovak order public.

Procedure on application for recognition of a foreign decision

The following courts shall have jurisdiction to proceed on the application for recognition of a foreign decision:

1. the Regional Court in Bratislava for recognition of foreign decisions in matrimonial matters, in matters involving establishment (determination or contestation) of parentage or adoption of a child,
2. for recognition of foreign decisions on placement of or contact with the child, the district court for the habitual residence of the child and, in absence thereof, the district court for the residence of the child; when no such court exists, the District Court Bratislava I,
3. the court having jurisdiction to order enforcement of a decision or to issue a mandate for execution for the recognition of decisions not covered by subparagraph b) above.

The proceedings on recognition shall commence by an application which may be filed by a person who is referred to as a party in the foreign decision and, in matrimonial matters, in matters involving establishment (determination or contestation) of parentage or adoption of a child also by a person who can manifest a legal interest in the matter.

Parties to the proceedings shall be the applicant and all the persons against whom the foreign decision shall be recognised. If the applicant fails to specify them in the application, the parties to the proceedings shall be all the persons referred to as parties in the foreign decision.

If the applicant has her/his residence or seat abroad, s/he shall choose a representative having residence or seat in the Slovak Republic for the purposes of service of documents. Failing to do so in a specified delay, the documents shall be deposited in the court with the effects of service; the applicant shall be advised of such a consequence.

The application for the recognition of a foreign decision shall specify the court addressed, the identity of the applicant, the matter it relates to and the purpose of the application; it shall be signed and specify the date of delivery. The application shall furthermore specify the foreign decision, the name of the authority of origin, the date when the foreign decision became binding or provide information on its enforceability and it shall list all the supporting documents attached to the application. The application shall be filed in a number of copies with the supporting documents which would allow one copy to be retained by the court and each party to be served with one copy, too.

The application shall be supported by the following:

1. the complete text of the original of the foreign decision or its duly certified copy,
2. a certificate by the competent foreign authority evidencing that the foreign decision is binding or enforceable or that an ordinary appeal is no longer possible against it,
3. documents evidencing that the ground of non-recognition under the Article 64(d) was not given or a declaration by the other parties that they did not insist on the review of this ground,
4. duly certified translations of all the supporting documents into Slovak.

If necessary, the court shall invite the applicant to complete her/his application in a delay of 15 or more days. If the applicant, failing the invitation by the court, does not rectify or complete her/his application and due to this the proceedings cannot be continued, the court shall terminate the proceedings. The applicant shall be advised of such a consequence.

The filing of an application for the recognition of a foreign decision shall stay any proceedings for its enforcement or issuance of a mandate for its execution until the decision on the application for recognition shall have become binding.

If the foreign decision was appealed in the State of origin, the court proceeding on recognition or enforcement (issuance of a mandate for execution) of that foreign decision may stay its proceedings until the decision on the appeal shall have become binding.

Unless one of the parties files a complaint against the recognition of a foreign order within a period of 15 day from the service of the application for recognition, the court shall not conduct a hearing in the case. If the parties have declared in writing that they agree with the recognition of the foreign decision, the court shall not serve the application and shall not conduct a hearing. Such a written statement by the parties shall be filed with a duly certified translation into Slovak.

The court shall be bound by the findings of fact on which the foreign authority based its jurisdiction. The foreign decision may not be reviewed as to its substance.

In matrimonial matters, in matters involving establishment (determination or contestation) of parentage or adoption of a child, the court shall decide on the application for recognition of a foreign decision by a judgment, in all other cases it shall decide by a resolution. If any of the conditions for the recognition of a foreign decision is not fulfilled, the court shall refuse the recognition. In all other cases it shall recognise the foreign decision.

If the foreign decision contains more than one verdict and the recognition is not possible or required for all of them, the court shall recognise the foreign decision only to the extent possible or required. The applicant himself may request a partial recognition of a decision. The provisions of this division shall be applicable mutatis mutandis to the proceedings on the application for non-recognition of a foreign decision in the Slovak Republic. Provisions relating to the proceedings on the recognition of a foreign decision shall be applicable mutatis mutandis to the proceedings on the application for the declaration of enforceability or non-enforceability of a foreign decision in the

Slovak Republic.

Proceedings on recognition and enforcement of foreign decisions commenced under unamend legal provisions shall be finalised in application of those provisions. If the Slovak court based its jurisdiction on unamend legal provisions, its jurisdiction shall continue. Jurisdiction conferred on the courts by a written agreement of the parties under unamend legal provisions shall be retained. The validity of a choice of court agreement concluded, before this amendment entered into force, shall be governed by unamend legal provisions.

The Brussels I Regulation

The Brussels I Regulation is concerned to simplify formalities with a view to rapid and simple recognition and enforcement of judgement given in the Member States. This is seen as being essential for the sound operation of the internal market. The objective is to have free movement of judgements within the Member States in civil and commercial matters. In order to achieve this regulation provides that:

1. the recognition of judgements is automatic;
2. enforcement follows on from the recognition and is largely a procedural matter;
3. the defences available under the Regulation against the recognition and enforcement are limited – in particular, a court in another Member State is under a duty to recognise and enforce a judgement even though the court which granted is misapplied the rules on jurisdiction under the Regulation.

Such liberal provisions on recognition and enforcement can only work where there is a mutual trust among the Member States. This requires safeguard to be built into the system. The first, and most obvious, one is that the Regulation is a double instrument; it contains direct rules both on jurisdiction and on recognition and enforcement. The two sets of the rules on jurisdiction and on recognition and enforcement are each part of a single scheme. In order to achieve the objective of the free movement of judgements it is necessary that the rules on jurisdiction are unified (harmonized).

The fact that the Member States share the same rules on jurisdiction means that, when it comes to the recognition and enforcement, the Regulation does not need to impose a requirement that the court in the second Member State, in which the enforcement is sought, should have to check the basis on which the court in the first Member State, which gave the judgement, took the jurisdiction. Moreover, the bases of jurisdiction under the Regulation are narrow; exorbitant bases are prohibited and there are special provisions on natural justice designed to protect the defendant where he has not entered an appearance at the trial. The second safeguard is that there are still defences which can be considered by the court in the Member State in which recognition and enforcement of the judgements is sought.

The emphasis under the Regulation is away from litigation at the stage of recognition and enforcement (and in the country where this is sought); instead, any disputes

as to the jurisdiction should be dealt with in the Member State in which the trial of the substantive issue takes places. A defendant cannot longer ignore the original action and decide instead to defend by challenging the recognition and enforcement of the judgement when this is sought in other Member States. This is not unfair to a defendant who is domiciled in a Member State – the Regulation´s rules on jurisdiction will frequently mean that the trial takes place in the Member State of her/his domicile anyway. Even when s/he has to go to another Member State to defend the action, this will still be within the Community. It is more questionable, however, whether the Regulation is fair in its treatment of defendants domiciled in non-Member States. Judgement given against them in a Member State is to be recognised and enforced under the Regulation. This is despite the fact that the defendants domiciled in non-Member States are denied the jurisdiction safeguards available to the defendants domiciled in the Member States; in particular, they are subject to the exorbitant bases of jurisdiction used in the Member States. These defendants will have to defend away from home and may have to travel long distance on order to do so.

The Brussels I Regulation is based on, and updates, the earlier Brussels Convention which is replaced in virtually all the cases. The exception being that the Brussels Convention still applies in relation to certain overseas territories of some Member States. The Regulation applies to legal proceedings instituted and to documents formally drawn up or registered as authentic after its entry into force on 1st March 2002. However, there is a transnational provision stating that, if proceedings in the judgement-granting Member State were instituted before this date but the judgement was given after it, this will be recognised and enforced in accordance with the Regulation, provided that certain conditions are met.

When do the rules on recognition and enforcement under the Brussels I Regulation apply?

The Chapter III (Articles 32 to 56) of the Regulation deals with the recognition and enforcement of judgements. In case coming within this title traditional national rules cannot be used. This chapter applies, regardless of which rules on jurisdiction have been applied in the court which gave the judgement, to the situation where the recognition and enforcement is sought in one Member State of a judgement given in another Member State in respect of a matter coming within the scope of the Regulation. As will be seen, it does not cover orders without notice.

The Chapter III of the Regulation applies equally to judgements given by the courts of the Member States granted after the jurisdiction was taken under the Regulation´s rules (contained in the Chapter II) and to judgements granted after the jurisdiction was taken under traditional national rules (the defendant being domiciled in non-Member State). It would even apply to the situation where a court has relied upon an exorbitant basis of the jurisdiction (a French court takes a jurisdiction over an American on the basis of the claimant´s French nationality). It also applies to the judgements granted after jurisdiction was taken under other conventions (in cases of admiralty jurisdiction). The

basis distinction drawn for jurisdictional purposes between situations where the defendant is and is not domiciled in a Member State does not apply when it comes to the recognition and enforcement of judgements. At this stage, any judgement is entitled to recognition irrespective of the domicile of the defendant.

There must be a judgement given in a Member State

The "judgement" is widely defined under the Article 32 of the Regulation as "any judgement given by a court or tribunal of a Member State". There is no limitation on the type of court and, therefore, the judgements of inferior as well as superior courts are covered. The awards of tribunals are also included, provided that the tribunal is of a Member State. In other words, the tribunal must be a state rather than a private body. The fact that this requirement would exclude most arbitral awards from the Article 32 is of no practical importance since the Article 1 excludes arbitration awards from the scope of the Regulation anyway. Neither does it matter what the judgement is called; it includes "a decree, order, decision or writ of execution, as well as the determination of costs or expenses". This is very wide definition, and it follows, for example, that maintenance orders come within the Article 32. It can also include judgements on preliminary issues. A "judgement" must be distinguished, thought, from a court settlement. The former is a decision which emanates from a judicial body deciding on its own authority on the issues between the parties, whereas the latter is essentially contractual, its terms depending first and foremost on the parties´ intentions.

There is no requirement that the judgement must be a final one and it is intended that, in principle, provisional orders will be covered. In contrast to the position in respect of the recognition and enforcement in common law countries, the Regulation is not limited to money judgements, and can, therefore, include an order for specific performance or an injunction. According to the Regulation Report on enforcement of a foreign judgement for specific performance, the same penalties for contempt of court should be imposed as it were an common law judgement. The Report also envisaged that the foreign judgement imposing the penalty for disregarding a court order can come within what is now the Regulation, although it is not clear whether it will do so, when it is a fine which accrues to the state rather than to a judgement creditor. A court order in one Member State falls for the enforcement of a judgement given in another state, whether a Member State or a non-Member State, falls outside the Chapter III of the Regulation. To decide otherwise would mean, in effect, that a court in the Member State A would have to recognise a judgement given in a non-Member State (X) simply because a court in the Member State B had recognised the judgement given in the State X and had granted an enforcement order in respect of it. This would be contrary to one of the basic principles of the Regulation; the Regulation is only concerned with recognition of judgements given in the Member States and is not intended to affect the recognition of judgements given in non-Member States.

Two preliminary points must be made before looking at the scope of the Regulation as defined by the Article 1. First, the Chapter III is only concerned with the inter-

national recognition and enforcement of judgements; it will not apply to the internal cases, without relation to another country. Secondly, the Article 71 provides that the Regulation "shall not affect any conventions to which Member States are parties and which in relations with particular matters, govern the jurisdiction or the recognition or enforcement of judgements. The effect of this is to preserve a number of conventions dealing with the jurisdiction or recognition and enforcement in respect of certain specific matters, such as maintenance obligations towards children. It follows that, if another convention as applicable and has rules on recognition and enforcement, these rules will apply and not those contained in the Chapter III of the Brussels I Regulation. This can be justified on the ground that these other conventions usually involve obligations towards non-Member States and should therefore be altered by the European Community Regulation which is confined to the Member States of the Community. The Article 71 is only concerned with conventions which the Member States have entered into in the past (prior to the Regulation coming into force on 1st March 2002). There is no position, as there is under the Brussels Convention, for conventions entered into by the Member States in the future.

Recognition

The issue of recognition can arise in three different ways:

1. in order to a judgement to be enforced under the Regulation, it must first be recognised;
2. recognition will apply on its own, without any question of enforcement, where a judgement is used as a defence to a new action; and
3. recognition can operate on its own in a more positive way – in order to establish a title to property or by way of a set-off.

The Article 33, paragraph 1 provides that a judgement given in a Member State shall be recognised in the other Member State without any special procedure being required. The Regulation makes recognition of judgements mandatory between the Member States and does so without any condition having to be satisfied. A foreign judgement recognised by virtue of the Article 33 in principle has the same effect in the state in which the enforcement is sought as it does in the state in which it was given. The Article 33 will not apply to a decision of a court of a Member State on an issue arising in proceedings to enforce a judgement given in a non-Member State, such as the question whether the judgement in question was obtained by fraud. This is dictated by the principle that if a dispute falls outside the scope of the Regulation, the existence of a preliminary issue which the court must resolve in order to determine the dispute, cannot justify the application of the Regulation.

The Section 1 of the Chapter III (Articles 33 to 37) contains no procedural provisions in respect of the recognition. In the situation where recognition is merely a first step towards enforcement, the enforcement procedure under the Section 2 (Articles 38 to 52) will obviously be used. If the recognition is used merely as a defence to an action,

no procedure is necessary; this still leaves minority of cases where there is a need for some procedural rules. The Article 33, paragraph 2 provides that, if the recognition of a judgement is the principal issue in the dispute, an interested party may apply for the judgement to be recognised in accordance with the enforcement procedure under the Section 2. The example negotiable l instrument declared to be invalid in Italy and presented to a bank in Belgium. The bank can apply for the judgement in Italy to be recognised using the simplified enforcement procedure in the Section 2. If a party opposes the recognition, however, the normal rules of procedure of the recognition state will have to be used, and if the outcome of the proceeding in a court of a Member State depends on the determination of an incidental question of recognition, that court shall have jurisdiction over that question.

Enforcement

The ECJ decided in De Wolf v. Cox that, in situations where what is now the Chapter III applies the enforcement procedure in those sections must be used. National rules cannot be used as an alternative. The procedure of enforcement involves making a without notice application in the Member State in which the enforcement is sought. The judgement is declared enforceable on completion of certain formalities. The other party is informed of this and has a right of appeal and, if that party does appeal, the proceedings then become contentious. Before considering the details of this procedure the policy considerations underlying these rules should be examined. The Regulation seeks to ensure that the procedure for making enforceable in one Member State a judgement given in another is efficient and rapid. At the same time it seeks to provide safeguards for both parties.

An efficient and rapid procedure

The application for a declaration of enforceability is made without notice – the other party would have no warning and is not entitled to make any submissions on the application. This simplifies the procedure, which is in the interests of both parties. The Regulation has simplified the procedural formalities incumbent on the applicants. The only documents that they have to provide when applying for the declaration of enforceability are a copy of the judgement and a certificate from the court in the judgement – granting state containing all the information that the court deciding on the application requires. More significantly, the Regulation has modified the enforcement procedure to reduce the time taken for the declaration of enforceability. To ensure a rapid procedure, the declaration of enforceability is issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the ground for non-recognition (and hence non-enforcement) provided by the Regulation under the Articles 34 and 35. These grounds may be reviewed only in the course of an appeal from the party against whom enforcement has been authorised.

The applicant´s interests are protected in six ways:

1. by the adoption of an unilateral procedure in respect of the declaration of enforceability, the party against whom enforcement is sought is prevented from removing assets out of the jurisdiction in order to thwart the applicant;
2. simplifying the procedural requirements incumbent on the applicant when applying for a declaration of enforceability;
3. making the issue of a declaration of enforceability virtually automatic;
4. protective measures can be obtained without a declaration of enforceability being required. When a judgement must be recognised in accordance with the Regulation, "nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member States requested. Once there has been a declaration of enforceability, the applicant is entitled as of a right to protective measures, such as freezing injunction preventing the other party from removing assets. The applicant cannot be denied the right of a protective measure by being required, for example, to obtain a court order authorising this, even though this is required by the national law. To require this would go against the basic policy of the Regulation that the party who has that declaration of enforceability or has registered a judgement may proceed with protective measures;
5. if the declaration of enforceability is refused, the applicant can appeal against this;
6. if the application for a declaration of enforceability is successful, the defendant is not given an excessive number of avenues for appeal, which could be used as delaying tactics.

Safeguarding the interests of the party against whom enforcement is sought

This party is protected in three ways:

1. a declaration of enforceability can be granted only if the judgement is "enforceable" in the Member State in which it was granted. The Court of Justice has held that the term "enforceable" is referring solely to the enforceability, in the formal terms, of foreign decisions and not to the circumstances in which such decisions may be executed in the state of origin. Moreover, "the question whether a decision is, in formal terms, enforceable in character must be distinguished from the question whether the decisions can any longer be enforced by reasons of a payment of the debt or some other cause". This is a very narrow view of the term "enforceable", and it casts doubt on whether the enforceability requirement will now operate in two situations in which it was previously thought that it would do so. The first is when an appeal is pending in the Member State in which the judgement was given, and the effect of this is to suspend enforcement in that state. The second is where the judgement has already been enforced in the state in which it was given. The enforceability re-

quirement would, it was thought, prevent the claimant from recovering twice;
2. if the application for a declaration of enforceability is successful, the defendant is notified and can appeal against the declaration of enforceability but only on the basis that the one of the defences under the Articles 34 and 35 applies;
3. if a declaration of enforceability is refused, the applicant may appeal against this; but the other party must be summoned to appear before the appellate court. If s/he fails to do so, the natural justice provision in the Article 26 of the Regulation will apply, even though this party is not domiciled in a Member State and the Article 26 would, therefore, not normally apply. The requirements to summon the other party is a very strict one; it applies even though the application for a declaration of enforceability has been dismissed in the lower court on the purely formal ground, that the correct documents as required under the Article 53 have not been produced, and even where the enforcement order is applied for in a state which is not the state of residence of the party, against whom the enforcement is sought. By summoning a party to appear there is an obvious danger (at least where the declaration of enforceability is sought against him/her in a state other than that of his/her residence) that he will remove assets from that state before the declaration of enforceability is granted; nonetheless he must still be summoned.

