



Naděžda Rozehnalová (ed.)

# **UNIVERSAL, REGIONAL, NATIONAL**

Ways of the Development of Private  
International Law in 21<sup>st</sup> Century

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# **UNIVERSAL, REGIONAL, NATIONAL**

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Naděžda Rozehnalová (ed.)



Masaryk University  
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## About the Authors

**Martin Bulla** is an assistant professor and postdoctoral researcher at the Department of International Law and European Law, Trnava University, Faculty of Law (Slovakia). He teaches graduate courses in private international law and undergraduate courses in European Union Law, European migration law and EU gender equality law. His research focuses predominately on the area of private international labour law, characterisation and protective mechanisms in private international law.

**Lucia Gandžalová** is a PhD. candidate at the Department of Commercial and Economic Law at Faculty of Law, Matej Bel University in Banská Bystrica, Slovakia. She conducts her PhD. research focused on the European Economic and Monetary Integration and since 2018 she's been participating in the project aiming the correct and uniform implementation of EU Private International Law (EU PIL) instruments in the Central European Member States – Cross-border litigation in Central-Europe: EU private international law before national courts (CEPIL).

**Michaela Garajová** is a Ph.D. student at the Department of International and European Law, Faculty of Law, Masaryk University. Her area of research is focused on corruption of parties in international trade transactions and its impact on international commercial arbitration.

**Lukáš Grodl** is a Ph.D. student at the Department of International and European Law, Faculty of Law, Masaryk University. He specializes in Private International Law and IP law. His recent research focuses in particular on non-state law in contractual obligations and private transnational commercial law.

**Gabor Hajdu** is a doctoral student at the Doctoral School of the Faculty of Law in the University of Szeged. He obtained his law degree at the Faculty of Law in the University of Szeged. During his studies, he took part in several research-based contests, and reached national first place in the famous OTDK contest, competing in the category of private international law. At the end of his studies, he received a certificate from his university for his contributions to scientific endeavours as a student. He has since been

an active researcher in foreign investment protection and international trade and economic law, with a special focus on ISDS and the new wave of free trade agreements.

**Elena Judová** graduated from the Faculty of Law, Comenius University in Bratislava. She works as a senior lecturer at the Department of International Law, European Law and Legal Communication. She teaches courses in Private International Law, European Private International Law and International Commercial Law. In her research, she focuses on Private International Law, namely family law relationships and succession with cross-border implications.

**Tereza Kyselovská** graduated from the Faculty of Law, Masaryk University (2008, 2011 and 2013), where she works as a senior lecturer at the Department of International and European Law. She teaches courses in Private International Law, international commercial law and arbitration. In her research, she focuses on issues of Private International Law and intellectual property rights.

**Radovan Malachta** is a Ph. D. student at the Department of International and European Law, Faculty of Law, Masaryk University. At the same time, he is holding the position of a junior lecturer at the same department. He teaches courses of Private International Law and International Trade Law. His area of research is primarily focused on public policy. He is interested also in Islamic family law.

**Michal Malacka** is a former dean and currently a lecturer at Faculty of Law, Palacký University Olomouc. He also acts as an arbitrator of the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic. His recent research aims on mediation and commercial arbitration.

**Nikola Pacalajová** is a PhD. candidate at the Department of Commercial and Economic Law at Faculty of Law, Matej Bel University in Banská Bystrica, Slovakia. She deals mostly with the topic of securing of creditor's claims in her publications.



**Tereza Profeldová** is a Ph.D. student at the Faculty of Law of the University of West Bohemia in Pilsen where she works on a thesis concerning doctrinal approaches to the independence of arbitrators. She is also an associate at the Law Offices Bělohávek. Her specialties are international law, cross-border insolvency and commercial relationships with an international element.

**Naděžda Rozehnalová** was born in Kroměříž, Czech Republic. She graduated from the Faculty of Law of UJEP (now Masaryk University) in 1979, obtained Doctorate in Law at UJEP in 1997, “habilitation” at Masaryk University in 1994 and was named Professor of Private International Law at Charles University in 2005. She gives lectures on Private International Law at Masaryk University. She is a member of many scientific committees. She also works as an arbitrator. She has written and published a larger number of scientific and expert papers, 10 books and textbooks for students. She also participated in a number of conferences. Between 2007 and 2015 she was the dean of the Faculty of Law and between 2015 and 2019 she was the vice-rector of Masaryk University.

