FROM THE EXCLUSIVE JURISDICTION IN MATTERS RELATED WITH THE VALIDITY OF THE DECISIONS OF THE COMPANY'S ORGANS TO A SPECIAL FORUM FOR INTERNAL DISPUTES WITHIN COMPANIES

[Commentary on the Judgment of the CJEU (First Chamber) of 7 March, C-560/16, *E.ON Czech Holding AG v. Michael Dědouch, Petr Streitberg, Pavel Suda*, intervener *Jihočeská plynárenská, a.s.*]

Dr. Rafael Arenas García
Professor of Private International Law
Universitat Autònoma de Barcelona

SUMMARY: According to Czech law, if a person who owns participating securities that represent at least 90% of the company's share capital, is entitled with the right to request the transfer of the participating securities owned by the minority shareholders. The decision of the general meeting of the company on the transfer of the participating securities to the principal shareholder must include the amount of the consideration that must be paid to the minority shareholders. The minority shareholders may request a court to review the reasonableness of the consideration.
The minority shareholders of a company domiciled in the Czech Republic brought an action before the Czech courts in order to obtain a reasonable consideration after having been forced to deliver their shares to the principal shareholder, a German company.
The Czech Supreme Court referred some questions for a preliminary ruling to the Luxembourg Court. The questions were related with the interpretation, in the framework of the case, of articles 5(1), 5(3) and 22(2) of Regulation No 44/2001. The Court of Luxembourg concludes that the action brought by the minority shareholders falls within the scope of article 22(2) of the Regulation (validity of the decisions of the company's organs), despite the fact that, according to Czech law, the judicial decision would not affect the validity of the resolution adopted by the general meeting.
The ruling opens the way to the creation of a specific forum on corporate litigation through an extensive interpretation of the exclusive forum of article 22(2) of the Regulation 44/2001 (24(2) in Regulation 1215/2012). It is an example of judicial activism that could pose some problems, problems that are exposed in this commentary.
KEYWORDS: Brussels I Regulation. International jurisdiction. Company law. Exclusive jurisdiction.

I. INTRODUCTION

Czech law provides that the owner of at least 90% of a company's share capital is entitled to request the compulsory transfer of all the company's other participating securities. The transfer will be decided by the general meeting of the company and that decision must include the consideration that will receive the minority shareholders. Minority shareholders have the right to request a court for a reviewing of the reasonableness of the consideration. The court decision shall be binding on the majority shareholder and the company; although the decision does not affect the validity of the resolution of the general meeting. That the judicial decision does not affect the validity

of the decision derives clearly and expressly from article 183k of the Czech Commercial Code[1].

In 2006, the general meeting of a Czech company (*Jihočeská plynárenská*) decided on the compulsory transfer of all participating securities in that company to its principal shareholder, E.ON, a German company. In January 2007 several minority shareholders of the company brought an action before a Czech regional court requesting a review of the reasonableness of the consideration decided by the general meeting of the company.

E.ON alleged the lack of jurisdiction of the Czech courts on the basis that the domicile of the defendant was located in Germany. The regional court rejected the objection on the ground that article 6(1) of Regulation No 44/2001 conferred jurisdiction to the Czech courts[2]. Probably, this jurisdiction resulted from the fact that the minority shareholders not only would have sued the majority shareholder, E.ON, but also the company, which obviously had its domicile in the Czech Republic. That would enable the jurisdiction also over E.ON on the ground of the connection between both defendants. The decision of the regional court was appealed to the High Court of Prague, which maintained the competence of the Czech courts; but now on a different basis, the exclusive jurisdiction forum in the matter of companies of article 22(2) of the Regulation No 44/2001.