Defences

It is a part of the claimant´s case when seeking the recognition or enforcement to show that the Regulation applies, and, in case of enforcement, that the judgement is enforceable in the Member State in which it was given. The court in the Member State in which an application for a declaration of enforceability is sought, will check that the documents supplied by the claimant are correct and these documents include evidence that the judgement is indeed enforceable in the Member State in which it was given. The enforcement procedure does not appear to give an opportunity for the defendant to raise any of these matters by the way of a defence. At the application stage the party against whom the enforcement is sought, is not entitled to make any submissions. At the subsequent appeal stage the only grounds for revoking a declaration of enforceability are those specified in the Articles 34 and 35. Nonetheless it would be extraordinary if the defendant cannot rise at the appeal stage the question of whether the Regulation applies, and whether the judgement is indeed enforceable in the Member State of origin. The Articles 34 and 35 set out the defences to recognition, but since there can be no enforcement without a recognition, they are also implicitly defenced to enforcement. Paragraph 1 of the Article 45 spells this out by providing expressly that the defences specified in the Articles 34 and 35 operate as reasons for refusing or revoking a declaration of enforcement.

Where a defence under the Articles 34 and 35 is established, the judgement will not be recognised or enforced in other Member State. Likewise, if a judgement is not enforceable in the Member State in which it was given, it cannot be enforced in other

Member State. In contrast to this, where the Regulation does not apply, it may still be possible for a judgement to be recognised and enforced in another Member State under an existing bilateral treaty or at domestic law. The Articles 34 and 35 are an obstacle to the free movement of judgements and should, accordingly, be interpreted strictly.

Defences under Article 34

The Article 34 lay out four defences:
public policy
natural justice
a conflict with a judgement given in the Member State in which the recognition is sought
a conflict with a judgement given in another Member State or in non-Member State.

The Regulation has sought to narrow defences and there is one fewer than under the Brussels Convention. Likewise the Regulation has reworded individual defences in a restrictive manner so as to improve the free movement of judgements.

Public policy

The Article 34 (1) provides that a judgement shall not be recognised "if such recognition is manifestly contrary to the public policy in the Member State in which the recognition is sought".

The wording of the Article 31 (1) strongly suggest that the recognising court is to apply its own concept of public policy when considering this defence. However, because of the differences in the meaning of public policy in the separate Member States, it would be most undesirable for national courts to apply their own concept of public policy automatically. National courts are undoubtedly left with some latitude in deciding on the meaning of the concept, bet they must give it a meaning which is appropriate in the context of the Regulation, and the Court of Justice may intervene, if they fail to do so. Thus, we are left with the position whereby the recognising court of a Member State determines, according to its own conceptions, what public policy requires, but there are limits to that concept which are subject to review by the Court of Justice. These limits are a matter for interpretation of the Regulation.

Natural justice

The Article 34 (2) provides that a judgement shall not be recognised:

Where it was given in default of appearance, if the defendant was not served with the documents which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him/her to arrange for his/her defence, unless the defendant failed to commence proceedings to challenge the judgement, when it was possible for him/her to do so.

There is a concern that the rights of the defendant should by fully protected by the Regulation. When a judgement has been given in default of appearance, there is a particular concern as to whether the service on the defendant was such as to give him/her the opportunity to defend himself/herself properly. The Article 34(2) is intended to ensure that a judgement is not recognised or enforced under the Regulation, if the defendant has not been given such an opportunity.

The defendant was not served

This is a vital question and it cannot pass unnoticed at the time when the recognition and enforcement is sought. The Article 53(2) requires the party seeking recognition or enforcement to produce certain evidence which establishes that the party in default was served with the document instituting the proceedings. The Regulation has altered the natural justice defence so as to no longer require that the defendant was "duly" served. This required reference to the legislation of the state in which the judgement was given and to its conventions on service. The requirements of due service and service in sufficient time constituted two separate and concurrent safeguards for defendant who failed to appear. If the document was not duly served, this in itself triggered the operation of the natural justice defence, even if the defendant had sufficient time to arrange for his/her defence. The intention under the Regulation is that this should no longer be so. It is enough for the defendant in the judgement-granting state to have been served with a notice in sufficient time and in such a way as to enable him/her to arrange for his/her defence. This means, for example, that a mere formal irregularity in the service procedure, as where it is not accompanied by a required translation, will not debar recognition or enforcement under the Regulation, provided the service was in sufficient time and in such a way as to enable the defendant to arrange his/her defence. A formal irregularity, which does not affect the capacity of the defendant to understand the elements of the claim and his/her capacity to defend his/her right, can be ignored. This is another example of the way in which defences have been reworded so as to narrow them down, thereby improving the free movement of judgements. But at the same time the rights of the defendant must have been effectively protected.

The Article 34(2) requires that the defendant was served and it is not enough that he was merely notified of the proceedings. This raises the difficult question of what constitutes service in the present context. This could be referring to service according to the procedures of the judgement-granted state. However, certain irregularities in these procedures will not be fatal. An alternative view, which was found favour with

the Court of Appeal, is that this refers to service according to the European Union Service Regulation. But given the purpose of rewording of the Article 34(2), a mere formal irregularity in compliance with that Regulation should not be enough to deny that there has been service.

The conflict with the judgment given in the Member State in which recognition is sought

Article 34 (3) provides that a judgement shall not be recognised if it is irreconcilable with a judgement given in a dispute between the same parties in the Member State in which recognition is sought. Where there are contemporaneous proceedings between the same parties in two Member States, in respect of the same or a related cause of action, the Regulation requires one court to decline jurisdiction in favour of the other. The position is more difficult where the cause of action in the two Member States is neither the same nor related. There is no provision requiring one of the courts to decline jurisdiction in favour of the other, and there can be conflicting judgements in two Member States.

Article 34 (3) solve this problem, in so far as the conflict is between a judgement given in the Member State in which recognition is sought and the judgment given in another Member State, by providing that the judgement given in the recognising Member State takes priority. The court of the Member State in which recognition is sought must refuse recognition; it has no discretionary power to authorise recognition on the basis that the foreign judgment does not sufficiently disturb the legal order.

A conflicting judgment given in another Member State or in a third State

Article 34 (4) provides that the judgement shall not be recognised if it is irreconcilable with an earlier judgement given in another Member State or in a third State involving the same conditions necessary for its recognition in the Member State addressed.

This provision is concerned with the situation where there are two irreconcilable judgments and with ensuring that priority is given to one of them. The lis pendens provisions in the Regulation, requiring one court to decline jurisdiction in favour of another, can only operate where the proceedings are in two different Member States. Where the proceedings are in a third state (non-Member State) and a Member State, and there is a real possibility of two judgments being given, both of which have to be recognised. This is a serious situation which could give rise to diplomatic problems with non-Member States. To avoid this, Article 34 (4) gives priority to the judgement given in the non-Member State, and the judgment given in the Member State is not recognised.

For Article 34 (4) to operate it must be shown that:

1. the judgment given in the non-Member State is the earlier one
2. it is entitled to recognition
3. it is irreconcilable with the later judgment given in the Member State
4. it involves the same cause of action and the same parties.

Defences under Article 35

This provides a defence to recognition in two situations; both involve an examination of the jurisdiction taken by the court which delivered the judgment.

The judgment will not be recognised if it conflicts with the jurisdictional provisions related to the insurance matters (Articles 8 to 14), the consumer contracts (Article 15 to 17) and exclusive jurisdiction (Article 22). Normally, the recognising court cannot review the jurisdiction taken by the court in the Member State in which the judgment was granted. Article 35 provides an exception to this which can be justified because Section 3, 4 and 6 depart from normal rules of jurisdiction.

Further, a judgement will not be recognised in a case provided under Article 72. This is concerned with agreements entered into a Member States, prior to the Regulation entering into force.

XII. International Dispute Settlement

Introduction

It is inevitable, in such a dynamic global economy exemplified by the booming of international commercial transactions, that the number of the international commercial disputes has significantly increased. Characterized by legal complexity and the time-consuming process and expensive costs of their resolution, international commercial disputes have caused tremendous difficulties to parties once they are discovered. In order to ameliorate the harshness of disputes, parties to international commercial agreements should consider at the outset how any disputes arising under them may be resolved.

Firstly, they may choose, in advance or at some stage of the dispute, a mode of dispute resolution after considering the advantages and disadvantages of each mode, their suitability for the particular business relationship, and the legal, economic and commercial backgrounds of the dispute. There are several well-established dispute resolution mechanisms for international commercial disputes that parties can rely on. Most popular, among others, are negotiation, mediation/conciliation, arbitration and litigation. Traditionally, the parties submitted their dispute to the courts of a chosen forum operating around well-settled legal rules and principles, yet nowadays the alternative dispute resolution (ADR) processes have been popularly resorted. Under this light, the parties may agree contractually to pursue non-binding modes of dispute resolution such as negotiation, mediation/conciliation. Subsequently, they may further agree that if such informal modes fail, they will resort to a binding form of ADR such as arbitration. It is also noted that arbitration has been *the dominant method of resolving private party disputes in international commerce*, given that international commercial arbitration provides a number of benefits that are not available through litigations.

Furthermore, parties may make use of other non-binding modes including negotiation, mediation and conciliation in aiding the arbitration or litigation proceedings with a view to reach an outcome that better serve the interest of the disputant parties. To scratch a picture of available international dispute settlement processes and possible choice of the disputant parties, Section Two of this Chapter will, in turn, deal with negotiation, mediation or conciliation, arbitration and litigation. At the end of this Section, some hints will be provided to parties on the choice of those modes to settle their commercial disputes.

Choosing the dispute settlement modes, however, does not mean the dispute would be resolved in the way that the parties wish. The process and the outcome of the dispute resolution also depend significantly on the jurisdiction in charge and the governing (both procedural and substantive) law. In litigation, it is almost true that the governing law is the law of the court jurisdiction, though in some cases foreign laws would be applied if found necessary. That means the parties' choice of jurisdiction would also mean that they implicitly choose the applicable law for resolving their disputes. Indeed, the chosen governing law, in this circumstance, is actually the national law, which would follow its principles of conflicts of laws in deciding the case in question. That means the litigation process is neither easily predicted nor unambiguous. In arbitration, the situation is slightly different. The principle of party autonomy is much more favoured. The parties have greater freedom to build their desired process of dispute resolution. They may choose an 'institutional' arbitration with established arbitral rules, or an ad hoc arbitration with flexible rules. They may also choose the venue at which the arbitration takes place. It should be noted that the venue may play a significant role in the enforcement of the arbitral award. Besides, in most ad hoc arbitrations, the parties may tailor their own regulations to resolve the disputes. It should be noted that, however, as flexible is the governing law, as unpredictable is its result. In many cases, the choice of the applicable law is tacit, impractical or in conflict with other related law, resulting in tremendous difficulties for arbitrators in settling the dispute. In other cases, any agreement on the choice of law between the parties may be lacking, which suggests that the situation may be even more complex.

Section Three of this Chapter will discuss the parties' choice of laws and jurisdictions. While trying to canvass the main complications around the topic, this Section also introduces several international conventions guiding the parties. The international regulations on the choice of law and jurisdiction have been most strongly influenced by the common law system as well as

the civil law system. This Section, therefore, exemplifies several regulations of the English law and European law to cover the topic. Prior to entering into commercial contracts parties are encouraged to decide at the outset the applicable law and jurisdiction for their prospective disputes. That would be a crucial point at which to determine which law is applicable for the contract.

At the final stage of a dispute resolution process, a court's judgment or an arbitral award are usually provided. The crucial importance for the prevailing parties is to seek their recognition and enforcement. It would not be a major problem if the enforcement of the judgment or arbitral award to be sought within the jurisdiction where the court or the arbitral tribunal resides. The situation is further complicated if the prevailing party wishes to obtain the arbitral award or the court's judgment under a foreign jurisdiction. In the case of an arbitral award, international law has gone so far as to facilitate its recognition and enforcement in more than 140 state jurisdictions. The New York Convention 1958 ruled on the recognition and enforcement of an arbitral award (New York Convention). It is necessary to discuss the main rules of the New York Convention in order to understand the reason why arbitration has dominated litigation in the field of commercial dispute resolution in the last decades. Under the New

York Convention, the grounds for non-enforcement of a foreign arbitral award have been narrowly defined. However, it is not uncommon for a foreign arbitral award to be rejected on limited grounds, such as that of damaging the public policy the enforcing state.

The merit of the award will not be reviewed, although its enforcement may need further action. The most controversial aspect of enforcing the arbitral awards is the choice of the place to enforce the award and the national law of the chosen jurisdiction for enforcement. Other issues arise in the circumstance that the prevailing party wishes to seek the enforcement of an arbitral award in a country not a party to the New York Convention. The aim of enforcement would depend solely on the national law of the country in question in recognizing and enforcing the foreign award.

Section Four will present the enforcement of arbitral awards under the New York Convention and contemplate enforcement in the absence of the New York Convention. In the case of seeking enforcement of a court's judgment within a foreign jurisdiction, the enforceability faces further complexities and impediments given the predominant situation that foreign judgment has no local legal effect. Several regional regulations have been established to deal with the enforceability of foreign judgments, yet this is not applied globally. A foreign court judgment has usually followed a cumbersome process, possibly immired in legal pitfalls.

Recently, any international effort to deal with this matter has failed, along with the failure of The Hague Convention on the recognition and enforcement of foreign judgment. There is still a long way to go until foreign judgments would be treated as arbitral awards in the regard of recognition and enforcement in a foreign jurisdiction.

Section Five will discuss the enforceability of foreign judgments, with its focus on several leading regional regulations and certain well-known national jurisdictions. The enforcement of foreign judgment has been largely exercised in compliance with the parameters of sovereign interests.

1. Negotiation

It is of common knowledge that negotiation is probably the first step adopted by parties in dealing with disputes arising in their international commercial transactions. While disputes cannot usually be settled through negotiation, it helps parties to address the matter of the disputes and understand one another's position. In addition, parties may resume their negotiation at any time even if other dispute resolution processes are continuing, with a view to reaching agreement. This part therefore introduces as comprehensively as possible the tactics and strategies that have been applied in international negotiation.

Why Negotiate?

Negotiation may be defined as back-and-forth communication designed to reach an agreement between two or more parties with some interests that are shared and others that may conflict or simply be different.

As such, negotiation is one of the most basic forms of interaction, intrinsic to any kind of joint action, as well as to problem solving and dispute resolution. It may be verbal or nonverbal, explicit or implicit, direct or through intermediaries, oral or written, face-to-face, ear-to-ear, or by letter or e-mail.

Once parties enter into negotiation, they should consider the seven element framework developed by the Harvard Negotiation Project to obtain a clear result. The seven-element framework includes **interests, fairness, legitimacy, relationship, options, commitments, and communication**.

It is up to the negotiators to apply procedural tactics or strategies to manage the negotiation; however, those elements have been the ground for both sides to define the terrain of their negotiation process.

Process of Negotiation

A seven-element checklist for defining success in negotiation and for preparing to negotiate is relatively manageable and easy to remember. Juggling seven variables simultaneously in the course of interaction is a difficult matter. Negotiators face almost limitless possibilities as they consider which elements to emphasize or ignore and how to handle each one. In practice, however, there are a few major archetypal approaches to the process of negotiation at the root of most interactions. Four of the most common are described here:

1. Positional Bargaining

The simplest and most common approach is haggling, or positional bargaining. One party stakes out a high (or low) opening position (demand or offer) and the other a correspondingly low (or high) one. A series of (usually reciprocal) concessions are made until an agreement is reached somewhere in the middle of the opening positions, or no agreement is reached and the parties walk away to pursue other dispute settlements. In addition to its simplicity, positional bargaining has the advantages that it is universally understood, frequently expected, and concrete. There are also strategic benefits from effectively staking out a favourable position.

However, the simplicity of positional bargaining and its overwhelming focus on commitments have substantial drawbacks. Perhaps the most certain kind of relationship may be a much more important interest than the particular substantive issues in disputes. A major reason to negotiate is to seek an outcome that offers more value than one's BATNA (*Best Alternative to a Negotiated Agreement*), enough more to justify the investment of time and efforts in negotiating. Options are possible agreements or pieces of a potential agreement upon which negotiators might possibly agree. The

most basic form of option is trade - *I give you this, you give me that in exchange*.

A commitment is an agreement, demand, offer, or promise by one or more parties, and any formalization of that agreement. *Communication* here means the manner in which parties discuss and deal with the preceding six elements of negotiation. This would be carried out in adversaries, colleagues, beseech or threaten, trade concessions or brainstorm without commitment significant, by discouraging the exploration of interests, is that it makes it difficult to find creative, value-maximizing options. Without knowing the parties' interests, it is hard to find opportunities for joint gain. Moreover, a negotiation climate focused on commitment discourages creativity and brainstorming. Secondly, positional bargaining tends to be slow and inefficient. Each party tries to make the smallest concessions possible and even then only when necessary to avoid a failed negotiation. Thirdly, positional bargaining tends to produce arbitrary split-the-difference outcomes that poorly satisfy either party's interest in fairness, are hard to explain to constituents, and do little to set a precedent that reduces the future need for additional (time-consuming) negotiation. Finally, positional bargaining tends to promote an adversarial relationship as it may focus on the areas of conflict between the parties and establish a distributive *win-lose* frame.

2. Favours and Ledgers

A second important process archetype also involves trading commitments, by taking advantage of an on-going relationship between the parties to produce more creative and value-maximizing outcomes. The basis is to agree to a one-sided outcome now in exchange for a reciprocal favour in the future. Negotiators then keep a ledger of who owes whom what. The result is a creative way to 'expand the pie' by relaxing the timeframe for trades, which often permits deals and dispute resolutions that otherwise seem impossible.

3. The 'Chicken' Approach

A third common archetype of negotiation process focuses on alternatives: whose are better, and whose have the upper hand. *"Our walk-away is better than yours, and furthermore, we will make yours worse by…"*. This is commonly called the game of *chicken - Give in to my demands, or I will kill us both*.