**Kristina Sedláková Salibová** is a Ph.D. student at the Department of International and European Law, Faculty of Law, Masaryk University where she specializes in the area of private international law. In her thesis, she deals with the principle of *lex fori* and its position in private international law. She is also interested in legal comparative studies.

**Miroslav Slašťan** is a university lecturer and currently a professor at the Department of International Law and International Relations at the Faculty of Law of Comenius University in Bratislava. His areas of specialization are European law and constitutional law. His recent research focus aims on judicial protection of European Union Law before the Court of Justice and national courts of EU Member States.

**Jiří Valdhans** is an associate professor at the Department of International and European Law at the Faculty of Law of Masaryk University. He specializes mainly in Private International Law, commercial international law, arbitration. His recent research focuses in particular on predictability and flexibility in private international law, non-contractual obligations with

a foreign element, application of foreign law and cross-border evidence taking. He publishes in the Czech Republic and abroad.

**Zoltán Víg** obtained his degree in law (masters equivalent) at the Szeged University Faculty of Law and holds LLM and SJD in International Business Law from Central European University in Budapest. He teaches subjects related to international economic relations at the Faculty of Law, University of Szeged and business law at the Faculty of Economics, Finance and Administration (FEFA) in Belgrade. During his career he, has taught corporate law, EU law and environmental protection law. Currently, he works as a research fellow at the Hungarian Academy of Sciences, and during his earlier career, he conducted research at Max Planck and Asser Institutes, as well as at Humboldt, Hamburg, Emory and Yale Universities. He has published several books and articles in English, Hungarian, Serbia and German languages. Dr Víg also gained additional practical work experience by working for Freshfields Bruckhaus Deringer international law firm.

**Filip Vlček** is a first-year Ph.D. student at the Masaryk University's Faculty of Law. In his research, he focuses on the impact of European Union law on international commercial arbitration. Concurrently, he works as a junior associate for an international law firm in Prague.

**Kateřina Zabloudilová** is a Ph.D. student at Faculty of Law, Masaryk University. She is mainly interested in International Trade Law, Arbitration, ADR and Private International Law. In her thesis, she focuses on recognition and enforcement of both arbitral awards and court decisions. Moreover, she participated in Willem C. Vis International Commercial Arbitration Moot and worked as a team coach last academic year.

**Lucie Zavadilová** is holding the position of a junior lecturer at the Department of International and European Law, Faculty of Law, Masaryk University. She teaches courses in Private International Law. At the same time, she is a Ph.D. student at the Department of International and European Law. In her research, she focuses on Private International Law and International Civil Procedure, particularly on the issue of matrimonial property regimes having cross-border implications.

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## List of Abbreviations

<b>Act on Bankruptcy and Restructuring</b>	Act No. 7/2005 Coll., on Bankruptcy and Restructuring (Slovak Republic)
<b>Art.</b>	Article / Articles
<b>Asylum Act</b>	Act No. 100/2005 Coll., Federal Act Concerning the Granting of Asylum (Republic of Austria)
<b>BGB</b>	German Civil Code (Germany)
<b>BIT/BITs</b>	bilateral investment treaty/ bilateral investment treaties
<b>Brussels Convention</b>	Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters
<b>Brussels I Regulation</b>	Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
<b>Brussels I bis Regulation</b>	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
<b>Brussels II Regulation</b>	Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses

<b>Brussels II bis Regulation</b>	Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000
<b>Brussels II Regulation Recast</b>	Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction
<b>CISG</b>	United Nations Convention of 11 April 1980 on contracts for the international sale of goods
<b>CJEU</b>	Court of Justice of the European Union
<b>CNPC</b>	Act No. 161/2015 Coll. of laws the Civil Non-Contentious Procedure Code (Slovak Republic)
<b>COMI</b>	centre of main interests
<b>Czech Civil Code</b>	Act No. 89/2012 Coll., Civil Code (Czech Republic)
<b>Czech PILA</b>	Act No. 91/2012 Coll., on Private International Law (Czech Republic)
<b>EC</b>	European Community
<b>ECJ, alt. Court of Justice</b>	European Court of Justice
<b>EEC</b>	European Economic Community
<b>EGBGB</b>	Introductory Act to the Civil Code (Germany)
<b>EU</b>	European Union

