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REAL ESTATE FROM THE PERSPECTIVE OF CZECH PRIVATE INTERNATIONAL LAW

General Remarks

This chapter considers the question of real estate from the view of Private International Law. Private international law as a legal discipline deals in general with three main areas of problems which can be, of course, widely and in detail specified. These three main areas according to a particular matter are[1]:

1) determination of law applicable to a particular question;

2) jurisdiction of national courts in such a matter;

3) treatment of a foreign judgment, especially recognition and enforcement of such a judgment.

A very important condition which has to be fulfilled in order to use the private international law rules is the presence of a relevant international element – it has to be of sufficient significance.

Hereafter we will focus on first two areas in which specificities in relation to real estate can be found while the third area holds the general character with no differences when dealing with the judgment in the matter related to the real estate. Because of this reason the third area mentioned above will not be discussed further in this chapter.

Determination of Applicable Law

Classification

The procedure how to determine the applicable law consists of several interconnected steps. The first of them is the classification of the subject-matter. Qualification could be defined as a process of analyzing the facts in order to subsume

1 M. Pauknerová, Evropské mezinárodní právo soukromé a procesní - aktuální otázky, "Evropské právo" 2003, no. 8, p. 2.

them under the certain legal rule[2], to be specific under the concrete conflicting rule of law. It is not a problem only of private international law but it is necessary to qualify the legal relationship in every case of using the legal rule as such.

Let me give you an example. A question is connected with the small construction and it is important to decide whether it is real estate or movable estate. It does not necessarily have to be a problem in the case of absence of a cross-border impact. In such a case the national legal rule is used and the problem is solved under the national law. When the cross-border impact is presented the first issue to be solved is the selection of law according to which the classification will be accomplished. Usually classification takes place according to the rules of the *lex fori*. Despite the fact that this is the most common method of classification, in case of a real estate several exemptions could be found in the international treaties on judicial cooperation. To name some examples – the treaty between former Czechoslovakia and former Yugoslavia (No. 207/1964 Sb.), or the treaty between former Czechoslovakia and former Soviet Union (No. 95/1983 Sb.), the treaty between former Czechoslovakia and Poland (No. 42/1989 Sb.), the treaty between former Czechoslovakia and Bulgaria (No. 3/1978 Sb.), or the same treaties between former Czechoslovakia and Cuba or Vietnam. All these treaties are still effective and according to their text the decision whether a thing is a real estate or a movable estate must be based on the law of a contracting state where the asset is situated. Moreover, all these exemptions are formulated only for the purposes of succession. There are also special conflicts of law rules included for these special purposes, but we will deal with this topic closely thereinafter.

Conflict of Law Rules and Determination of Applicable Law

When the legal classification is done, it is possible to proceed to the determination of the applicable law. For this purpose special legal rules were formed – a conflict of law rules (choice of law rules). These rules do not constitute the substantive legal solution of a particular matter but determine the one specific national legal order whose substantive law is used afterwards to solve the issue of fact[3]. To achieve this objective a special construction of a conflict of law rules is needed. In one part the scope (what is the matter ensues from the classification) is specified whereas the second part refers to the applicable law by using a connecting factor. From the general view of the Czech Republic these rules are contained not only in the national Act No. 97/1963 Sb., but also in international treaties and European secondary

2 N. Rozehnalová, V. Týč, Evropský justiční prostor (v civilních otázkách), Brno 2003.

3 Z. Kučera, Mezinárodní právo soukromé. Brno 2001. Or N. Rozehnalová, V. Týč, Evropský justiční prostor (v civilních otázkách), Brno 2003.

legislation. These latter sources of law have priority over national legal provisions in the case of concurrence.

Rights in Rem

When talking about real estate the most important issue to solve is the law applicable to the rights in rem. Conflicts of law rules for this topic are part of the Czech national Act No. 97/1963 Sb. with a few exceptions in international treaties.

Historically, the most important connecting factor for real estate (rights in rem) has been the principle of *lex rei sitae*. It is used also in the Czech legal order in Section 5 of the legal Act No. 97/1963 Sb. It is important to say that this principle entirely prevails even though there is a divergence for the purpose of succession. *Lex rei sitae* decides about what rights in rem are in existence, how they originate and cease or what is their capacity and effect[4].