4. Problem-solving 'Circle of Value' Negotiation

As scholars began to subject the negotiation process to more systematic analysis, the drawbacks of positional bargaining became more starkly apparent. The outline of an alternative problem-solving approach emerged from a combination of theoretical analysis, on the one hand, and case studies and extrapolations form atypical negotiations on the other. In essence, it argues that (i) negotiators should work together as colleagues to determine whether an agreement is possible, far better for both than no agreement; (ii) in doing so, they should postpone commitments while exploring how best to maximize and fairly distribute the value of any agreement; and (iii) it makes sense for one party to take this approach even if the other does not. This problem-solving approach is intended to overcome the drawbacks of traditional positional bargaining by focusing on the parties' underlying interests, looking for ways to

maximize the satisfaction of shared interests and no commitment made until the end of negotiation; encouraging explainable, well-reasoned outcomes that set sustainable precedents; allowing parties to maintain and build their relationship even as they disagree by uncoupling the quality of the relationship from the degree of agreement. There is an argument that the problem-solving approach also helps manage each of their three tensions.

The first tension, between creating and distributing value, is also sometimes called the *negotiator's dilemma* because to create value requires that negotiators disclose their interests. Being the first party to disclose may put it at a strategic disadvantage in capturing the results value. The problem solving approach helps manage the tension between creating and distributing value by fostering a collaborative working relationship that permits the gradual and reciprocal disclosure of interests while brainstorming options without commitment, and that helps negotiators address distributional questions side-by-side with objective standards, rather than through adversarial claiming and subjective valuation.

The problem-solving method is sometimes called the *circle of value* approach to negotiation, because the core of the process involves negotiators exploring options for creating and distributing value with collaborative, side-by-side, problem-solving mentality. This way of working together with has to be carefully created and maintained, as is a special space or circle.

2. Conciliation/Mediation

In fact, conciliation and mediation have been rarely better triggered in international commercial disputes. Mediation and conciliation appear more suitable means to settle environmental related disputes. In the realm of commercial disputes, they usually mix with another dispute resolution method to address the wishes of the parties in question. This would be exemplified by the mediation-arbitration mechanism. Therefore, this part is intended to outline those two processes.

Conciliation

1. Definition

Conciliation is a system in which a third party, designated by the litigants, attempts to reconcile the disputant parties either before they resort to litigation or arbitration, or after. The attempt to conciliate is generally based upon showing each side the contrary aspects of the dispute, in order to bring the sides together and to reach a solution, generally found between the two parties' positions. The conciliation process may take many forms and in some legal systems they are presented in a modern fashion.

2. Application of Conciliation

Conciliation, given its importance, is mentioned in the most recent arbitration conventions. The Washington Convention 1965 provides that a conciliation committee

should be set up, at the request of a contracting state, or of a subject of a contracting state, and rules its procedure.

Conciliation is also mentioned in the international arbitration rules of the American Arbitration Association and is governed as to domestic commercial arbitration by the Commercial Mediation Rules.

Reference to conciliation is found in the international arbitration rules of the Milan Chamber of Arbitration, and in the Inter-American Commercial Arbitration Commission (IACAC). No reference is made to it in the 1999 arbitration rules of the Institute of Arbitration of the Stockholm Chamber of Commerce, yet the Stockholm Chamber of Commerce has set up Mediation Institute of the Stockholm Chamber of Commerce, which has published its own set of rules. Conciliation is given much coverage by the rules of the Euro-Arab Chambers of Commerce.

2. Mediation

1. Introduction

Mediation is a form of third-party intervention that has the consent of the parties to a dispute. A mediator's function is to provide a solution to a dispute in the hope that the parties will accept it. The mediator is to be a neutral person with knowledge and expertise in the subject-matter of the dispute.

A mediator will en sure each party understands the other's point of view, will meet with each party privately and listen to their respective viewpoints, stress common interests, and try to help them reach a settlement. Mediation is confidential. There is usually a provision in the chosen rules that no disclosure made during the mediation may be used at the next level of the dispute, whether arbitration or litigation. If the rules do not provide for this, then there should be an agreement in writing to the effect that anything disclosed in the mediation process may not be used at the next level, except to the extent that it comes in through documents not created for the mediation.

Mediation may occur at any time in the dispute. If parties get to a point in litigation or in arbitration where they wish to settle and require help, they may engage a mediator. Mediators are also sometimes used in the negotiation stage of a contract; when negotiations have reached an impasse yet both parties actually want the deal to proceed. Because mediators try to understand and reconcile the interests of the parties, mediation is referred to as an *interest-based* procedure, while arbitration is referred to as a *rights-based* procedure.

2. Application of Mediation

Normally, the initiation of mediation is the most difficult task to achieve, as at this stage the relationship between the parties is already acrimonious. At this stage even a third party's intervention to initiate a friendly settlement proves to be difficult. Nevertheless, a neutral third party may be required to put forward suggestions to the other side without giving the impression that the party on whose initiation mediation

began has any weakness. The legal issue remains that, in the event of a party's refusing to participate in ADR for settling its disputes, a breach of contractual obligation would not arise, on the ground that ADR is not specified in the contract. There are four different ways to initiate mediation: party to party, lawyer to lawyer, third party's persuasion, and a party's prerogative to approach mediation. Where a dispute is already in litigation, involves large claims or entails complex legal issues, the parties may engage solicitors and barristers for their participation in the mediation process. In such a situation, the mediation becomes a law-orientated one and may be subordinated by their lawyers' role and the lawyers might express their ideas in complex legal jargon that would be beyond the comprehension of the parties. In fact, where legal representation is allowed, a mediator is often required to remind them of their remit in order to ensure that a forum suitable for court proceedings may not be created.

It is essential for the mediator to determine at what point legal representatives might be allowed to make their presentation (not be abused but necessary to make a clear point).

3. Advantages of Mediation

Mediation is a far more flexible process in comparison with litigation therefore parties may alter their postures without *losing face*. The aftermath of a successful mediation is generally cordial, since both parties have been made a winner. Dissimilarly to a court case, there are fewer causes for animosity between the parties. This feature of mediation is particularly important if the parties either must have or desire to have on-going dealings, as is frequently true in labour, business, or family disputes.

Mediation, as a form of alternative dispute resolution, *is premised upon the intention that by providing disputing parties with a process that is confidential, voluntary, adaptable to the needs and interests of the parties, and within party control, a more satisfying, durable, and efficient resolution of disputes may be achieved*.

Mediation is unique, as it is non-binding, and the mediator is present to facilitate communication and negotiation between the parties, and not to impose a settlement on them.

4. Disadvantages of Mediation

Mediation should not be applied in cases where dispute is centred more on law than on fact, or if one or both parties will not participate in good faith. If the dispute is based on a contract, the parties must be mindful of the limitation period. Under simple contracts, the limitation period operates for six years from the date of the occurrence of the breach of contract. If the contract is under seal the limitation period is 12 years. It would not be advantageous to commence a mediation process just about the time when the limitation period is running out. There is inequality of bargaining position between the parties. This does not necessarily manifest itself in their respective sizes, although size may often be a crucial factor.

3. Differentiating Conciliation and Mediation

Often, the terms conciliation and mediation are used interchangeably although there is a difference. A conciliator listens to the two parties, hears their different positions, and then sets forth a proposed settlement agreement, representing what s/he believes to be a fair compromise of the dispute. If the proposal fails to resolve the dispute, the conciliator may offer another proposal. Mediators try to encourage the parties to suggest a settlement agreement themselves, and may also, at the parties' request, make a specific proposal, similarly to conciliators. In another explanation, conciliation differs from mediation in the way Lord Donaldson stated: *In conciliation proceedings, the neutral party listens to the complaints of the disputants and seeks to narrow the field of controversy. The Chinese word for a conciliator is said to be a go between who wears out 1,000 sandals while the mediator performs the functions of a conciliator but also express his view on what would constitute a sensible settlement*.

Lord Wilberforce, himself a Law Lord, has expressed a view along the same lines: T*he difference between the two methods of settling disputes would thus be that the purpose of a conciliator would be to induce the parties themselves to realize what benefits they might obtain from settling the matter out of court in whichever way they deem most convenient*.

Mediation, on the other end, would have the more concrete aim of advising each litigant to waive part of his claim in order to reach a settlement through an aliquid datum and an aliquid retentum (giving a part of a claim in exchange for receiving the rest of it). This distinction is perhaps theoretically accurate, but somewhat artificial. If a real distinction between these two systems must be drawn, it is submitted that it lies in the granting of the authority to the third party to issue in the end of binding settlement.

XIII. International Commercial Arbitration

Why Arbitrate?

Dispute resolution in international business transactions runs the gamut from friendly consultations to litigation everywhere. Non-binding conciliation and mediation do their best at facilitating a compromise, an approach common to Asia. In between also lies international commercial arbitration (ICA). The volume of ICA has grown enormously in recent decades, particularly in North America, Western Europe, the Middle East and East Asia. ICA is, therefore, the focus of this Chapter. Parties to an international contract may include a jurisdiction clause in the contract. The growth of ICA is in part a retreat from the vicissitudes and uncertainties of international business litigation. More positively, ICA offers predictability and neutrality as a forum (irrespective of where the court resides) and the potential for specialized expertise (many national judges know little of international commercial law). ICA also allows parties to select and shape the procedures and costs of dispute resolution. Clearly, ICA has its pros and cons. Necessity has shown how the use of arbitral dispute resolution methods is increasing.

One of the most attractive attributes of ICA is its enforceability in national courts of arbitral awards under the New York Convention. More than 140 nations participate in this Convention. There is no comparable convention for the enforcement of court judgments around the world, yet The Hague Convention on Jurisdiction and Enforcement of Judgments is being concluded.

Another major advantage of ICA is the support of even those legal regimes that give arbitration agreements negative effects. In the US, for example, the Federal Arbitration Act provides a level of legal security unknown to international business litigation. Many countries have similar statutes, thus avoiding issues of subject matters and personal jurisdiction, forum non conveniens and the like. International Arbitration has become the established method of determining international commercial disputes.

All over the world, states have modernized their laws of arbitration to take account of this fact. New arbitral centres have been established and the rapidly evolving in dispute settlement. Law and practice of ICA is a subject for study in universities and law schools. ICA is a private method of dispute resolution, chosen by the parties themselves as a way of putting an end to disputes between them, without recourse to the courts of law. It is conducted in different countries and against different legal and cultural backgrounds, with a striking lack of formality. ICA gives the parties substantial autonomy and control over the process that will be used to resolve their own disputes.

Parties decide whether the arbitration will be administered by an international arbitral institution, or will be ad hoc which means no institution is involved. The rules that apply are the rules of the arbitral institution, or other rules chosen by the parties. In addition to choosing the arbitrators and the rules, parties may choose the place and the language of the arbitration. This is particularly important in the international commercial disputes, because parties do not want to be subject to the jurisdiction of the other party's court system. Each party fears the other party's home court advantage. Arbitration offers a more neutral forum, where each side believes it will have a fair hearing.

Moreover, the flexibility of being able to tailor the dispute resolution process to the needs of the parties, and the opportunity to select arbitrators who are knowledgeable in the subject matter of the dispute, make arbitration particularly attractive. Today, ICA has become the dominant dispute resolution method in most international business transaction. An arbitral award is generally easier to enforce internationally than a national court judgment, because under the New York Convention, courts are required to enforce an award unless there are serious procedural irregularities, or problems that go to the integrity of the process. The New York Convention is considered to have a pro-enforcement bias, and most courts will interpret the permissible grounds for non-enforcement quite narrowly, leading to the enforcement of the vast majority of awards.

Other advantages include the ability to keep confidential the procedure and the resulting award. Confidentiality is provided in some institutional rules, and may be expanded (to cover witnesses and experts, for example) by the parties' agreement to require those individuals to be bound by a confidentiality agreement. Many companies prefer confidential procedures because they do not wish information disclosed about their company and its business operations, nor the kinds of disputes it is engaged in, nor do they want a potentially negative outcome of a dispute to be public.

Parties prefer to be able to choose arbitrators with particular subject matter expertise. There are fewer discoveries in arbitration, thereby generally resulting in a shorter process than in a full-scale litigation. The lack of opportunity for multiple appeals of the decision on the merits is also an attractive aspect. For business people, there is great value in finishing a dispute so they can get on with their business.

Some Western European countries long have been accustomed to arbitration (e.g. English Arbitration Act 1889 and English Arbitration Act 1950, as amended by Arbitration Act 1979); the London Court of Arbitration, a private arbitration institution, has existed since 1892. Arbitration in international commercial contracts is favoured by China, either through the Chinese International Economic and Trade Arbitration Commission (CIETAC) or the Chinese Maritime Arbitration Commission (MAC). In terms of volume, CIETAC is now the world's largest arbitration centre. The Japan Commercial Arbitration Commission has been active since 1953. Virtually all countries in Latin Americas, Asia and Africa have arbitration statues and international commercial arbitration centres or courts.

Disadvantages of Arbitration

To an extent, some of the disadvantages of arbitration are the same as the advantages, only viewed from the opposite perspective. For example, having fewer discoveries may be generally viewed as an advantage. Certain kinds of disputes typically involving extensive discovery, such as antitrust disputes, are increasingly arbitrated. These disputes often require the aggrieved party to prove a violation, which it is able to achieve only if it has sufficient access to documents under the control of the offending party. Fewer discoveries in this kind of case mean less of a chance for a claimant to meet its burden of proof.

Moreover, the lack of any right of appeal may be beneficial in terms of ending the dispute. If an arbitrator has rendered a decision that is clearly wrong in the law or on the facts, the lack of an ability to bring an appeal may be frustrating to a party. Another disadvantage is that arbitrators have no coercive powers - that is, they do not have the power to force an action by threatening a penalty. A court, for example, may impose a fine for contempt if a court order is not followed. Arbitrators may not impose penalties, although they may draw adverse inferences if a party fails to comply with an order of the tribunal. However, with respect to non-parties, arbitrators have no power. Thus, it may be necessary at times for the parties or the tribunal to seek court assistance (for example, interim measures), when coercive powers are necessary to ensure compliance with the orders of the tribunal.

In multiparty disputes, an arbitral tribunal frequently does not have the power to require the presence of all relevant parties, even though all may be involved in some aspect of the same dispute. Because the tribunal's power derives from the consent of the parties, if a party has not agreed to arbitrate, usually it may not be included in the arbitration. A tribunal has no rights to consolidate similar claims of different parties, even if this would be more efficient for all concerned to do so.

Finally, it could be viewed as a disadvantage that the pool of experienced international arbitrators lacks both gender and ethnic diversity. Although some institutions and a few individual members of this group made efforts to broaden that pool, on the whole there has been little change.

Types of International Commercial Arbitration

There are two types of ICA:

1. institutional and
2. ad hoc.

Ad hoc arbitrations involve selection by the parties of the arbitrators and rules governing the arbitration. The classic formula involves each side choosing one arbitrator who in turn chooses a third arbitrator. The ad hoc arbitration panel selects its procedural rules (such as UNCITRAL Arbitration Rules). Ad hoc arbitration may be agreed

upon in advance or, quite literally, selected as disputes arise. Ad hoc arbitration presupposes a certain amount of goodwill and flexibility between parties. It may be faster and less costly than institutional arbitration.

Institutional arbitration involves the selection of a specific arbitration centre, accompanied by its own rules of arbitration. Institutional arbitration is professional, a quality lost in ad hoc arbitration. Awards from well-established arbitration centres (including default awards) are more likely to be favourably recognized in the court if enforcement is needed. Many institutional arbitration centres now also offer *fast track* or *mini* services to the international business community. One of the choices parties must make when they decide to arbitrate is whether they prefer their arbitration to be administered by an arbitral institution, or to be ad hoc.

1. Institutional Arbitration Institutions

The advantages are that the institution performs important administrative functions. It ensures that the arbitrators are appointed in a timely way; that the arbitration moves along in a reasonable manner, and fees and expenses are paid in advance. From the arbitrator's point of view, it is an advantage not to have to deal with the parties about fees, which are handled by the arbitral institution. Moreover, the arbitration rules of the institution are time-tested and are usually quite effective to deal with most situations that arise. Another advantage is that an award rendered under the auspices of a well-known institution may have greater credibility in the international community and the courts. This may encourage the losing party not to challenge an award.

(a) ICC International Court of Arbitration

The ICC International Court of Arbitration is one of the better-known and most prestigious arbitral institutions. It is neither an actual court nor a part of any judicial system. Rather, the Court is the administrative body responsible for overseeing the arbitration process. Its members consist of legal professionals from all over the world. In addition, the ICC has a Secretariat, members of a permanent, professional, administrative staff. The ICC is different from other arbitral institutions is that every ICC arbitral award is scrutinized by the Court of Arbitration, meaning that the award is not provided to the parties until it has been reviewed by the Court.

(b) The American Arbitration Association's (AAA), International Centre for Dispute Resolution (ICDR)

The ICDR has greatly expanded the number of arbitrations it handles yearly. The number of international arbitration cases filed with the AAA or the ICDR in the ten years between 1993 and 2003 has more than tripled, from 206 to 646. Moreover, the ICDR has opened offices in other countries.

(c) The London Court of International Arbitration (LCIA)

It is also not a court; rather, the responsible *supervising* body of the arbitration institution. The LCIA Court is the final authority for the proper application of the LCIA Rules. It also has the responsibility of appointing tribunals, determining challenges to arbitrators, and controlling costs. The LCIA is the oldest international arbitration insti-

tution, founded in the late nineteenth century. Its Secretariat is headed by a Registrar, and is responsible for the administration of disputes referred to the LCIA. The LCIA is headquartered in London although will administer cases and apply its rules at any location the parties choose.