<b>European Enforcement Order Regulation</b>	Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European enforcement order for uncontested claims
<b>European Payment Order Regulation</b>	Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure
<b>Former Czech PILA</b>	Act No. 97/1963 Coll., on Private International and Procedural Law (Czech Republic)
<b>FTAs</b>	free trade agreements'
<b>Giuliano-Lagarde Report</b>	Council Report on the Convention on the law applicable to contractual obligations by Mario Giuliano and Paul Lagarde. In: Official Journal No C 282/1 of 31 October 1980
<b>Hague Convention on Choice of Court Agreements</b>	Hague Convention on Choice of Court Agreements of 30 June 2005
<b>Hague Principles</b>	Principles on Choice of Law in International Commercial Contracts of 19 March 2015
<b>Hamburg Proposal</b>	Hamburg Group for Private International Law. Comments on the European Commission's Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations
<b>Hague Protocol on the law applicable to maintenance obligations</b>	Protocol of 23 November 2007 on the law applicable to maintenance obligations

<b>HCCH</b>	Hague Conference on Private International Law
<b>ICSID</b>	International Centre for Settlement of Investment Disputes
<b>Insolvency Regulation</b>	Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings
<b>Insolvency Regulation Recast</b>	Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings
<b>IPR</b>	Intellectual property rights
<b>ISDS</b>	Investor-State Dispute Settlement
<b>Jenard Report</b>	Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters by Mr P. Jenard. In: Official Journal No C 59/1 of 27 September 1968
<b>Maintenance Regulation</b>	Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations
<b>Matrimonial Property Regulation</b>	Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes
<b>New York Convention</b>	United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards
<b>p. / pp.</b>	page / pages

<b>para.</b>	Paragraph / Paragraphs
<b>PECL</b>	Principles of European Contract Law
<b>Property Consequences of Registered Partnerships Regulation</b>	Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships
<b>Proposal for Rome I</b>	Proposal for a regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)
<b>Rome Convention</b>	Convention of 19 June 1980 on the law applicable to contractual obligations
<b>Rome I Regulation</b>	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations
<b>Rome II Regulation</b>	Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations
<b>Rome III Regulation</b>	Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation
<b>Slovak PILA</b>	Act No. 97/1963 Coll., on Private International Law and Rules of International Procedure (Slovak Republic)

<b>Small Claims Procedure Regulation</b>	Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure
<b>Succession Regulation</b>	Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European certificate of succession
<b>Swiss CPIL</b>	Federal Code No. 291 on Private International Law (Switzerland)
<b>TEC</b>	Treaty establishing the European Community
<b>TEEC</b>	Treaty establishing the European Economic Community
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>The Hamburg Group</b>	The Hamburg Group for Private International Law
<b>UN Convention</b>	United Nations Convention on the Assignment of Receivables in International Trade
<b>Vol.</b>	Volume
<b>ZPO</b>	Code of Civil Procedure (Germany)



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## Introduction

Private International Law as a special branch of jurisprudence dealing with questions of private law including some kind of foreign element, which comes into play when private natural persons or legal entities of different states interact with one another. Private International Law serves as an instrument that helps to decide to which of the potentially relevant laws the legal issue is linked the most and helps to apply the law that has the greatest connection to the issue.

At the turn of 21<sup>st</sup> century, Private International Law gained new impulses which are associated with the communitarization at European level. As a result of the fact that legal regulation of cross-border disputes falls within the first pillar of the EU, international conventions were being replaced by regulations. Moreover, much of the so-called special part of Private International Law is nowadays regulated by the EU legislation and issues related to universal unification efforts arise. What is more, the jurisprudence of the European Court of Justice has developed significantly. The EU's competences play an important role as well as its ties with third countries including possibly and highly likely the United Kingdom. At the same time, the fragmentary unification of Private International Law reaches its limits. For instance, in the fragmentation of the general part of Private International Law – which may cause difficulties in the unification of special parts of Private International Law – or in relation to the procedural aspects of Private International Law.