The order of the High Court of Prague was appealed before the Czech Constitutional Court, who set aside the order and referred the case back to the High Court. The Prague High Court confirmed its jurisdiction; but no longer on the basis of article 22(2) of Regulation No 44/2001, but from the special forum of competence in contractual matters (article 5.1a) of the Regulation). This decision of the High Court of Prague was appealed before the Supreme Court of the Czech Republic and this court refer some questions to the European Union Court of Justice for a preliminary ruling. These questions refer to the projection on the case of three precepts of Regulation No 44/2001: article 22(2) (exclusive jurisdiction in matters of validity, nullity or dissolution of companies and validity of the decisions of their organs), article 5(1) (jurisdiction in contractual matters) and article 5(3) (jurisdiction in non-contractual matters). The answers to these questions offer the Court of Luxembourg the opportunity to analyse the rules of international jurisdiction in corporate matters.

[1] See numbers.9 and 10 of the judgment.
[2] See number 15 of the judgment.

For temporary reasons, the issues raised refer to Regulation No 44/2001; but given the continuity between this and Regulation 1215/2012, the conclusions adopted by the court will apply also to Regulation 1215/2012 (articles 24(2), 7(1) and 7(2) respectively). In any case, and as we shall see, the Court does not rule on the interpretation of article 5 of the Regulation, because the answer to question referred to article 22 makes unnecessary the consideration of the other questions[3].

First we will examine how the Luxembourg Court has interpreted article 22.2 of the Regulation 44/2001 in this case, and after that we will deal with the consequences of this judgment for the whole regulation of international jurisdiction in corporate matters.

II. BROAD INTERPRETATION OF EXCLUSIVE JURISDICTION GROUNDS?

1. Exclusive jurisdiction and autonomous interpretation

The questions referred to the European Union Court of Justice in this case show that there are some doubts about the application of article 22(2) of Regulation 44/2001 to an action rose by the minority shareholders for review of the reasonableness of the consideration that the principal shareholder is required to pay to the minority shareholders in the event of the compulsory transfer of their shares to that principal shareholder. As is well known, the exclusive forum on companies is limited, as far as the decisions of the company's organs are concerned; to cases in which the validity of the decision is discussed. The wording of article 22(2) is clear and certainly it could have been written in a different way. Thus, for example, it could have been established that the exclusive jurisdiction embraced "the validity and effectiveness" of the resolutions of the organs of the company, which would have extended the exclusive jurisdiction to cases in which the validity of the decision is not questioned. However, instead of that, the wording of article 22.2 of Regulation 44/2001 restricts the scope of application of the exclusive ground of jurisdiction to the litigation related to validity of the decisions of the company's organs. That implies that those cases related with the decisions of the company's organs, but in which it is not in question the validity of the decision, are not covered by article 22(2) of Regulation Brussels I[4].

[3] See number 46 of the judgment.
[4] See number 46 of the judgment.

The wording of article 22(2) of Regulation No 44/2001 does not, therefore, support exclusive jurisdiction of the courts of the company's domicile in all cases in which a decision adopted by a body of the company may be affected by the decision that ends up being issued; only those cases in which the validity of the decision is considered are included in the wording of article 22(2) of the Brussels I Regulation. It must also be added that, in principle, exclusive jurisdiction forums must be interpreted strictly[5]. A restrictive interpretation can pose difficulties in those cases in which is intended to exclude assumptions that fall within the literal meaning of the article; but it should not present these difficulties when the question that arises is whether the precept can be applied to assumptions that do not fall within its literal meaning. In principle, if the rule is one of strict interpretation, a negative response to such an extensive application of the rule is obliged[6]. In the decision we are commenting, however, the Court of Luxembourg concludes that it is necessary to adopt an extensive interpretation of article 22.2 of Regulation 44/2001.

That we are facing an extensive interpretation seems clear in light of the provisions of article 183k (3), (4) and (5) of the law that approves the Czech Commercial Code[7]. These articles establish that "(3) A court decision granting the right to a different amount of consideration shall be binding on the majority shareholder and the company as regards the basis of the right granted, as well as vis-à-vis the other owners of participating securities… (4) A finding that the consideration is unreasonable shall not render the resolution of the general meeting adopted under Paragraph 183i(1) invalid. (5) An application under Paragraph 131 to have the resolution of the general meeting declared invalid may not be based on the unreasonableness of the consideration". It is expressly stated that the judicial decision will not affect the validity of the social decision, so it does not seem doubtful, in principle, that we are not facing an assumption that may be included in the case of article 22(2) of the Regulation.