(d) Other Arbitral Institutions

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC), particularly well-known for handling East-West arbitrations; The China International Economic and Trade Arbitration Commission (CIETAC) adopted new rules in 2005; The WIPO Arbitration and Mediation Centre (which has rules on mediation and arbitration appropriate for technology, entertainment, and other disputes involving IPRs). International arbitrations are handled by institutions in Hong Kong, Switzerland, Vienna, Cairo, Germany, Venezuela, Mexico, and other countries. In addition, there are some specialized arbitral institutions such as the Grain and Feed Trade Association (GAFTA), the London Maritime Arbitration Association (LMAA), the Federation of Oils, Seeds, and Fats Association (FIOFA), and the London Metal Exchange (LME), all of which have industry-based rules and procedures for resolving the disputes of their members.

UNCITRAL Arbitral Rules

The UNCITRAL Rules were issued in 1976 following ten years of study. The UNCITRAL Rules are intended to be accepted in all legal systems and in all parts of the world. Rapidly, DCs favour the UNCITRAL Rules because of the care with which they have been drafted, and because UNCITRAL was one forum for developing arbitration rules in which their concerns would be heard. The Arbitral Institute of the Stockholm Chamber of Commerce has been willing to work with the UNCITRAL Rules, as has the London Court of Arbitration. The Iran-US Claim Tribunals has used the UNCITRAL Rules.

UNCITRAL Rules provide, among other points, that an appointing authority shall be chosen by the parties or, if they fail to agree upon that point, shall be chosen by the Secretary-General of the Permanent Court of Arbitration at The Hague (comprised of a body of persons prepared to act as arbitrators if required). The UNCITRAL Rules also cover notice requirements, representation of the parties, challenges of arbitrators, evidence, hearings, the place of arbitration, language, statements of claims and defences, pleas to the arbitrator's jurisdiction, provisional measures, remedies, experts, defaults, waivers, the form and effect of the award, applicable law, settlement, interpretation of the award, and costs.

In addition to its Model Arbitration Rules 1976, UNCITRAL has also promulgated a Model Law on International Commercial Arbitration 1985. The Model Law has been adopted in Australia, Canada, Hong Kong and Scotland. It has been adopted as state law by several states of the US, including California, Florida, North Carolina, Connecticut, Georgia, Ohio, Oregon, and Texas.

Under the UNCITRAL Model Law, submission to arbitration may be ad hoc for a

particular dispute, yet is most often accomplished in advance of the dispute by a general submission clause within a contract. Under Article 8 of the Model Law, an agreement to arbitrate is specifically enforceable. UNCITRAL recommends the following model ***submission clause***: *Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as a present in force.*

ICC and LCIA Arbitral Rules and Clauses

Many arbitration clauses use the Rules of the Court of Arbitration of the International Chamber of Commerce (ICC) at Paris. The ICC recommends use of the following model clause to engage its rules: *All disputes arising out in connection with the present contract shall be settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules*.

Parties who wish to refer any dispute to the equally active London Court of Arbitration may use the following model clause: *The validity, construction and performance of this contract (agreement) shall be governed by the laws of England and any disputes that may arise out of or in connection with this contract (agreement), including its validity, construction and performance, shall be determined by arbitration under the Rules of the London Court of Arbitration at the date hereof, which Rules with respect to matters not regulated by them, incorporate the UNCITRAL Rules. The parties agree that service of any notices in reference to such arbitration at their address as given in this contract (agreement) (or as subsequently varied in writing by them) shall be valid and sufficient*.

Enforcement of Arbitral Awards under the New York Convention

In over 140 countries, the enforcement of foreign arbitral awards is facilitated by the New York Convention. The New York Convention commits the courts in each contracting state to recognize and enforce arbitration clauses and writing agreements for the resolution of international commercial disputes. Where the court finds an arbitral clause or agreement, it *shall… [r]efer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative, or incapable of being performed*'.

The New York Convention also commits the courts in each contracting state to recognize and enforce (under local procedural rules) the awards of foreign arbitral tribunals under such clauses or agreements, and also set forth the limited grounds under which recognition and enforcement may be refused. Under the New York Convention, ***grounds for refusal to enforce*** include:

- incapacity or invalidity of the agreement containing the arbitration clause *under the law applicable to* a party to the agreement; lack of proper notice of the arbitration proceedings, the appointment of the arbitrator or other reasons denying an adequate opportunity to present a defence;

- failure of the arbitral award to restrict itself to the terms of the submission to arbitration, or decision of matters not within the scope of that submission;
- composition of the arbitral tribunal not according to the arbitration agreement or applicable law; and
- non-finality of the arbitral award under applicable law.

In addition to these grounds for refusal, recognition or enforcement may also be refused if it would be contrary to the public policy of the country in which enforcement is sought; or if the subject matter of the dispute cannot be settled by arbitration under the law of that country. Courts in the US have taken the position that the *public policy limitation on the New York Convention is to be construed narrowly (and) to be applied only where enforcement would violate the forum state's most basic notion of morality and justice*.

Recourse to other limitations of the Convention, in order to defeat its applicability, has been greeted with judicial caution in the absence of violation of basic US notions of morality and justice. Whether the New York Convention applies generally turns upon where the award was or will be made, not the nationality of the parties. Arbitration agreements, traditionally called compromises, come in a variety of forms. Many arbitration centres sponsor model clauses that may be incorporated into business agreements. The existence and validity of an arbitration agreement must be proved, and may be litigated before arbitration takes place.

Article II of the New York Convention requires states to recognize written arbitration agreements signed by the parties *or contained in an exchange of letters or telegrams*. In most jurisdictions, exchanges of fax, email or the like embracing arbitration will be recognized. However, arbitration clauses in unsigned purchase orders do not amount to a written agreement to arbitrate. Delay in triggering arbitration or invocation of litigation rights may constitute a waiver of arbitration rights. When arbitral awards are null, courts in enforcing jurisdictions have taken different positions on the enforceability of the award. French courts enforced an improperly vacated award to the detriment of the claimant who had prevailed in a second arbitration. An US federal court refused to honour the clearly legitimate annulment of an arbitral award by an Egyptian court because the parties had agreed not to appeal the award. The US Supreme Court has repeatedly affirmed that arbitrators have jurisdiction to decide their own jurisdiction. Silence or ambiguity should favour judicial review of issues of whether arbitration may be relevant. US courts are split on whether contract parties may alter the scope of judicial review of arbitration awards.

International Commercial Litigation

Introduction

Arbitration is commonly used for commercial contracts. Trade agreements have developed unique processes for dispute resolution especially the dispute panel process, often combining elements of litigation and arbitration. But many international commercial disputes are handled by traditional litigation. Compared to negotiation, mediation and even arbitration, litigation is a highly structured and formalized dispute resolution process. Well established rules and procedures address nearly every detail of the process from the time a lawsuit is initiated to final appeal and enforcement of the outcome. This has the advantage of making the procedural aspects of the case reasonably predictable. The parties are aware of the basic stages of the process, the steps within them, and related deadlines at the time a lawsuit is filed, or soon thereafter. Litigation's great emphasis on procedure, its strict adherence to formal rules of evidence, the opportunity to appeal an unfavourable outcome, and other features also make many lawsuits long and cumbersome. Advocates of alternatives to litigation frequently claim that litigation takes longer and is more expensive than other dispute resolution processes. However, arbitration that may be nearly as structured and formalized as litigation is not always speedier or cheaper.

Some disputants actually prefer a costly, time-consuming process, because they have greater financial resources or less need of a quick resolution, or both. Precisely because the litigation process is so laden with intricate rules, litigants are often tempted to engage in tactical gamesmanship to delay the process, force their adversaries to incur unnecessary costs, or gain

other advantages unrelated to the merits of the case. A judge may impose penalties on a party that abuses the process, but courts are overburdened and unable to police all questionable behaviour.

Advantages of Litigation

One of the advantages of litigation is that disputants who do not want to negotiate or otherwise cooperate with one another during the proceeding need not do so. An independent tribunal will consider the dispute and render a decision that is legally binding upon the parties, even if one or more of the parties is uncooperative. When one party is unwilling to deal with other parties, litigation ensures that some opportunity for redress of legally recognized claims will be available. Of course, parties who submit their dispute to a court for resolution may be disappointed by the outcome. Decisions regarding key aspects of the process also are left to the judge. The court may compel one party to disclose information it would rather not produce, establish inconvenient dates for pre-trial hearings and the trial itself, and impose other burdens to which one or more of the parties objects. Once again, one of the benefits of involving a third party with the power to make decisions that are binding on the disputants is that the process progresses even when the disputants are unable or unwilling to cooperate. Each party has the potential to make the others bend to its will, provided

one party can persuade the court to embrace its own perspective on a disputed procedural issue. In contrast, one party's opponent may persuade the court to impose requirements of which the other party disapproves.

One of the clear advantages of litigation is the ability to compel others to respond to one's grievances. Dissimilarly to mediation, arbitration and other common dispute resolution processes, litigation proceeds whether or not all participants consent to their involvement. Parties who otherwise would be content to ignore the claims against them must defend themselves or suffer the consequences of failing to do so. Litigation thus ensures that some resolution of a dispute will occur, provided the plaintiff's claims are recognized by law and the litigation is filed in the right court. The initial defendant may convince the court that another party is potentially liable, or a non-party may convince the court that it has a critical stake in the outcome and therefore must be included in the litigation. Separate lawsuits arising out of the same incident or failed transaction may be consolidated to conserve judicial resources and eliminate the possibility of inconsistent decisions.

When these occur, these instructions in a lawsuit may or may not have a negative effect; however, they will affect one party's case. Nonetheless, the existing participants in other dispute resolution processes generally retain greater control over the admission of new participants, and many disputants and their lawyers view this as an attractive feature of alternatives to litigation. Because litigation is highly formalized and the law applicable to a case may be technical, thus difficult for a non-lawyer to research and interpret, litigants typically hire lawyers to serve as their agents during the process. Examples of lawyers complicating lawsuits and other matters are legion, although they may simply increase the likelihood that the process will unfold as it should, with the right issues and claims being presented and addressed according to established procedure and protocols. The rules of discovery, which courts will enforce against parties who do not voluntarily comply with them, ensure that a great deal of legally relevant information about the dispute will be exchanged among the parties. Information that would be useful to a party in advocating its perspective, and which is in the possession of another party, may or may not be obtainable in any other dispute resolution process. Even in arbitration proceedings in which discovery are permitted, discovery may have been limited in an arbitration provision to which the parties bound themselves before the dispute arose or by the rules of the organization providing arbitration services.

Many of the characteristics of litigation already discussed make it a rather impersonal process for the litigants and arguably increase the odds that the dispute will escalate before it is resolved. Litigation as a social institution is sometimes referred to as the *adversary system,* and its structure and many of its procedures do indeed tend to encourage competitive, rather than cooperative, behaviour. In the pre-trial phases of litigation, the parties and their lawyers communicate primarily through documents that are filed with the court and delivered to one another by mail.

Through these documents, often burdensome and expensive fact-finding activities designed to strengthen one party's own claims and weaken the other's. Most lawsuits are analogous to debates, in which interlocutors listen to one another primarily to gather fodder for attacking the other's positions.

When disputants are deeply estranged from one another or have no expectation

of further interaction apart from the lawsuit, they may appreciate the fact that litigation largely spares them from having to deal with each other.

Yet, when the parties expect an on-going relationship or cooperation, they miss an important opportunity to begin to reorient their relationship in constructive ways, because they use litigation as a means of avoiding one another. Even when the parties anticipate no on-going relationship after the dispute is resolved, however, the discomfort of continuing to litigate may outweigh the relatively fleeting discomfort of having to deal with other disputant in the context of a negotiation or mediation process that may produce a resolution of the dispute more quickly. The relative openness of litigation is an advantage to parties seeking public awareness of their claims and perspectives. However, one or more of the parties may prefer to resolve the case more discreetly, especially in commercial disputes.

Jurisdiction of A Court

1. Definition of Jurisdiction of A Court

The jurisdiction of a court may be *viewed* in various ways. Many aspects of judicial jurisdiction are purely domestic (internal). What is often called 'subject-matter jurisdiction' is an example. It deals with the question as to whether a court has jurisdiction with regard to a particular subject. Specialized courts are sometimes set up with jurisdiction over certain subjects only, e.g. they have no jurisdiction to decide other matters. For example, a specialized tax court may not grant a divorce. In the US, subject-matter jurisdiction has a different meaning. It is concerned with the question whether the federal courts can hear a particular case or whether it has to be brought in the state courts.

2. Types of Jurisdictions: "in personam" or "in rem"

International judicial jurisdiction may be analyzed on the basis of the effect that the judgment is intended to have. Here, the most common division is between jurisdiction in personam and jurisdiction in rem. There are also certain other proceedings - for example, divorce or custody proceedings - that do not fit into either category, thus will not be addressed.

(a) Jurisdiction "in personam"

Few areas of the US law or English law are as difficult to explain to jurists from civil law jurisdictions as personal jurisdiction. The history of personal jurisdiction in the US involves difficult and complex notions of minimum contacts and constitutional due process. Where a suit is initiated in the US and the defendant believes a forum conveniens motion will prevail, possible defects in jurisdiction are overlooked, or deferred pending the resolution of the forum non conveniens motion. The reason may be that predicting answers to questions of jurisdiction is less certain than predicting answers to forum non conveniens. Minimum contacts were held necessary to meet constitutional due process requirements under the XIV Amendment. If the minimum contacts test is satisfied, the court next considers reasonableness, i.e., whether exercising juris-

diction meets notions of fair play and substantial justice?

Jurisdiction in personam (over the person), or personal jurisdiction as it is sometimes known, leads to a judgment in personam. A claim in personam is one in which the claimant seeks a judgment requiring the defendant to pay money, deliver property, do, or refrain from doing, some other act. A judgment in personam is a judgment that binds only a specific person (or several specific persons), and requires that person to do or not to do something (usually to pay money). This is the most common form of judgment. In England, there are three main regimes governing the in personam jurisdiction of the English court. The first, which has a European origin, is the Brussels I Regulation (derived from the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters). The second regime is a modified version of the European jurisdiction rules, which in certain circumstances allocate jurisdiction within the UK. Thirdly, there are traditional rules that apply in cases not regulated by the European rules and/or the modified version, which allocates jurisdiction within the UK.

At common law, the basis of the English court's jurisdiction in claims in personam is that the defendant is amenable to the court's jurisdiction, in the sense that the claim form commencing the proceedings may be served on him/her (whether in England or abroad). If the defendant is present in England, process may be served on him/her in England. If the defendant is not present in England at the commencement of the proceedings, but s/he has submitted to being sued in England, the English court has jurisdiction. If the defendant cannot be served with process in England, and does not submit to the jurisdiction, then the court may have the power under Rule 6.20 of the Civil Procedure Rules (CPR Rule 6.20) to assume jurisdiction by giving permission for process to be served on the defendant outside of the jurisdiction. This power arises where, notwithstanding the fact that the defendant is foreign, the events or subject matter of the dispute are connected with England. The court will not give permission unless satisfied that England is *the proper place in which to bring the claim*.

(b) Jurisdiction 'in rem'

Jurisdiction in rem (over property) leads to a judgment in rem. This is binding on everyone in the world, although only to the extent that they have an interest in the property with regard to which the action is brought. In English law, actions in rem are directed against property, usually a ship. It is not uncommon for the ship to be referred to as the defendant in a claim in rem, while the reality is that the claim is brought against the owner of the ship.

A typical case is where the claimant has a claim against a ship owner in respect of his ship, for example, where the claimant's cargo has been damaged as a result of the negligent navigation of the vessel. Proceedings in rem are commenced by process being affixed to the mast or any suitable part of the superstructure of the ship. The claimant will normally also seek to arrest the ship so that it may be sold to meet any judgment granted to the claimant. Such cases may be brought only for a limited number of claims - for example, claims by cargo owners for damage to the cargo, claims by seamen for their wages, and claims by persons who have repaired the ship for the cost

of the repairs. Where action is in rem only, it can be enforced only against the *res* (the ship) - by seizing and selling it by order of court. It cannot, therefore, be enforced for more than the value of the res. In proceedings that proceed solely in rem, the claimant is confined to the proceeds of sale of the ship for the satisfaction of his judgment, but where a claim proceeds both in rem and in personam, the claimant is not so limited.

Service of Process

Service of process abroad is effectively regulated by The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965. Service under The Hague Convention is available in some 40 countries. Service is made upon a central authority in the foreign nation, which subsequently transmits the documents to the proper location. There is some limited authority to send a document by mail but whether sending constitutes service is debated. Service that does not comply with an applicable convention will almost certainly cause any judgment to be rejected if there is an attempt to enforce it abroad. The German Government made it very clear in the Schlunk case that, unless service was made under The Hague Convention, German courts would not enforce a judgment.

Forum non conveniens

The forum non conveniens doctrine is a creature of equity. It allows a court to dismiss a case that it believes is better brought in another forum. Not all nations recognize the doctrine, but some reach a similar conclusion under other titles. The US doctrine has origin in Gulf Oil Corp. v. Gilbert, a case involving two US forums. In this case, the Supreme Court allowed courts to decline to exercise jurisdiction where public and private factors favoured another forum.

Forum non conveniens motions are presented by defendants as part of litigation strategy. If they are successful, the case is sometimes moved to a forum distant from where the case dies.

The death is because US attorneys no longer have visions of large punitive damages judgements. Indeed, they may have little involvement as attorneys in the foreign forum. One problem for defendant in obtaining a successful forum non conveniens ruling is that control over the case may be diminished or lost. If the case is moved abroad, the attorneys will not be able to appear before the foreign court, and foreign counsel must be hired. The defendant will have to learn about the foreign law and legal system. The better choice for the defendant may be to keep the matter in the US court and, at the same time, to seek the application of foreign law. Many such cases merit the application of foreign law, and when a court so rules the difficulty of proving foreign law may be an impossible burden for the plaintiff. The law is a product of equity and, as is equity, it is somewhat amorphous and difficult to foresee.