The topic of the publication – Universal, regional, national – ways of the development of Private International Law in the 21<sup>st</sup> century constitutes a topic at European and global level. Thus, the topic of the publication has been selected as a core section of 13<sup>th</sup> annual traditional international conference Days of Law which took place on 21 and 22 November 2019 at the Faculty of Law, Masaryk University in Brno. Furthermore, the topic of the publication was accepted as a project of Specific Research at Faculty of Law, Masaryk University. Consequently, this publication reflects the results that have been achieved through the conference and the project by academics

and Ph.D. candidates. Contributions in this publication deal with both conflict-of-law questions as well as procedural ones.

Regarding the area of conflict-of-law rules, contributions in this publication firstly evaluate the relation between the norms of European Private International Law and international conventions. Their mutual relationship is illustrated by the example of rights in rem. Consequently, the area of succession and its universal, regional and national regulation is examined. Secondly, suitable ways of advanced application of universal norms of Private International Law are described as well as attitudes to the adaptation of both conflict and procedural solutions. Next, the question of unification of conflict-of-law rules dealing with intellectual property law is analyzed. Moreover, the issue of regional unification of the conflict-of-law rules in matters of matrimonial property regimes at EU level is looked into in this publication. The goal of this part of the publication is to analyze the doctrine of overriding mandatory provisions and consider the applicability of the public policy exceptions.

Furthermore, contributions in this publication dealing with conflict-of-law questions assess possible areas of cross-border relationships and conflict norms arising thereof. In addition, contributions also aim to analyze current values of Private International Law – the balance between the flexibility of solutions and the legal certainty in the form of predictability of decision-making process and protection of the values of a particular legal order or the society as such.

Also, contributions in this publication evaluate procedural norms, i.e. the question of international jurisdiction as well as the area of recognition and enforcement of foreign court decisions including the obligation of recognition and enforcement of court decisions published within the EU. The field of procedural norms of Private International Law is examined in view of the principles of state sovereignty and territoriality of law. Regarding the recognition and enforcement of foreign court decisions, the necessity of the recognition phase is further discussed in the publication. Next, contributions in this publication assess the relation between European Private International Law and national laws which constitute a residual regulation and may set certain guidelines arising out of procedural law. Furthermore, the

contributions in this publication evaluate the future of choice of court agreements after Brexit. It is discussed whether the Hague Convention presents a complete and comprehensive solution in terms of choice of court agreements for the United Kingdom provided that the Brussels Ibis Regulation is no longer applicable. Finally, the question of choice of court agreements in succession matters is analyzed.

The meaning and benefits of Private International Law in today's global world are undisputed. As both universal and regional aspects of Private International Law have been developing rapidly in 21<sup>st</sup> century, the contributions in this publication aim to analyze the current challenges and troublesome questions as well as to outline prospective solutions.

# The Aftermath of the Achmea Case

Tereza Profeldová\*

## Abstract

The paper deals with the implications arising from the Achmea judgment which are far reaching not only for the arbitration community. With regard to investment arbitration, the decision controversially excluded the possibility of arbitration agreements in BITs concluded between EU Member States. The lack of proper reasoning concerning individual arguments used by the CJEU is discussed. The judgment is also being taken as example of increasing practice where decisions are being made based on political needs rather than as a result of legal assessment.

## Keywords

Achmea; Case C-284/16; Investment Arbitration; Commercial Arbitration; (intra-EU) BIT; ICSID; EU Law Autonomy.

## 1 The Achmea case

On 6 March 2018, the Court of Justice of the EU (“CJEU”) rendered a decision in case C-284/16 (“*Achmea case*”). The judgment immediately drew attention of the arbitration community and is often described as the end of the current investment protection and Investor – State dispute settlement (“ISDS”) mechanism that is contained in the bilateral investment treaties (“BITs”). Considering its significance and implications for the legal relationships between states and investors, it is surprising that the CJEU restricted its findings to the mere statement, according to which Art. 267 and 344 TFEU<sup>1</sup> must be interpreted as precluding a provision in an international agreement concluded between Member States under which an investor from one of those Member States may, in the event of a dispute concerning

\* University of West Bohemia, Faculty of Law, Department of International Law, Sady Pětaticátníků 14, Pilsen, Czech Republic, tprofeld@kmp.zcu.cz

<sup>1</sup> Treaty on the Functioning of the European Union.