The examples of the exceptions to be taken into consideration in international treaties are: the Treaty on juridical cooperation with Bulgaria (No. 3/1978 Sb.) and the Treaty on juridical cooperation with Poland (No. 42/1989 Sb.) where the connecting factor points the state where the real estate is – *lex rei sitae*. The treaty with Bulgaria speaks about rights in rem only whereas the treaty with Poland speaks more generally about legal relations to the real estate. Nonetheless, we incline to the interpretation within the meaning of the rights in rem. European secondary legislation in the field of private international law doesn't contain any conflict of law rules related to rights in rem to real estate.

Contracts

In this case we have to take into account also the Convention on the law applicable to contractual obligation – future ROMA I Regulation. The convention, still being not "communitarized" and thus existing as a source of international law only, is effective in the case of Czech Republic for contracts signed up on the 1st July 2006. The principle of *lex rei sitae* is used also for the contracts where the real estate is the subject-matter of such a contract (Section 10(2) of Act No. 97/1963 Sb., and Section 4(3) of the Convention). It doesn't matter whether it is a contract of purchase, working contract or mortgage contract or real burden contract. The only important condition is that the subject-matter of the contract is a right in real estate. It is not sufficient that the contract is only connected to the real estate (insurance contract)[5].

4 Z. Kučera, Mezinárodní právo soukromé, Brno 2001. p. 308.
5 Z. Kučera, L. Tichý, Zákon o mezinárodním právu soukromém a procesním. Komentář, Praha 1989.

Succession

The conflict of law rule for succession is the only exception in the Czech legal order from the principle *lex rei sitae*. According to the Section 17 of the Act No. 97/1963 Sb., legal relations in the case of succession should be governed by the *lex patrie* of decedent. Czech legal order uses so called uniform status of inheritance when both real estate and movable estate questions are subordinated to the same legal order – to the law of the citizenship of the decedent at the time of death. In case the state of the citizenship uses the split status of inheritance the usage of renvoi is possible and exploited in real juridical decision-making.

The conflict of law rules included in the international treaties on juridical cooperation (all mentioned therein before) uses for the purposes of succession also the principle of *lex rei sitae*.

Jurisdiction of Czech National Courts

In this part the practical authority granted to the Czech courts in proportion to the authority of foreign courts in matters of real estate will be dealt with. Also in this field of interest there are three levels of legal regulation – rules included in Czech national Act No. 97/1963 Sb., rules in European secondary legislation, i.e. Council Regulation (EC) No. 44/2001 on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels I), and rules included in international treaties (treaties on juridical cooperation mentioned supra). Jurisdiction of national courts in relation to foreign courts could be formed as exclusive (impact on recognition of foreign judgments which is then impossible) or shared.

Act No. 97/1963 Sb.

Jurisdiction of Czech courts in proceedings about rights in rem in real estate is not mentioned in the Act explicitly but Czech doctrine of private international law[6] regarding the interpretation of the Czech Civil Procedure Code No. 99/1963 Sb. Section 88 has reached a view of exclusive jurisdiction of Czech courts in these matters. After accession to the European Communities on 1st May 2004 the Brussels I has entered into force in the Czech Republic and while it is a Regulation, it is applied directly and has the direct effect in Member States so the national legal provisions are not used anymore if they are inconsistent with the regulation[7]. Brussels I regulation will be mentioned infra.

6 Z. Kučera, L. Tichý, Zákon o mezinárodním právu soukromém a procesním. Komentář. Praha 1989. or Z. Kučera, Mezinárodní právo soukromé, Brno 2001. p. 308.
7 A. Briggs, P. Rees, Civil Jurisdiction and Judgments, London 2005.

Another example of exclusive jurisdiction applies when the inheritance regarding real estate located in the Czech Republic is handled – Section 45(1/c) of the Act No. 97/1963 Sb.

In cases of proceedings which do not have as their object rights in rem in real estate but do have relation to real estate only shared jurisdiction asserts.

Brussels I Regulation

Section 22(1) of Brussels I which shall be used regardless of parties domicile[8] determines exclusive jurisdiction of the courts of the Member State in which the real estate is situated. It also means that the national provisions are not used any more in any occasion when it comes to this subject-matter. Usage of this provision is restricted only for proceedings which have as their object rights in rem in real estate or tenancies of immovable property. National court is obliged to comply with Section 25 while examining its jurisdiction in claims which are principally concerned with matters under Section 22 and shall declare of its own motion that it has no jurisdiction in claims it has not[9]. Many European Court of Justice decisions have interpreted this chapter and thus help to solve the problems with its application. Some of them are presented supra. Even though these are decisions from preliminary rulings to Brussels Convention Section 16, they are usable for the interpretation of Brussels I Regulation as well.