XIV. Choice of Laws and Jurisdiction for the Dispute settlement

Arbitration

The Choice of Venue and Its Effects

The venue is the place where the arbitral proceedings are to be held, and in this respect may be compared to the seat of a court of law. In arbitration, the role of venue is more important. In court proceedings the place where the judge actually signs his/her judgment is not a matter, since that will be treated as a judgment of that court, independently of the place the judgment is actually signed. In contrast, in arbitral proceedings, the choice of the venue of the arbitral proceedings produces effects in various respects. Firstly, the mandatory provisions of the lex fori shall apply. Secondly, in some jurisdictions, the arbitrators as well as state courts will apply to the proceedings the national substantive law of the forum. Thirdly, the venue may influence the validity of the arbitration agreement. The choice of a given venue may, depending on the chosen state, allow national state courts to interfere with the arbitral proceedings or prevent them from so doing. Also it may or may not allow national state courts to intervene in assistance to the proceedings. Fourthly, the choice of a given venue may favour one of the parties from the point of view of the distance, the costs to be met, and the need to instruct local counsel. If so, one of the parties may find itself in a better position than the other; the choice made may affect the possibility for a party to defend its case easily, or to ensure that its witnesses attend the hearings.

Recognition of the award in the countries where the parties reside may depend on the place of arbitration. An example of this is the Keban arbitration. There are other effects of the choice of the place of arbitration. Its being chosen by the designating authority, in the absence of a choice by the parties, has a good chance of influencing the choice of the procedural law. Even if it does not, the applicable procedural rules must comply with the procedural public policy of that particular state. For all of these reasons the place of arbitration is an element of the greatest importance in arbitral proceedings and its choice deserves particular attention.

The Choice of Laws

1. The Law Governing An Arbitration Agreement

Arbitration is a consensual process; it depends on there being a legally binding agreement between the parties. Arbitration agreements are excluded from the material scope of the Rome Convention on the Law Applicable to Contractual Obligations (Article 1(2)(d)). Accordingly, the validity and construction of an arbitration agreement are governed by its proper law, as determined by general principles of law. It follows that the proper law of the arbitration agreement may be different from the law governing the substantive dispute between the parties. If the contract contains an express choice of law, the chosen law governs the arbitration clause. If the contract does not include an express choice of law, the law governing the contract (and the arbitration agreement) is normally implied from the seat of arbitration. This is one of the sources of the forum non conveniens defence. Thus, if the parties agree to arbitrate their disputes in England yet do not make an express choice of the law governing the contract, the proper law of the arbitration agreement is normally English law.

If the parties fail to make an express choice of law and do not designate the seat of arbitration (from which a choice of law may be inferred), the 'proper law' of the arbitration agreement is, according to general principles of law, the law of the country with which it is most closely connected. Only in exceptional circumstances will this be different from the law governing the substantive contract.

In the context of proceedings for enforcement of an award under the New York Convention, it is possible for the award to be challenged on the basis that the arbitration agreement is invalid (see Article V(2)(a)).

2. The Law Governing Arbitration Proceedings

The lex arbitri, which governs the arbitral proceedings, is almost always the law of the place of arbitration. The lex arbitri is mostly a procedural law, with certain substantive elements. The line between substance and procedure is not always clear, and is not always viewed the same way in different countries. What is important to understand is the type of issues governed by the lex arbitri, how this law interacts with the rules chosen by the parties, and with substantive law governing the main contract. Arbitration proceedings include two elements: firstly, the procedure to be followed in the arbitration itself and the powers of the arbitral tribunal in relation to that procedure (the internal procedure); and secondly, the power of the court to support and supervise the arbitration (the external procedure).

Power of support includes, for example, the court's power to appoint an arbitrator and to grant an interim injunction (such as an injunction freezing the respondent's assets). The most important of the court's powers of supervision is the power to set aside an award, in the case where the arbitrator has exceeded his/her jurisdiction or where there has been serious irregularity affecting the arbitral tribunal, the proceedings or the award. The extent to which courts control arbitrations varies from country to country.

The rules determining which law governs the arbitration procedure have to try to satisfy two potentially conflicting objectives. On the one hand, the country in which the seat of arbitration is located has a legitimate interest in exercising a measure of control over local arbitrations to ensure that arbitrations proceedings meet certain minimum standards of fairness. On the other hand, arbitration is a consensual process and the parties should, as a general rule of law, be free to determine for themselves how to resolve their disputes.

The Arbitration Act 1996 of England contains provisions that seek to reconcile these competing objectives. The general principle of law is that the various provisions of the Act are 'prima facie' applicable to an arbitration whose seat is in England. Thus, if two foreign companies refer their dispute to arbitration in England, the English court has the power to remove an arbitrator on the basis of doubts as to his/her impartiality or to set aside the award if it is obtained by fraud. Most of the powers conferred by the Act are discretionary, however, and the court will have regard to the parties' connections with England when deciding whether or not to exercise its statutory powers. Where the seat of arbitration is abroad, as regards procedural questions, English law is less relevant. Certain provisions of the Arbitration Act 1996 are applicable regardless of the seat of arbitration. For example, the provisions relating to the staying of proceedings brought in breach of an arbitration clause are of universal application. There can, however, be no question of the court's being able to set aside an award on the basis of serious irregularity in a case where the seat of arbitration is abroad, even if the parties have expressly agreed that the arbitration procedure should be governed by English law.

Legal proceedings under the Arbitration Act 1996 are governed by the Civil Procedure Rules (CPR). In order for the court to have jurisdiction, the arbitration claim form, which initiates the proceedings, must be served on the defendant in accordance with the relevant procedural rules. In appropriate cases, the court will give permission for the defendant to be served outside of its jurisdiction.

3. The Law Governing the Merits of the Dispute (Substantive Law)

Where a dispute is referred to arbitration, usually the dispute arises out of a contract. The arbitral tribunal must determine which rules to apply in deciding the dispute. It is well established that the arbitral tribunal is required to apply the choice of law rules of the law of the seat of arbitration. At common law, it was assumed that English arbitrators were bound to apply the choice of law rules that were binding on the English courts. This rule was the consequence of the traditional English approach that awards could be reviewed by the courts on points of law, including a choice of law issues. Other countries have taken a different approach; an established feature of many foreign arbitration laws is a statutory provision setting out a special choice of law principles to be applied by arbitrators. The Arbitration Act 1996 broke with English tradition by introducing such a provision into English law. The choice of law rules in Section 46 deals with three different types of situation: firstly, the parties make a choice; secondly, the parties choose other considerations; and thirdly, the parties fail

to make a choice.

The first principle is that arbitral tribunal shall decide the dispute *in accordance with the law chosen by the parties as applicable to the substance of the dispute*'. The doctrine of renvoi is excluded. Arbitration is seen by some as a mechanism for avoiding the idiosyncrasies of national laws. Why should the parties not authorize the arbitral tribunal to decide the dispute by reference to other standards? There are various options that the parties might consider. Firstly, if one party is English and the other French, the parties might agree that the contract should be governed by principles common to English law and French law, or the parties might agree on principles common to the law of country X and public international law.

Secondly, the parties may wish to choose rules detached from any particular legal system. A choice of law clause may stipulate, for example, *internationally accepted principles of law governing contractual relations* (such as lex mercatoria), a non-national corpus of rules (such as the UNIDROIT PICC) or a religious law (such as Jewish law or Shari law).

Thirdly, the parties may wish the arbitral tribunal to decide the dispute by reference to principles of 'equity' or fairness rather than in accordance with strict rules of law. Arbitration under an *equity clause* is often referred to by its Latin label, arbitration ex aequo et bono or by the broadly equivalent French term, aimable composition. The Arbitration Act 1996 permits the parties to make any of these choices. It is provided that, if the parties so agree, the arbitral tribunal shall decide the dispute in accordance with such other considerations as are agreed by them or determined by the tribunal.

If the parties fail to make a choice of law, the UK Arbitration Act 1996 provides that *the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable*. It is not uncommon for parties who have little or no connection with England to agree to arbitration in England. Indeed, the parties may choose London as the seat of arbitration precisely because it is a neutral venue. In such a case, the arbitrators might choose to apply the conflict rules common to the laws of both parties' countries. Where, for example, a Singaporean claimant and a New Zealand respondent are referred to arbitration in England, the tribunal might decide that the governing law is to be determined by the *proper law doctrine* within the common law system, rather than by the choice of law rules to be found in the Rome Convention, on the basis that the proper law doctrine is applicable in both Singapore and New Zealand.

The advantage of such an approach is that it reduces the chance that the outcome of the dispute will turn simply on where the arbitration happens to be held. The arbitral tribunal is not entitled, in the absence of authorization by the parties, to ignore all choice of law rules and decide in accordance with the lex mercatoria or by reference to the arbitrators' own conception of what is fair; the arbitral tribunal must apply law, a term inapt to describe principles of fairness or the lex mercatoria.

If, in a case where the parties have not designated the applicable law, the arbitra-

tors are free in their discretion to choose conflict rules to determine the applicable law, there is a danger that the parties will be permitted to evade imperative rules imposed in the public interest which would have to be applied by the court if the parties' dispute were resolved by litigation. The extent to which arbitrators should have regard to imperative rules is a controversial issue. The practical reality, however, is that if arbitrators fail to take into account the imperative rules of a country which has a close connection with the situation (by virtue of being the seat of arbitration or the country in which the award will be enforced), there is a likelihood that the award will be legally ineffective. If England is the seat of arbitration, a party may challenge the award on the ground of serious irregularity. It is provided, for example, that the court may set aside an award contrary to public policy. An award set aside by the courts of the country in which it was made is a nullity; enforcement of such an award may be refused in any country party to the New York Convention. The New York Convention also provides that enforcement of an award may be refused on the ground that it infringes the public policy of the forum in which enforcement is sought.

The possible impact of public policy may be illustrated by a simple example. Suppose that two US corporations conclude an anti-competitive agreement to be performed exclusively in Europe. The agreement is void under Article 81 TEC (Article 101 TFEU), yet is valid under New York law, the law chosen by the parties. When a dispute arises it is referred to arbitration in England. What is the likely outcome if the English arbitrator upholds the agreement on the ground that it is valid under New York law? The answer is that the losing party may be expected to apply to have the award set aside on the ground that it infringes English public policy (which includes European public policy). Since, in the final analysis, the whole arbitration is a waste of time and money if the award is not enforceable (because, for example, it violates the public policy of the seat of arbitration), the arbitrator must, in practice, consider the potentially relevant imperative rules.

The choice of the applicable law in international arbitration, if not made by the parties, frequently is one of the most difficult issues the arbitrators have to decide. The alternative to the application by the arbitrators of a national law is the principles of international law, the general principles of the law (in foro domestico), or the lex mercatoria.

4. Principles of International Law and General Principles of the law

It must also be mentioned that, although not frequently, the parties refer to the principles of international law, or to the general principles of the law. These sources of law are used to limit the applicable scope of the legal system in question, or to fill its possible lacunae.

5. Lex mercatoria (Merchant Law)

Lex mercatoria could be understood as a system of transnational legal principles, rules and standards derived from the usages, customs, and practice of international commerce, i.e., from the customary commercial law. The lex mercatoria is not based on any legal system, but incorporates international commercial rules, general principle of law, standards, and mercantile usages. An example of today's lex mercatoria is

found in the UNIDROIT PICC. These principles are not 'law' as such, because they are not adopted as law by any jurisdiction. Rather, they are a restatement of the law of international commercial contracts. The lex mercatoria is thought to include other kinds of rules, such as the ICC's UCP 600, these are the rules that govern virtually all letters of credit; and the ICC's INCOTERMS, international commercial terms such as FOB and CIF. Some commentators include in the lex mercatoria international arbitration awards, as well as principles derived from international conventions or international public law.

Although lex mercatoria are not 'law', however, they will be accepted to govern the arbitration if the parties agree to choose them. However, it should be noted that many practitioners resist any reference to the lex mercatoria in drafting international commercial contracts between private parties. This is because the parties usually prefer a law that is accessible, clear, and has an established jurisprudence that can provide some amount of certainty. Arbitrators, too, even when using some transnational rules to reach a decision, have sometimes been reluctant to admit they are relying upon lex mercatoria. In some situations, the lex mercatoria is likely to be useful.

6. Unrelated National Law

If parties cannot agree to choose the national law of one of them, and they do not want to choose general principles of law, another option is to choose a national law of a neutral country, that is, a country with no particular relationship to any party. In most jurisdictions, the strong concept of party autonomy will permit parties to choose an unrelated national law. Parties might prefer to choose a law that is well developed in a particular sector, or simply a law of a country where many international transactions occur. A number of international conventions support free choice by parties to the law for arbitration. Party autonomy is limited, however, by imperative rule (a rule that cannot be derogated by a contract term) and by the public policy of a country. In the US, parties are not free to choose any law. Under the

Restatements (Second) of Conflict of Laws, there must be a substantial relationship between the party or the transaction and the law that is chosen, or a reasonable basis for the parties' choice. Therefore, an US court might not honour a choice of Florida law if the transaction was between a German and a Japanese company, and the transaction had no connection to Florida.

New York law is a special case. New York courts will enforce the parties' choice of New York law under certain conditions even if there is no reasonable relationship to the state. The contract (which is considered by New York courts) must not involve personal or household services, or labour, and the amount involved must be at least 250,000 USD. Moreover, if foreign parties stipulate that New York law is the law of the contract, New York courts provide personal jurisdiction and its courts may not dismiss for forum non conveniens if the amount in question is at least 1,000,000 USD. New York is trying to secure and increase its reputation as an international business centre, with ease of access to its legal system for parties with relatively significant transactions.

For example commercial contracts between states or state-controlled entities; commercial contracts between a state and a private company; the lex mercatoria have been usually referred as to the fact that neither sovereign state wants to be subject to the laws of any other sovereign state.

Litigation

Jurisdiction in the present account is used in its widest sense to refer to the question of whether a court will hear and determine an issue upon which its decision is sought.

The Choice of Jurisdiction

Usually the choice of jurisdiction will initially rest within the claimant. The claimant will commence the litigation in the courts of the country that it believes has the jurisdiction to hear the claim. However, if a company is warned that it is about to be sued in respect of a major claim, it may prefer to commence an action itself (for example, for a declaration that it is not liable). The effect of this is for the company to attempt to ensure that the proceedings are heard before a court of the jurisdiction that is most favourable to it. International Consideration to Choice of Jurisdiction The question of whether the courts of a country have jurisdiction to determine a claim will be decided according to international treaties to which a country has acceded or the national private international law (in other words, the conflict of laws provision under the national law of that country).

Choice of Jurisdiction under the Brussels Regulation Within the EU, there are several relevant treaties. The Brussels Regulation 44/2001 on the Recognition and Enforcement of Judgments in Civil and Commercial Matters was issued on 22 December 2000. This Regulation applies in respect of claims against defendants domiciled within the EU or to cases brought before courts of participating member states. The Brussels Regulation contains detailed rules on jurisdiction within the EU and defines which country has jurisdiction over a particular action. It reduces the possibility of forum shopping, that is, the number of jurisdictions in which a plaintiff may choose to commence proceedings. Choice of Jurisdiction under the Lugano Convention On 16 September 1988 in Lugano, the EFTA (European Free Trade Association) countries, namely, Austria, Finland, Iceland, Norway, Sweden and Switzerland, entered into the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters with the member states of the EC. The Lugano Convention contains materially the same provisions as those of the Brussels Regulation and has largely been superseded by the latter. The Lugano Convention is currently in force in Norway and Switzerland of the EFTA countries, as well as France, Italy, Luxemburg, the Netherlands, Portugal and the UK.

Outside the EU, there are currently no significant international treaties on the subject. This means that there is almost no harmonization. The respective rules of each country and their inter-relation have to be considered in turn. There is a proposal for The Hague Convention on International Jurisdiction and Judgments in Civil and Commercial Matters that would provide a degree of global harmonization.

The Choice of Law

The issue of which law the courts will apply in determining a dispute arising from an international agreement is governed by relevant international conventions and treaties (such as the EU directives and regulations) and/or relevant national legislations (such as the private international laws of the relevant countries involved). The questions of which law will be applied in relation to a dispute will not always be answered in the same way.

1. The Choice of Law under the United Nations Convention for the International Sale of Goods 1980 (CISG)

There is no global convention dealing with choice of law in international commercial contracts. Dealing with the substantive law, by far the most important international convention outside the EU relating to the international sales contracts is the CISG.

2. The Choice of Law under the Rome I Regulation

In England, under the traditional rules, the proper law of a contract is determined primarily by reference to any express agreement on choice of law concluded by the parties to the contract. Only in the absence of any - or any valid - express choice is reference made, secondarily, to implied choice or closest connection. For example, the Rome I Regulation specifies that a contract is governed by the law chosen by the parties, and that the choice may be made expressly by the terms of the contract.

Since no requirement of writing or other formality is required for an express choice of law, an oral agreement on the applicable law, concluded in the negotiations leading to the conclusion of a substantive contract in writing, will be effective.

Any express choice of law will usually be made by a clause contained in the contract as concluded; Article 3(2) permits an express choice to be agreed on after the conclusion of the contract. A subsequent choice could usually have retroactive effect, unless a contrary intention is indicated. In the absence of an express choice, Article 3 of the Rome I Regulation directs the court to consider next whether an implied choice of law by the parties can be discovered. It is sufficient under Article 3(1) that the parties' choice, although not expressed in the contract, is clearly demonstrated by the terms of the contract or the circumstances of the case.

The Regulation agrees with the traditional rules of English law in its post-war phase in adopting a fairly restrictive approach to the discovery of an implied choice. In the absence of any valid express or implied choice by the parties, the proper law of a contract is in most cases determined in accordance with the default rules laid down by Articles 4 and 5 of the Rome I Regulation, which favour the law of the place that has the closest connection with the performance of the contract.

Applicable Law in the Absence of Choice According to Article 4(1) of the Rome I

Regulation, to the extent that the parties have made no choice of law, expressed or implied, a contract is governed by the law of the country with which it is the most closely connected. Subject to the provisions of Paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance characteristic of the contract has, at the time of conclusion of the contract, his/her habitual residence, or, in the case of body corporate or incorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, under the terms of the contract, the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated. This rather vague rule has been developed to cover specific situations. For example, in a dispute regarding property, the law of the place where the immovable property is situated will usually apply. If one party is in a weaker position, the applicable law will often be that best suited to protect them. This is so in the case of a consumer, where the law of the consumer's habitual residence is often cited to govern.

The general presumption in Article 4(2) applies neither to contracts relating to rights in immovable property nor to contracts for the carriage of goods. Special presumptions are set out in paragraphs 3 and 4:

Contracts relating to rights in immovable property. Article 4(3) provides that *To the extent that the subject matter of the contract is rights in immovable property or a right to use immovable property, it shall presumed that the contract is most closely connected with the country where the immovable property is situated.*

Contract for the carriage of goods: A contract for the carriage of goods is presumed to be most closely connected with the country in which the carrier has, at the time the contract is concluded, his principal place of business, if that country is also the place of loading or the place of discharge or the principal place of business of the consignor. If the country in which the carrier has his principal place of business does not coincide with any of the other connecting factors, the presumption in Paragraph 4 cannot be applied.

Recommendation

1. Recommendation on the Service of Proceedings

If jurisdiction is to be exercised in respect of a party who does not reside in the territory, leave from the court is usually needed to serve proceedings outside the jurisdiction. If a company enters into a commercial agreement with an overseas party, it is desirable to include an 'agent for service' clause in the contract. This means that the other party appoints a third party resident in the company's countries to accept service on its behalf. Such appointment eliminates the need to apply to court for leave to serve proceedings outside the jurisdiction. A typical 'agent for service clause' would be 'X hereby irrevocably appoints Y as its agent for service to accept all proceedings and legal documents on its behalf'.

2. Jurisdiction Clause to Eliminate Forum Shopping

In international contracts there will be therefore often be several countries where the courts may have jurisdiction to hear a dispute. To avoid arguing with another party about where a case should be brought before considering the substance of a case, it is best to include a jurisdiction clause in the contract. An example of a jurisdiction clause is as follows: *The parties hereby irrevocably submit to the exclusive jurisdiction of the courts of Slovakia to determine all disputes in connection with this agreement*. This jurisdiction clause guarantees that the chosen courts will hear the dispute. However, it should be noted that some countries may have mandatory rules that override such a choice.

If a party commences an action in one country while the other party does not consider it to be an appropriate choice of jurisdiction, the latter party must usually oppose the choice of jurisdiction at the outset, before issuing a defence. The opposing party will need to prove in the first court that another country's courts are a more appropriate forum in which to hear the dispute. Only once the first court has decided that the courts of another country are more appropriate, will the initial action be struck out and proceedings recommended in the second country's courts. If the opposing party seeks, pending the first court's decision, to bring proceedings in the second country's courts, they will be stopped. The other party will successfully be able to stay the second set of proceedings by pleading that there is another case being brought in a different country's courts.

XV. Recognition and enforcement of the foreign arbitration´s awards and Foreign Court´s Judgements

As noted above, one of the prime reasons parties include an arbitration clause in an international contract is the relatively certain enforceability of the award. The likelihood of enforcement is high because so many countries have adopted international conventions that are pro-enforcement, that is, they provide only narrow grounds for refusing to enforce. This Section will discuss some of issues and procedures pertinent to recognition and enforcement of awards under international conventions and various national laws, as well as the limited grounds for refusing enforcement.

Application of International Conventions

The New York Convention

The New York Convention requires courts of contracting states to enforce arbitration agreements and arbitration awards. Currently, more than 140 countries are parties to the New York Convention. This Convention has contributed to the growth of international arbitration because parties in contracting states are confident that if they prevail in an arbitration hearing,

they will obtain a remedy. A recent study noted that for corporate counsel, the most important reason for choosing arbitration over litigation to settle disputes was the enforceability of awards.

Because the New York Convention is the predominant arbitration enforcement convention, this Section will focus primarily on its function, requirements, and effect. Article III of the New York Convention requires countries to recognize arbitral awards as binding, and to enforce them in accordance with national laws, consistent with the provisions of the Convention.

Although the terms *recognition* and *enforcement* tend to be said together, they have different meanings. When a court 'recognizes' an award, it acknowledges that the award is valid and binding, and thereby gives it an effect similar to that of a court judgment. Thus, a recognized award may be relied upon as a set-off a defence in related litigation or arbitration. The award has an official legal status, so that issues deter-

mined by the award usually cannot be re-litigated or re-arbitrated.

Suppose, for example, the party that prevailed in the arbitration was the respondent, and the award simply said the respondent had no liability. The respondent might want to have the award recognized in order to defeat claims on the same facts that might be brought against it in other proceedings, either before a court or in another arbitral tribunal. Enforcement means using whatever official means are available in the enforcing jurisdiction to collect the amount or otherwise carry out any mandate provided in the award.

When an award has provided that the respondent is liable to the claimant for money damages, and the respondent appears in no hurry to pay the amount awarded, then the claimant - the award creditor - may seek recognition and enforcement of the award in a jurisdiction where assets of the respondent - the award debtor - are located. In some jurisdictions, the award must first be recognized before the award creditor is able to use the enforcement mechanisms of the enforcing court. Once the award is recognized, the award creditor may use whatever methods are normally used to collect the amount of the award, for example, by seizing assets in accordance with legal procedures in enforcing jurisdiction. In other jurisdictions, there may be no practical difference between procedures for recognition and for enforcement. When the award is enforced, it is a priori recognized.

Forum Shopping for Enforcement of Foreign Arbitral Awards

Forum shopping is the search, by a party to an arbitration agreement, for the most favourable venue for the proceedings or for the place where to try to enforce or to attack the award. The premise for this choice is the identification of assets of the award debtor in the various jurisdictions. If assets are available only in one of them, frequently there will be no alternatives among which to choose. If the factual premise for a choice exists, then the interested party will compare the advantages and disadvantages of each jurisdiction. Among the basic elements to be given weight are the degree of liberalism in recognizing a foreign award and in this respect whether the New York Convention has been adopted; whether it has been implemented? how strict the notion of public policy and suitability for arbitration are? whether the enforcement proceedings may be stayed? how long these will last? whether immunity from enforcement is granted, and in which situations, to governmental agencies? what are the grounds for setting aside, and duration of the related proceedings?

Recognition and Enforcement of Foreign Arbitral Awards under the New York Convention

The New York Convention has been one of the most successful international treaties. Along with other conventions that support the enforcement of internation-

al awards, it has contributed to the growth of international arbitration as a preferred method of resolving commercial disputes. Parties are willing to engage in international arbitration because they have confidence that if they obtain an award, it will be readily enforceable in almost any country in the world where the award debtor's assets are found.

1. Requirements for Enforcement

(a) Scope: The Convention was intended to apply to international awards, and expressly states that it covers awards made in a state other than the one where enforcement is sought. It permits the enforcement of awards considered non-domestic by the enforcing jurisdiction.

(b) Jurisdiction and forum non conveniens: When an award creditor seeks enforcement in a contracting state, the presence of the award debtor's assets in that state will usually suffice to provide a jurisdictional basis for the enforcement of the award under the Convention. In the US, however, some courts have refused to enforce foreign arbitral awards either on the ground that there was no personal jurisdiction (jurisdiction in personam) over the award debtor, or that the forum was inappropriate under the doctrine of forum non conveniens. While this doctrine has been internationally criticized as regards it application to the enforcement of an arbitral award under the New York Convention, the fact is that some courts in the US have refused enforcement on these grounds. This suggests that parties should contemplate this issue in an arbitration clause, if enforcement is likely to be sought in the US.

2. Procedure for Enforcement

Procedure for enforcing an award will vary by jurisdiction, because a contracting state will enforce an award in accordance with its own rules of practice. It may not, however, impose any higher fees or any more onerous conditions on the process than would be applicable in enforcing a domestic award. The only requirements imposed by the Convention are that the party applying for recognition and enforcement must provide the court with the authenticated original award or a certified copy, and the original arbitration agreement or a certified copy. If the award or the agreement is not in the same language used in the enforcing jurisdiction, the party must provide a certificated translation of the documents. Otherwise, the procedures are determined by each jurisdiction, although are frequently similar to the procedures used to enforce court judgments within that jurisdiction.

However, the Convention also provides several defences to enforcement, including: the incapacity and invalidity; a lack of notice or fairness; the arbitrator acted in excess of authority; the tribunal or the procedure was not in accord with the parties' agreement, and the award is not yet binding or has been set aside.

Other defences to enforcement are a lack of grounds for arbitration and the violation of public policy (of that jurisdiction). The most important characteristic of those defences is that they are not based on the merits of the awards. It has been estimated that voluntary compliance combined with the court enforcement results in 98 per cent

of international arbitration awards being paid or otherwise carried out.

2. Enforcement of Foreign Arbitral Awards in Absence of International Convention

In the absence of international convention, each legal system shall apply its own procedural law to make a foreign award effective in its territory, whether through enforcement or simply through recognition. A short survey of the position of other legal systems is given here, based on published reports that, due to their respective peculiarities and to frequent changes, should be checked locally in each case.

A. Under the Italian Law

Whoever wishes a foreign award to have effect in the Italian legal system must apply to the President of the competent Court of Appeal, filing the original or a certified copy of the award and of the submission or of the contract containing the arbitration agreement. The President of that Court of Appeal, after checking that the award complies with the formal requirements of awards, that the dispute is subject to arbitration under Italian law and that the award does not conflict with Italian public policy, grants leave to enforce. The order may be opposed on various grounds and in the absence of opposition becomes final. These opposition proceedings are based on grounds very close to those provided for by the New York Convention. The decision of the Court of Appeal may be attacked before the Court of Cassation; it may also be the subject of a petition for reconsideration, if the requirements for this exist.

B. Under the Greek Law

It is reported that a foreign award, if the various requirements for this exist (such as the grounds for arbitration of the dispute, the validity of the arbitration agreement, the respect of the right of a party to put its case and to reply to its opponent's case, and evidence that the award cannot be challenged), is declared enforceable by the judge of First Instance. The award must not conflict with a previous Greek judgment issued between the same parties and which is 'res judicata', or with Greek public policy.

The Common Approaches to Recognition and Enforcement of Foreign Court's Judgments

The most fundamental tenet of the law of recognition of foreign country judgments prescribes that foreign judgments have no local legal effect. The prevailing party may not use a foreign judgment in any way to the detriment of the opposing party. A formal legal process of recognition by the local forum is required in order to make a foreign judgment legally effective in the forum. Such a formal recognition process entails an examination of several peripheral issues, including: the jurisdiction of the foreign court to give the judgment; the finality of the judgment; compliance of the proceedings in which the foreign judgment was obtained with the forum's principles of natural justice and 'due process'; and a lack of contradiction between the foreign judgment and the forum's principles of public policy. The examination deliberately ignores the merits of the dispute as the dispute has already been litigated before the

foreign forum.

Each nation, through its sovereignty is able to unilaterally decide whether and how it will use the judgments of another nation's courts. Usually, nations will give effect to foreign judgments only if doing so is in the nation's best interest. The case of China provides an interesting case study. China's laws formally entertain the possibility of recognizing foreign judgments, although in reality foreign judgments have rarely been recognized by its courts.

On this issue, there are currently two hypotheses. The first analogizes countries as being captured criminals in the canonical prisoners' dilemma. Each individual country prefers that its own judgments be recognized whenever possible, since extensive worldwide recognition generates an incentive for litigants to choose that country as a litigation venue and ensures that the legal outcome pronounced by the forum's judgments becomes truly relevant and effective.

For the international legal system as a whole, an agreement to enforce foreign judgments seems ideal. Such cooperation would engender cooperation and reduce the overall costs of litigation. However, no country rushes to recognize foreign judgments. Countries are reluctant to recognize foreign judgments in order to protect local defendants, to encourage an incoming transfer of asset and capital, and to allow additional litigation and increased income for certain influential groups.

As a sovereign entity, no country can be compelled to recognize foreign judgments. The second hypothesis argues that countries recognize at least some foreign judgments, because it directly benefits them through economic savings, rather than only through the inducement of similar behaviour from other nations. Recognizing foreign judgments decreases litigation costs for the parties and relieves the forum's overcrowded courts. The relevant assumption is that recognition of a foreign judgment would be a cheaper process through which to settle the dispute than litigating the dispute as to its merits the second time. The effect of recognition by other countries is appreciated, yet secondary. Recognition is thus a weakly dominant strategy - in other words, one that is always at least as good as any other strategy, but it may be better than other strategies depending on how the other player acts. Thus, even if the other country does not cooperate, the forum is still better off recognizing certain foreign judgments from that country. Neither of these hypotheses has won the day. The conflicting evidence supports both.

Recognition and Enforcement of Foreign Court's Judgments under International Conventions

The pursuit of recognition agreements seems to be considered by various countries as productive. However, few recognition agreements have thus far been executed. For example, the US is not a party to any such agreement, and several attempts to form such agreements to which the US would be a party have failed. Those countries that are party to such agreements are generally parties to only a few. A small number

of multilateral recognition agreements exist worldwide: two in the EU; the Inter-American Convention on Jurisdiction in the International Sphere for Extraterritorial Validity of Foreign Judgments; and three conventions for the recovery abroad of maintenance.

A recent famous attempt to produce a multilateral recognition agreement, by The Hague Convention on Private International Law, has also failed. Nevertheless, it is necessary to discuss further the content of The Hague Convention in brief in order to capture the international attempt in this regard.

The Hague Convention on Choice of Court Agreements

The Convention is the counterpart for litigation of the New York Convention, promulgated on 30 June 2005. This was published in September 2007. It has never been possible to achieve a multilateral treaty, because of the diversity of substantive and procedural laws and of legal cultures. Courts, unlike commercial arbitrators, are regarded as manifestations of national sovereignty which governments are reluctant to compromise, even in the promotion of economic growth.

Brussels and Lugano Conventions

There are currently two sets of rules in relation to recognition and enforcement of foreign judgments, depending on where the judgment in question was rendered. If it was rendered within EC/EFTA states and related to a civil or commercial matter, then the issue would be exclusively governed by the Civil Jurisdiction and Judgments Acts 1982 and 1991 ('CJJA'). However, if the judgment was rendered outside those states, then the traditional rules would apply. Matters are complicated further by the fact that the traditional law rules comprise three sets of rules. There are those rules which govern judgments of courts of Commonwealth countries to which the Administration of Justice Act 1920 (AJA 1920) applies; those which govern judgments of courts of other countries to which the Foreign Judgments (Reciprocal Enforcement) Act 1933 (FJA 1993) applies; and those of the common law which apply to judgments of courts of other countries.

Recognition and Enforcement of Foreign Court's Judgment at Common Law of England

At common law, foreign judgments have been recognized and enforced by English courts since the seventeenth century. This was initially based on the ground of *comity*. However, this theory has been superseded by *the doctrine of obligation* developed from Schibsby v. Westenholz [1870]. The true principle on which the judgments of foreign tribunals are enforced in England is that the judgment of a court of compe-

tent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce.

Requirements for recognition and enforcement: At common law, a successful litigant seeking to enforce a foreign judgment in England has to institute fresh legal proceedings, that is, s/he must sue on the obligation created by the judgment. Alternatively, s/he may plead the judgment res judicata in any proceedings that raise the same issue. If a fresh action is brought in England, s/he may apply for summary judgment under civil procedure rules, so long as the defendant has no defence to the claim as was held by Grant v. Easton [1883]. This is so, provided that the action in England satisfies the English rules as to jurisdiction and service of writs. The most essential requirement for recognizing or enforcing foreign judgments in England, whether at common law or under both the AJA 1920 and FJA 1933, is that the foreign court that rendered the judgment in question had jurisdiction in the international sense to entertain the action. In other words, the English court would not give effect to a foreign judgment unless the foreign court was jurisdictionally competent according to the English conflict of laws rules.

Questions/Exercises

1. What are negotiation, conciliation, mediation, arbitration and litigation? How would those dispute resolution modes be differentiated?
2. What are the differences between an 'ad hoc' arbitration and an institutional arbitration?
3. How courts would assist arbitral tribunals in settling international commercial disputes?
4. To what extent do you think the rules and practice within the common law system have influenced the resolution of international commercial disputes worldwide?
5. How the choice of venue would affect the process and the outcome of an arbitration?
6. How different is it between the principle of party autonomy in the context of arbitration and the principle of party autonomy in the context of litigation?
7. Where should the prevailing party seek recognition and enforcement of the arbitral award?
8. In which case where it is important to differentiate 'recognition' and 'enforcement' of the foreign arbitral award?
9. Do you agree with the premise that 'foreign judgment doesn't have local effect'? In which case where do you think the enforcement of foreign court's judgment should be favoured?
10. What is The Hague Convention on the choice of courts about? Do you believe in its success in the future?
11. Do you think a foreign court's judgment may be easier to be enforced under

the common law? And how it may be enforced?

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The National Assembly of the Slovak Republic has passed the following Act:

INTRODUCTORY PROVISIONS

Article 1

Purpose of Act

The purpose of the present Act is to determine which law shall govern civil, commercial, family, labour and other comparable relations with an international element, to regulate the legal status of aliens, as well as to set up the procedure before Slovak judicial authorities in the regulation of such relations and the decision-making in respect of such relations, and help thereby to facilitate international co-operation.

Article 2

International treaties

The provisions of the present Act shall apply only if an international treaty binding the Slovak Republic or the implementing legislation thereto do not provide otherwise.

PART I

PROVISIONS CONCERNING CONFLICT OF LAWS

AND THE LEGAL STATUS OF ALIENS

Division 1

Conflict of laws

Article 3

Legal capacity

1. Legal capacity of a person shall be governed by the law of the State of his nationality, unless the present Act provides otherwise.
2. If a foreign national concludes a legal act in the Slovak Republic, it suffices, unless the

present Act provides otherwise, if he has legal capacity to act under Slovak law.

Article 4

Legal acts

Unless otherwise provided or unless otherwise required in the interest of reasonable regulation of relations, the validity of a legal act as well as the consequences of its invalidity shall be governed by the same law which governs the effects of such an act; as regards the form of an act, however, it suffices if the law of the place where the will to act was expressed had been observed, unless the law governing a contract should require, as a condition for its validity, the written form for an act.