C-115/88 – Mario P. A. Reichert and others v. Dresdner Bank

The concept of "proceedings which have as their object rights in rem in immovable property" mentioned in Article 16(1) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters must be given an independent interpretation. It encompasses only those actions concerning rights in rem in immovable property which both come within the scope of the Brussels Convention and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and to provide the holders of those rights with the protection of the powers which attach to their interest .

It does not apply to an action whereby a creditor seeks to have a disposition of a right in rem in immovable property rendered ineffective as against him on the ground that it was made in fraud of his rights by his debtor.

8 J. Pontier, E. Burg, EU Principles on Jurisdiction and Recognition and Enforcement of Judgements in Civil and Commercial Matters, Hague.

9 U. Magnus, P. Mankowski, European commentaries on Private International Law. Brussels I Regulation, Munchen 2007.

C-294/92 – George Lawrence Webb v. Lawrence Desmond Webb

In order for Article 16(1) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil Matters to apply, it is not sufficient that a right in rem in immovable property be involved in the action or that the action have a link with immovable property: the action must be based on a right in rem and not on a right in personam, save in the case of the exception concerning tenancies of immovable property.

It follows that an action for a declaration that a person holds immovable property as trustee and for an order requiring that person to execute such documents as should be required to vest the legal ownership in the plaintiff does not constitute an action in rem within the meaning of Article 16(1) of the Convention.

C-73/77 – Theodorus Engelbertus Sanders v. Donald van der Putte

The concept of "matters relating to... tenancies of immovable property" within the context of article 16 of the Convention must not be interpreted as including an agreement to rent under a usufructuary lease a retail business carried on in immovable property rented from a third person by the lessor. The fact there is a dispute as to the existence of such an agreement does not affect the reply given as regards the applicability of article 16 of the Convention.

C-518/99 – Richard Gaillard v. Alaya Chekili

An action for rescission of a contract for the sale of land and consequential damages is not within the scope of the rules on exclusive jurisdiction in proceedings which have as their object rights in rem in immovable property under Article 16(1) of the Convention of 27 September 1968 between the Member States of the European Economic Community on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the Convention of 9 October 1978 .

C-241/83 – Erich Rösler v. Horst Rottwinkel

Article 16(1) of the Convention of 27 September 1968 applies to all lettings of the immovable property, even for a short term, and even where they relate only to the use and occupation of a holiday home.

All disputes concerning the obligation of the landlord or of the tenant under a tenancy, in particular those concerning the existence of tenancies or the interpretation of the terms thereof, their duration, the giving up of possession rent and of incidental charges payable by the tenant, such as charges for the consumption of water, gas and electricity, fall within the exclusive jurisdiction conferred by

Article 16(1) of the Convention on the courts of the state in which the property is situated. On the other hand, disputes which are only indirectly related to the use of the property let, such as those concerning the loss of holiday enjoyment and travel expenses, do not fall within that exclusive jurisdiction.

International Treaties

Treaties on juridical cooperation mentioned hereinbefore are quite similar when dealing with jurisdiction in the matters of real estate. They state the jurisdiction of the courts of a contracting state where the real estate is located both in succession matters or matters about rights in rem.

Final Remarks

As shown above, real estate is considered to be an important object of legal regulation of private international law as well as in other legal disciplines. With respect to its character the principle *lex rei sitae* is mostly used with some exceptions as in case of succession. This approach to the conflict of law rules is reflected in procedural rules providing jurisdiction where usually exclusive jurisdiction is given to the courts of a state where the real estate is located. These solutions are also applied in the Czech legal system.

Streszczenie

Wskazanie właściwego (mającego zastosowanie w danej sytuacji) systemu prawnego oraz jurysdykcji, tj. określenie, czy ma zastosowanie własny system (jurysdykcja), czy system (jurysdykcja) państwa obcego, jest domeną prawa międzynarodowego prywatnego. W Republice Czeskiej stosowne przepisy zawarte są w ustawie nr 97/1963 Sb. oraz w podpisanych przez to państwo umowach międzynarodowych.

W odniesieniu do władania nieruchomościami stosowana jest zasada lex rei sitae. Wyjątek stanowi dziedziczenie nieruchomości – tu w prawie czeskim przyjęto zasadę lex patrie (prawo właściwe dla zmarłego). Kwestia postępowania w sprawach praw rzeczowych i dziedziczenia nieruchomości jest przekazywana do wyłącznej jurysdykcji sądów państwa, w którym znajduje się nieruchomość. W tym aspekcie czeskie prawo krajowe nie różni się od uregulowań unijnych i norm zawartych w traktatach międzynarodowych.