Rights *in rem*

Article 5

Rights relating to immovable or movable property shall be governed by the law of the place where such property is situated unless the present Act or specific legislation provides otherwise.

Article 6

The establishment and termination of rights relating to movable property shall be governed by the law of the place where the movable property was situated at the time of the fact which establishes or terminates such rights. If movable property is being transported under the terms of a contract, the establishment and termination of such rights shall be governed by the law of the place from where such property was dispatched.

Article 7

Provisions concerning entries in public records in force in place where the immovable property is situated shall apply even in cases where the legal ground for the establishment, termination, restriction or transfer of a recorded right is governed by a different law.

Article 8

Adverse possession shall be governed by the law of the place where the property was located at the beginning of the period of prescription. The person acquiring such property by adverse possession may, however, invoke the law of the State where such possession was finalised, provided all conditions for prescription under the law of that State have been fulfilled after the removal of the property to the territory of that State.

Contracts and torts

Article 9

Choice of law

1. Parties to a contract may choose the law which shall govern their mutual property relations unless specific legislation provides otherwise; they may do so tacitly, if, with regard to the circumstances, there is no doubt as to their expressed will.

2. Unless the expressed will of the contracting parties indicates otherwise, the conflict of law provisions of the chosen law shall be disregarded.
3. If the parties to a consumer contract choose a law which offers smaller protection of consumer's rights in comparison to Slovak law, their relations shall be governed by the Slovak law.

Article 10

1. In the absence of choice of applicable law by the parties, their contractual relations shall be governed by the law whose application corresponds to the reasonable regulation of the relation concerned.
2. To that effect, the following principles shall in general apply, unless specific legislation provides otherwise:
   a) sales and performance contracts shall be governed by the law of the place where the seller or performer have their seat (residence) at the time of the conclusion of the contract;
   b) contracts concerning immovable property shall be governed by the law of the place where such property is situated;
   c) transportation contracts (contracts of carriage, forwarding contracts, etc.) shall be governed by the law of the place where the transport operator or forwarding agent had their seat or residence at the time of the conclusion of the contract;
   d) insurance contracts, including contracts concerning insurance of immovable property, shall be governed by the law of the seat (residence) of the insurer at the time of the conclusion of the contract;
   e) commissions and similar contracts shall be governed by the law of the place where the person carrying out the commission had his seat (residence) at the time of the conclusion of the contract;
   f) agency and brokerage contracts shall be governed by the law of the place where the person for whom the agent or broker act had his seat (residence) at the time of the conclusion of the contract;
   g) contracts involving multilateral barter trade shall be governed by the law whose application best corresponds to the regulation of mutual relations as a whole.
3. Other contracts shall in general, unless specific legislation provides otherwise, be governed by the law of the State in which both parties have their seat (residence); if their seat (residence) is not in the same State and the contract was concluded with both parties present, the contract shall be governed by the law of the place where the contract was concluded; if the contract was concluded between absent parties, it shall be governed by the law of the seat (residence) of the party accepting the offer for the contract.

Article 11

The law determined in application of Articles 9 and 10 shall also apply to any changes to, securities for and the consequences of a breach of obligations specified there, unless the intent of the parties or the nature of the matter indicate otherwise.

Article 12

With respect to movable property, the law determined in application of Articles 9 to 11

shall govern, as regards relations between the parties, also the following issues:
a) the moment from which the right to dispose of a thing passes to the acquirer,
b) the moment from which the acquirer gains title to the products and yields of the transferred thing,
c) the moment from which the risk of damage to the transferred thing passes to the acquirer,
d) the moment from which the right to compensation for damage which occurred in connection with the transferred thing passes to the acquirer,
e) the reservation of proprietary rights to the transferred thing.

Article 13

1. Prescription of rights relating to obligations shall be governed by the law applicable to the obligation itself.
2. The setting off of claims shall be governed, unless the concern for a reasonable regulation of the legal relation concerned requires otherwise, by the law applicable to the claim to be set off against.

Article 14

Legal relations arising from unilateral legal acts shall be governed by the law of the State of the debtor's residence (seat).

Article 15

Tort claims shall be governed by the law of the place where the damage or the harmful event occurred.

LABOUR LAW

Article 16

1. Relations arising out of an individual contract of employment shall be governed - unless the parties agree otherwise - by the law of the place where the employee works. If the employee, however, works in one State under a contract of employment with an organisation which has its seat in another State, the law of the seat of the organisation shall apply, unless the employee has his residence in the State where he worked.
2. The relations of employment of transport workers shall be governed, in case of rail or road transport, by the law of the seat of the employer and in the case of river and air transport by the law of the place of registration, and in the case of maritime transport by the law of the State under whose flag the transport is carried out.

SUCCESSION

Article 17

Succession shall be governed by the law of the State whose national was the deceased at the time of his death.

Article 18

1. The capacity to make or invalidate the testament, as well as the effects of any defects of the will and its manifestation, shall be governed by the law of the State whose national was the deceased at the time he manifested his will. The same law shall apply to the determination which other forms of disposition of property upon death are admissible.
2. The form of the testament shall be governed by the law of the State whose national the deceased was at the time he made the testament; it suffices, however, if the law of the State on whose territory the testament was made had been observed. The same shall apply to the form of invalidation of the testament.

FAMILY LAW

RELATIONS BETWEEN SPOUSES

Article 19

Legal capacity of a person to conclude marriage, as well as the conditions for its validity, shall be governed by the law of the State of the nationality of that person.

Article 20

The form of celebration of a marriage shall be governed by the law of the place where the marriage is celebrated.

Article 20a

Marriage concluded abroad by a Slovak national before an authority other than an authority of the Slovak Republic duly authorised is valid in the Slovak Republic provided it is valid in the State where it was concluded and none of the circumstances excluding the conclusion of marriage under the Slovak substantive law existed. If the other spouse is not a Slovak national, his or her capacity to conclude marriage is governed by the law of the State whose national he or she is.

Article 21

1. The personal and property relations of spouses shall be governed by the law of the State of their common nationality. If the spouses have different nationalities, such relations shall be governed by the Slovak law.
2. Agreement on matrimonial property regime shall be determined under the law applicable to the property relations of spouses at the time when the agreement was concluded.

Article 22

1. Divorce shall be governed by the law of the State of the common nationality of the spouses at the time the divorce proceedings are initiated. If the spouses have different nationalities, the Slovak law shall apply.
2. If, under the provisions of paragraph 1, foreign law would be applicable which does not

permit divorce or does so under extremely difficult conditions, provided the spouses, or at least one of them, have lived in the Slovak Republic for a longer period of time, Slovak law shall apply.
3. The above provisions shall also apply to the declaration of marriage invalid or to the determination whether a marriage does or does not exist.

RELATIONS BETWEEN PARENTS AND CHILDREN

Article 23

1. Establishment of parentage (its determination or contestation) shall be governed by the law of the State whose nationality the child acquired by birth.
2. If the child lives in the Slovak Republic, parentage may be established (determined or contested) in application of Slovak law provided this is in the child's best interest.
3. For the recognition of parentage to be valid it suffices if it was done in accordance with the law of the State of recognition.

Article 24

1. Relations between parents and children, including the attribution or extinction of parental responsibility, shall be governed by the law of the State of the habitual residence of the child. In so far as the protection of the person or the property of the child so requires, the court may exceptionally take into consideration also the law of another State with which the situation has a substantial connection.
2. Parental responsibility acquired under the law of the State of the child's former habitual residence remains unchanged after a change of the child's habitual residence. If, however, one of the parents did not acquire parental responsibility which he or she would have under the Slovak law, he or she shall acquire such responsibility as of the moment when the Slovak republic becomes the place of the child's s habitual residence.
3. The exercise of parental responsibility shall be governed by the law of the State of the child's habitual residence.
4. For the purpose of this provision the Slovak Republic shall be deemed to be the place of habitual residence of minor refugees and children who, due to disturbances occurring in their country, were displaced to the territory of the Slovak Republic as well as children whose habitual residence cannot be established.

Article 24a

Maintenance obligation of parents in respect of their children shall be governed by the law of the State of the child's habitual residence. Other maintenance obligations shall be governed by the law of the State of the maintenance creditor's residence.

Article 25

1. Claims by the single mother against the child's father shall be governed by the law of the State whose national she was at the time of the child's birth.
2. If the mother, a foreign national, resides in the Slovak Republic and the child's father is a Slovak national, the mothers claims shall be governed by the Slovak law.

Article 26

1. Adoption shall be governed by the law of the State whose national is the adopter.
2. If the adopting spouses have different nationalities, the conditions for adoption specified by the laws of both national laws must be met.
3. If under paragraphs 1 and 2 a foreign law shall be applied which does not permit adoption, or does so under extremely difficult conditions, provided the adopter, or at least one of the adopting spouses, have lived in the Slovak Republic for a longer period of time, Slovak law shall apply.

Article 26a

The placement of the child in the pre-adoption care of the future adopters shall be governed by the law of the State of the habitual residence of the child.

Article 27

The question whether the consent of the child or another persons or authorities shall be required for the adoption or the establishment of similar relations shall be assessed in accordance with the law of the State of the child's nationality.

GUARDIANSHIP

Article 28

The conditions for the establishment or termination of guardianship over minors shall be governed by the law of the State of the minor's habitual residence. The guardianship shall, in principle, relate to the person of the minor and his property irrespective of its location.

Article 29

The obligation to accept and carry out the guardianship over minors shall be governed by the law of the State of the guardian's nationality.

Article 30

The legal relations between the guardian and the minor shall be governed by the law of the State where the guardianship court or authority are situated.

Article 31

The preceding provisions on guardianship over minors shall apply *mutatis mutandis* to similar measures of protection, such as the guardianship over incapable adults.

DIVISION 2

STATUS OF ALIENS

Article 32

1. Foreign nationals shall enjoy in the sphere of their personal and property rights equal rights and obligations as Slovak nationals unless the present Act or special legislation provide otherwise.
2. If another State treats Slovak nationals differently from its own nationals, the Ministry of Foreign Affairs in agreement with the competent Slovak authorities may decide that the provision of paragraph 1 shall not be applied.
3. The provisions of paragraphs 1 and 2, as regards property relations, shall apply *mutatis mutandis* to legal entities.

Article 33

Dual and uncertain nationality

1. If a person, at the relevant moment, has Slovak nationality and another State also considers such a person to be its national, the Slovak nationality shall be decisive.
2. If a person, at the relevant moment, has nationalities of several other States, the nationality acquired as last shall be decisive.
3. A person who, at the relevant moment, has no nationality or whose nationality or last acquired nationality cannot be determined shall be regarded as a national of the State of his residence at the relevant moment and, if this cannot be established, of the State where he dwelt. If the latter cannot be established either, he shall be treated as a Slovak national.

DIVISION 3

COMMON PROVISIONS

Article 34

Systems of Laws

If law of a State which has several systems of laws shall be applicable, the law of that State shall determine which particular system of law shall be applied.

Article 35

Renvoi

If under the provisions of the present Act foreign law shall be applicable and its provisions refer back to the application of the Slovak law or refer to the application of the law of a third State, such reference may be accepted if it corresponds with the reasonable and just regulation of the relation concerned.

Article 36

Ordre public

The legal provision of another State must not be applied if the effects of such an application would be contrary to principles of the social and governmental system of the

Slovak Republic and its legal system which must be complied with without reservation.

PART II

INTERNATIONAL PROCEDURAL LAW

DIVISION 1

JURISDICTION

Article 37

Unless the subsequent Articles provide otherwise, Slovak courts shall have jurisdiction if the defendant has his residence or seat in the Slovak Republic or, provided property rights are involved, if he has property there.

Article 37a

Slovak courts shall also have jurisdiction:

a) in matters relating to individual contracts of employment if the action is brought by the employee having his residence in the Slovak republic,
b) in matters relating to insurance contracts if the action is brought by the policyholder, the insured or the beneficiary and the defendant has residence or seat in the Slovak Republic,
c) in matters relating to consumer contracts if the action is brought by the consumer having his residence or seat in the Slovak Republic,
d) in matters relating to other contracts if the goods were delivered, or should have been delivered, or services were provided, or should have been provided, in the Slovak Republic; in all other cases if the place of performance was, or should have been, in the Slovak Republic.

Article 37b

Slovak courts shall also have jurisdiction:

a) in matters relating to tort, delict or quasi-delict if the harmful event occurred, or could have occurred, in the Slovak Republic,
b) in civil claims for damages arising out of a criminal offence if the prosecution is conducted by Slovak authorities,
c) in disputes arising out of operation of a branch, agency or other establishment of a legal entity if that branch, agency or other establishment is situated in the Slovak Republic.

Article 37c

Slovak courts may establish their jurisdiction over a person also by an action of the party to the proceedings:

a) if the claims are so closely connected that it is necessary to hear and examine them together to avoid the risk of irreconcilable decisions,
b) in respect of a counter-claim arising from the same facts on which the original claim was based and the Slovak court has jurisdiction over the original claim.

37d

Exclusive jurisdiction

Slovak courts shall have exclusive jurisdiction:
a) in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property if the immovable property is situated in the Slovak Republic,
b) in proceedings concerned with the registration or validity of patents, trade marks, designs or other similar rights required to be registered or deposited if the deposit or registration has been applied for or has taken place in the Slovak Republic or is deemed to have taken place there under international law.

Article 37e

Prorogation of jurisdiction

1. The jurisdiction of a court over disputes arising out of a contract or tort (delict or quasi-delict) may be established by the parties. Unless otherwise agreed upon by the parties, such jurisdiction shall be exclusive. An agreement conferring jurisdiction in matters referred to in Article 37d shall be null and void.
2. If the parties agreed that a Slovak court shall have jurisdiction, they cannot change by agreement the subject matter jurisdiction of the court.
3. An agreement conferring jurisdiction shall be in writing or evidenced in writing. If it relates to a contract in international trade or commerce, it suffices if it is done in a form which accords with the usual practice in such trade or commerce and which is regularly observed by the parties in respect of contracts of the type concerned.
4. An agreement conferring jurisdiction solely to the benefit of one of the parties shall be without prejudice to the right of that party to bring an action before a different court.
5. In matters relating to individual contracts of employment, insurance and consumer contracts, the agreement conferring jurisdiction shall be valid only if it does not exclude the jurisdiction of the courts of the State of the claimant's residence or if it was entered into after the dispute has arisen.
6. If the agreement confers exclusive jurisdiction on a foreign court, Slovak courts may be nonetheless seized if the chosen court declined exercising its jurisdiction.

Article 37f

1. If the Slovak court has no jurisdiction as to the substance of the matter, it may nevertheless, upon an application by a party, order provisional measures.
2. Such provisional measure shall have effects solely in the Slovak Republic.

JURISDICTION IN FAMILY MATTERS

Article 38

1. Slovak courts shall have jurisdiction in matrimonial matters (divorce, marriage annulment or determination whether a marriage does or does not exist) if at least one of the spouses is a Slovak national.
2. If none of the spouses is a Slovak national, Slovak courts shall have jurisdiction:
   a) if at least one of the spouses resides there and the decision is capable of recognition in the States of origin of both spouses, or
   b) if a least one of the spouses has resided in the Slovak Republic for a substantial period of time, or
   c) provided such ground of invalidity of marriage is concerned on account of which the marriage must be annulled under the Slovak law even without a motion to this effect, if both spouses live there.

Article 38a

Slovak courts shall have jurisdiction in matters of maintenance obligations if either the maintenance creditor or the maintenance debtor has his residence or habitual residence in the Slovak Republic

Article 39

1. Slovak courts shall have jurisdiction in matters of parental responsibility in respect of a minor if the minor has his habitual residence in the Slovak Republic or if his habitual residence cannot be determined.
2. Slovak courts shall also have jurisdiction in matters of parental responsibility in respect of refugee children or children who, due to disturbances occurring in their country, were internationally displaced and are present in the Slovak Republic.
3. If the Slovak court does not have jurisdiction on the substance of parental responsibility, it shall only take measures necessary for the protection of the person or the property of the child and shall inform thereof the competent authority of the State of the child's habitual residence. Such measures shall be taken by the Slovak court in application of provisions of the Slovak substantive law.
4. Slovak courts shall have, in proceedings in matrimonial matters, also jurisdiction over the question of parental responsibility of spouses in respect of their common child, provided:
   a) the child has his habitual residence in the Slovak Republic, or
   b) at least one of the spouses has parental responsibility in relation to that child, the jurisdiction of the courts has been accepted by the spouses and the exercise of such jurisdiction is in the best interest of the child.

Article 40

An application for establishment (determination or contestation) of parentage may be filed with the applicant's court of general jurisdiction in the Slovak Republic if the defendant has no court of general jurisdiction in the Slovak Republic. If the applicant has no court of general jurisdiction in the Slovak Republic either, but one of the parents or the child is a Slovak national, the application shall be filed with the court determined by the Supreme Court.

Article 41

1. The Slovak court shall have jurisdiction in matters of adoption if the adopter is a Slovak national. If the adopters are a married couple, it suffices if only one of the spouses is a Slovak national and resides in the Slovak Republic.
2. If neither the adopter nor any of the adopting spouses is a Slovak national, the Slovak court shall have jurisdiction:
   a) if the adopter, or at least one of the adopting spouses, resides there and if the court decision is capable of recopnition in the State of origin of the adopter or the adopting spouses, or
   b) if the adopter, or at least one of the adopting spouses, has resided in the Slovak Republic for a substantial period of time.

Article 41a

1. Adoption of a child who is a Slovak national and who has his habitual residence in the Slovak Republic may be declared only by the Slovak court.
2. The Slovak court has jurisdiction to declare adoption also in circumstances where, at the time of decision-making, the child no longer has his habitual residence in the Slovak Republic if the court had taken the decision on the placement of the minor child in the care of future adoptive parents.

Article 42

Jurisdiction in matters of legal capacity and guardianship

1. In matters of restriction or deprivation of legal capacity as well as guardianship the Slovak courts shall have jurisdiction if the person has his habitual residence in the Slovak Republic.
2. If the Slovak court does not have jurisdiction under paragraph 1, it shall only take measures necessary for the protection of the person or his property and shall inform thereof the competent authority of the State of the person's habitual residence. Such measures shall be taken by the Slovak court in application of provisions of the Slovak substantive law.

Article 43

Jurisdiction in matters of declaration of death

1. The Slovak court shall have exclusive jurisdiction to declare a missing Slovak national dead.
2. The Slovak court may declare a missing foreign national dead in application of the Slovak substantive law with legal effects limited to persons permanently resident in the Slovak Republic and to the property situated here.

JURISDICTION IN SUCCESSION MATTERS

Article 44

The Slovak court shall have jurisdiction in matters of succession always if the deceased was a Slovak national at the time of his death. In respect of the property situated abroad, however, the Slovak court shall proceed in the matter only if such property may be re-

leased to the Slovak authorities or if the other State recognises the legal effects of such decisions taken by the Slovak judicial authorities.

Article 45

1. The Slovak court shall proceed in a succession matter of a foreign national related to estate situated in the Slovak Republic:
   a) if the State of the deceased person's nationality neither releases the property of Slovak nationals to Slovak courts nor recognises the legal effects of their decisions, or if that State refuses to settle the estate or fails to respond, or
   b) if the deceased had his residence in the Slovak Republic and an heir residing there so requests,
   c) in all cases where immovable property situated in the Slovak Republic is concerned.
2. In all other cases the Slovak court shall only take measures necessary for the protection of the foreign national's estate.

Article 46

Jurisdiction in matters of invalidation of documents

The Slovak court shall have jurisdiction to invalidate documents issued abroad only if such invalidation may have, depending on the nature of the matter, legal effects in the Slovak Republic.

Article 47

Exemption from the jurisdiction of Slovak courts

1. Foreign States and persons who under international treaties or other rules of international law or specific Slovak legislation enjoy immunity in the Slovak Republic shall not be subject to the jurisdiction of Slovak courts.
2. The provision of paragraph 1 shall also apply to the service of documents, to summons of the aforesaid persons as witnesses, to enforcement of decisions as well as other procedural acts.
3. Slovak courts, however, shall have jurisdiction if:
   a) the object of the proceedings is the immovable property, situated in the Slovak Republic, of the States or persons specified in paragraph 1 or their rights relating to such immovable property owned by other persons, as well as their rights arising from the tenancy of such immovable property, unless the object of the proceedings is the payment of rent,
   b) the object of the proceedings is succession in which the persons specified in paragraph 1 appear not in their official capacities,
   c) the object of the proceedings relates to the exercise of employment or commercial activity which the persons specified in paragraph 1 carry out outside the framework of their official capacities,
   d) the State or the persons specified in paragraph 1 voluntarily submit to their jurisdiction.
4. Service of documents in cases specified in paragraph 3 shall be carried out by the Ministry of Foreign Affairs. If service cannot thus be performed, the court shall appoint a guardian for the purpose of receiving the documents or, as the case may be,

for the defence of rights.

DIVISION 2

PROVISIONS CONCERNING PROCEDURE

Article 48

The Slovak courts shall proceed in application of Slovak procedural rules while all parties shall have equal position in the proceedings as regards the assertion of their rights.

STATUS OF ALIENS IN PROCEEDINGS

Article 49

The capacity of foreign nationals to sue and be sued shall be governed by the law of the State of their nationality. It shall suffice, however, if they have such capacity under the Slovak law.

Article 50

Foreign nationals shall be entitled to exemption from court fees and deposits and to the appointment, free of charge, of a representative for the protection of their interests, provided reciprocity is guaranteed.

Article 51

1. If the defendant so moves, the court shall order a foreign national who seeks a decision on a property claim, to put up a bond for the payment of the costs of procedure with the proviso that should he fail to put up such a bond within the stipulated period of time, the court would not continue the proceedings against the will of the defendant and would terminate them.
2. The deposition of a bond may not be ordered if:
   a) the motion for the deposition was filed after the defendant had acted in the case or had made a procedural motion although he had known that the plaintiff was not a Slovak national or that he had lost his Slovak nationality,
   b) in the State of the plaintiff's nationality a bond would not be required from a Slovak national in comparable cases,
   c) the plaintiff owns immovable property in the Slovak Republic sufficient in value to cover the costs to be incurred by the defendant in the proceedings,
   d) the motion to initiate proceedings is dealt with by a payment order or an order to perform,
   e) the plaintiff is exempt from the payment of court fees and deposits.

Article 52

Documents issued by foreign courts and authorities, considered as public documents in the State of their origin, shall have probative force of public documents in the Slovak

Republic as well if they have been duly legalised.

DETERMINATION OF FOREIGN LAW AND RECIPROCITY

Article 53

1. The judicial authority shall take all necessary measures to determine the content of the applicable foreign law; if the content of the foreign law is not known to such an authority, it may request information to this effect from the Ministry of Justice.
2. If in the adjudication of matters specified in paragraph 1 any doubt arises, the judicial authorities may ask the Ministry of Justice for an opinion.

Article 54

A declaration by the Ministry of Justice on reciprocity in respect of another State, issued in consultation with the Ministry of Foreign Affairs and other Ministries concerned, shall be binding on the courts and other authorities.

INTERNATIONAL LEGAL ASSISTANCE

Article 55

Unless otherwise provided, judicial authorities shall communicate with foreign authorities through the Ministry of Justice.

Article 56

Slovak judicial authorities shall provide, upon request, legal assistance to foreign judicial authorities, provided reciprocity is guaranteed. Legal assistance may be denied if:

a) the performance of the requested assistance does not fall within the jurisdiction of the requested Slovak judicial authority; if, however, such assistance falls within the jurisdiction of another judicial authority or within the jurisdiction of other Slovak authorities, the request shall be forwarded to the competent authority for execution;
b) the assistance requested is contrary to the Slovak *ordre public*.

Article 57

1. The requested legal assistance shall be provided in application of the Slovak law; upon request by the foreign authority, foreign procedural rules may be applied if the requested procedure is not contrary to the Slovak *ordre public* .
2. If the foreign authority so requests, the witnesses, expert witnesses and parties may be examined under oath. The same shall apply to sworn affidavit of facts vital for the assertion or preservation of claims abroad.
3. The oath for witnesses and parties shall read as follows: „I swear on my honour that I shall say the truth and nothing but the truth about everything I am asked by the court and shall withhold nothing."
4. The oath for expert witnesses shall read as follows: „ I swear on my honour that I shall submit my expertise in accordance with my best knowledge and conscience."
5. In the case of an oath submitted after the fact, the wording shall be altered accordingly.

Article 58

If no authenticated Czech or Slovak translation is attached to a foreign document, it shall be served on the addressee if he accepts it voluntarily; the addressee shall be advised that he has to be aware of the potential legal consequences of his refusal to accept the document.

Article 59

1. Upon request by a Slovak judicial authority, the Slovak diplomatic or consular authority shall:
   a) effect service on persons in the State of their accreditation if such function is admissible under international treaties or other rules of international law, or if it is not contrary to the law of the State of service;
   b) effect service on Slovak nationals who enjoy diplomatic privileges and immunities in the State of service and examine such persons as witnesses, expert witnesses or parties;
   c) upon an authorisation by the Ministry of Foreign Affairs, examine witnesses, expert witnesses and parties as well as carry out other procedural acts if such persons appear voluntarily and if this is not contrary to the law in force in the State where the assistance shall be provided.
2. The Slovak diplomatic or consular authorities shall act in accordance with the law applicable to the requesting judicial authority and the acts performed by them shall have the same effect as if they had been carried out by the judicial authority itself.

Article 60

Service effected upon the request of a Slovak judicial authority by a foreign authority as well as evidence taken by the latter shall have legal effects even if they are not in conformity with the provisions of the foreign law as long as they are in conformity with the Slovak law.

Article 61

Certificate of Slovak law

The Ministry of Justice shall issue a certificate of the law in force in the Slovak Republic to anyone who requires it in order to assert his rights abroad. Such certificate shall neither interpret the law nor explain how it should be applied in a particular legal matter.

Article 62

Legalisation of documents

Documents issued by judicial authorities or documents authenticated by them or signed before them, which are intended to be used abroad, shall be legalised upon the party's request by:

a) the Regional Court, as regards documents issued by the District courts, notaries or *huissiers* located in the district of the Regional Court, documents or signatures authenticated by them, as well as translations made by translators or written opinions provided by experts,

b) the Ministry of Justice, as regards any other document not specified in subparagraph a).

Article 62a

Other duties of court in crossborder cases

1. A person who intends to claim maintenance abroad under an international treaty or reciprocity by bringing an action for establishment of maintenance or for enforcement of the decision of a Slovak court, may request the district court for the place of his residence to assist him in drawing up the application. The district court shall be under an obligation to draw up the application.
2. A person who intends to bring an action before a foreign court or who is a defendant in proceedings abroad may request the district court for the place of his residence to assist him in drawing up an application for legal aid to be given in the proceedings abroad under an international treaty. The district court shall be under an obligation to draw up the application.
3. The court, on a motion by the applicant and at his expense, shall arrange for the translation of an application under paragraphs 1 or 2 and its supporting documents. If the applicant meets the requirements for the provision of exemption from court fees, the costs of the translation shall be borne by the State.
4. Paragraphs 1 to 3 shall be applicable also in cases where the international treaty allows an application for the enforcement of a domestic decision abroad to be filed with the court which rendered that decision in the first instance.

DIVISION 3

RECOGNITION AND ENFORCEMENT OF FOREIGN DECISIONS

Article 63

Decisions of authorities of another State, including settlements approved by them, in matters specified in Article 1, provided that in the Slovak Republic they fall within the courts´ jurisdiction, as well as foreign authentic instruments in such matters (further referred to as „foreign decisions") shall have legal effect in the Slovak Republic if they have been recognised by the Slovak authorities.

Article 64

Conditions for Recognition

A foreign decision can neither be recognised nor enforced if

a) its recognition is pre-empted by exclusive jurisdiction of the Slovak authorities or if in application *mutatis mutandis* of the Slovak provisions on jurisdiction the foreign authority would have had no jurisdiction in the matter,
b) it neither has *res iudicata* effects nor is enforceable in the State of origin,
c) it is no decision on merits,
d) the party against whom recognition of the decision is sought has been deprived by

the foreign authority of the possibility to participate in the proceedings before it, in particular he was not duly served the summons or the document instituting the proceedings; the court shall, however, not review this condition if the decision was duly served on the party and he has not appealed it or if the party has declared that he does not insist on the review of this condition,

e) Slovak court has issued a decision, which has *res* iudicata effects, in the matter or an earlier foreign decision in the same matter was recognised or is capable of in the Slovak Republic,
f) the recognition would be contrary to Slovak *ordre public.*

Article 65

Foreign decisions in matrimonial matters and in matters involving establishment (determination or contestation) of parentage where at least one of the parties is a Slovak national and foreign decisions on adoption of a child who is a Slovak national shall be recognised in the Slovak Republic, unless precluded by the provisions of Article 64 (b) to (f).

Article 66

1. Foreign decision on the placement of the child in the care of a person or on the contact with the child may neither be recognised nor enforced if:
   a) any of the conditions set out in Article 64 (a) to (e) is not fulfilled,
   b) the child was not given the opportunity to be heard in the proceedings on the substance, unless the court dispensed with the hearing of the child for reasons of urgency or that the child was not capable to express his opinion due to his age and maturity,
   c) recognition would, taking into account the best interest of the child, be manifestly contrary to the Slovak *ordre public*.
2. The court shall not recognise a foreign order on placement or contact at the request of a person claiming that such decision infringes upon his parental responsibility if it was given, except in case of urgency, without such person having been given an opportunity to be heard.

Article 67

1. Foreign decisions in matrimonial matters, in matters involving establishment (determination or contestation) of parentage or adoption of a child shall be recognised by a specific decision of the Slovak court.
2. Foreign decision on the placement of or contacts with the child shall be recognised either by a specific decision of the Slovak court or by ordering its enforcement.
3. Any other foreign decision shall be recognised by the Slovak court by ordering its enforcement or issuing a mandate for its execution; if a foreign decision does not require enforcement, it shall be recognised in such a way that a Slovak authority takes account thereof as if it were a decision of a Slovak court. At a request by either the claimant or the defendant from the foreign decision, the Slovak court shall decide on the recognition of a foreign decision always by a specific decision.

Article 68

Effects of foreign decision

1. A foreign decision recognised by a Slovak court shall have equal legal effects as a decision rendered by a Slovak court.
2. Even without recognition a foreign decision in matrimonial matters, in matters involving establishment (determination or contestation) of parentage or adoption of a child shall have equal legal effects as a decision of a Slovak court if the parties are not Slovak nationals and if it is not contrary to the Slovak *ordre public*.

PROCEDURE ON APPLICATION FOR RECOGNITION OF A FOREIGN DECISION

Article 68a

Jurisdiction of court

The following courts shall have jurisdiction to proceed on the application for recognition of a foreign decision:

a) Regional Court in Bratislava for recognition of foreign decisions in matrimonial matters, in matters involving establishment (determination or contestation) of parentage or adoption of a child,
b) for recognition of foreign decisions on placement of or contact with the child, the district court for the habitual residence of the child and, in absence thereof, the district court for the residence of the child; when no such court exists, the District Court Bratislava I,
c) the court having jurisdiction to order enforcement of a decision or to issue a mandate for execution for recognition of decisions not covered by subparagraph b) above.

Article 68b

1. The proceedings on recognition shall commence by an application which may be filed by a person who is referred to as a party in the foreign decision and, in matrimonial matters, in matters involving establishment (determination or contestation) of parentage or adoption of a child also by a person who can manifest a legal interest in the matter.
2. Parties to the proceedings shall be the applicant and all persons against whom the foreign decision shall be recognised. If the applicant fails to specify them in the application, the parties to the proceedings shall be all persons referred to as parties in the foreign decision.
3. If the applicant has his residence or seat abroad, he shall choose a representative having residence or seat in the Slovak Republic for the purposes of service of documents. Failing to do so in a specified delay, the documents shall be deposited in the court with the effects of service; the applicant shall be advised of such a consequence.
4. The provision of paragraph 3 shall be applied *mutatis mutandis* also in relation to other parties of the proceedings if they do not have residence or seat in the Slovak Republic.

Article 68c

Elements of application for recognition of foreign decision

1. The application for the recognition of a foreign decision shall specify the court addressed, the identity of the applicant, the matter it relates to and the purpose of the application; it shall be signed and specify the date of delivery. The application shall furthermore specify the foreign decision, the name of the authority of origin, the date when the foreign decision became binding or provide information on its enforceability and it shall list all supporting documents attached to the application. The application shall be filed in a number of copies with supporting documents which would allow one copy to be retained by the court and each party to be served with one copy.
2. The application shall be supported by the following:
   a) the complete text of the original of the foreign decision or its duly certified copy,
   b) a certificate by the competent foreign authority evidencing that the foreign decision is binding or enforceable or that an ordinary appeal is no longer possible against it,
   c) documents evidencing that the ground of non-recognition under Article 64(d) was not given or a declaration by the other parties that they did not insist on the review of this ground,
   d) duly certified translations of all the supporting documents into Slovak.
3. If necessary, the court shall invite the applicant to complete his application in a delay of 15 or more days. If the applicant, failing the invitation by the court, does not rectify or complete his application and due to this the proceedings cannot be continued, the court shall terminate the proceedings. The applicant shall be advised of such a consequence.

Article 68d

1. The filing of an application for recognition of a foreign decision shall stay any proceedings for its enforcement or issuance of a mandate for its execution until the decision on the application for recognition shall have become binding.
2. If the foreign decision was appealed in the State of origin, the court proceeding on recognition or enforcement (issuance of a mandate for execution) of that foreign decision may stay its proceedings until the decision on the appeal shall have become binding.

Article 68e

Hearing the case

1. Unless one of the parties files a complaint against the recognition of a foreign order within a period of 15 day from the service of the application for recognition, the court shall not conduct a hearing in the case.
2. If the parties have declared in writing that they agree with the recognition of the foreign decision, the court shall not serve the application and shall not conduct a hearing. Such written statement by the parties shall be filed with a duly certified translation into Slovak.

Article 68f

Extent of review of foreign decision

1. The court shall be bound by the findings of fact on which the foreign authority based its jurisdiction.

2. The foreign decision may not be reviewed as to its substance.

Article 68g

Court decision

1. In matrimonial matters, in matters involving establishment (determination or contestation) of parentage or adoption of a child, the court shall decide on the application for a recognition of a foreign decision by a judgment, in all other cases it shall decide by a resolution.
2. If any of the conditions for recognition of a foreign decision is not fulfilled, the court shall refuse recognition. In all other cases it shall recognise the foreign decision.
3. If the foreign decision contains more than one verdict and the recognition is not possible or required for all of them, the court shall recognise the foreign decision only to the extent possible or required. The applicant himself may request partial recognition of a decision.

Article 68h

1. The provisions of this division shall be applicable *mutatis mutandis* to the proceedings on the application for non-recognition of a foreign decision in the Slovak Republic.
2. Provisions relating to the proceedings on the recognition of a foreign decision shall be applicable *mutatis mutandis* to the proceedings on the application for the declaration of enforceability or non-enforceability of a foreign decision in the Slovak Republic.

Article 68i

Transitional provisions

1. Proceedings on recognition and enforcement of foreign decisions commenced under the unamended legal provisions shall be finalised in application of those provisions.
2. If the Slovak court based its jurisdiction on the unamended legal provisions, its jurisdiction shall continue.
3. Jurisdiction conferred on the courts by a written agreement of the parties under the unamended legal provisions shall be retained. The validity of a choice of court agreement concluded before this amendment entered into force shall be governed by the unamended legal provisions.

FINAL PROVISIONS

Article 69

The Act No. 4l/l948 Collection of Laws on private international and interregional law and the legal status of aliens in the sphere of private law is hereby repealed.

Article 70

The present Act shall enter into force on 1 April l964[1].

[1] The last amendment entered into force on 1 July 2007.