The Court of Luxembourg, however, arrives at another conclusion, despite the fact that it realizes that according "to a literal interpretation of the wording or Article 22(2) of Regulation Nº 44/2001, it is by no means certain that such an action comes within the

[5] See number 27 of the judgment: "Those rules of special and exclusive jurisdiction must accordingly be interpreted strictly".

[6] See number 27 of the judgment: "As the provisions of Article 22 of Regulation No 44/2001 introduce an exception to the general rule governing the attribution of jurisdiction, they must not be given an interpretation broader than that which is required by their objective".

[7] See number 10 of the judgment.

scope of that provision"[8]. How does the Luxembourg Court elude this obstacle, the wording of Article 22(2) of Regulation Brussels I? Resorting to the autonomous interpretation of the provisions of the Regulation[9]; that is, an interpretation that does not depend on the domestic law of the Member States[10]. Taking this autonomous interpretation as point of departure, the Court of Luxembourg asserts that although Czech law provides that the judicial decision over the compensation does not affect the validity of the resolution adopted by the general meeting, in fact, the court examines the partial validity of the company's resolution, since it could fix an amount for the compensation other than the one decided by the general meeting. Probably, this approach of the Luxembourg Court to article 22(2) of Regulation 44/2001 deserves some nuances.

2. Autonomous interpretation of the Regulation or European reinterpretation of domestic law?

It is doubtful that the autonomous interpretation of the Regulation could lead to the result set out in this decision. Autonomous interpretation implies that the concepts used by EU law must be applied by reference to the Regulation's scheme and purpose, without taking into consideration the categories or domestic law of the Member States. According to that, for example, the concept "validity" of art. 22(2) of Regulation No 44/2001, that cannot be interpreted or applied differently in each of the Member States, must be understood in the framework of the Regulation and considering its aim. If we follow this approach the sense of "validity" will be the same in any Member State.
It seems, however, that there are no difficulties on this point. The meaning of "validity" is not in question in the case we are commenting here, and not even what a partial or a total (in)validity is. The validity -we will risk to try an approximation to the concept- will imply the maintenance of the decision in the legal world, the preservation of that resolution discarding the existence of some kind of vice that would cause that it had to

[8] See number 24 of the judgment.
[9] See number 25 of the judgment.
[10] See number 34 of the judgment: "In the present case, while it is true that, under Czech law, proceedings such as those at issue in the main proceedings may not lead formally to a decision which has the effect of invalidating a resolution of the general assembly of a company concerning the compulsory transfer of the minority shareholders' shares in that company to the majority shareholder, the fact nonetheless remains that, in accordance with the requirements of the autonomous interpretation and uniform application of the provisions of Regulation No 44/2001, the scope of Article 22(2) thereof cannot depend on the choices made in national law by Member States or vary depending on them".

be expelled from the legal system. In the case we are considering, this “expelling” of the resolution adopted by the general meeting of the Czech company has not been considered.

On the other hand, a valid resolution adopted without any vice, could be rendered ineffective because, for example, the same body that had issued the first decision modifies it; or another body, person, authority or court approves another resolution that prevails over the first one. For example, if the board of directors agrees to transfer the company's domicile, but the general meeting of shareholders does not ratify this agreement; the decision of the board of directors will be ineffective, but this does not mean that it has not been correctly adopted and that, therefore, it must be considered valid.

In the case at hand, it seems, in the light of the tenor of Czech law, that we are not dealing with a case of invalidity of the resolution on the price of the shares that the minority shareholders are compelled to transfer; but before the prevalence of the judicial criterion over the general meeting’s one, as far as the determination of that price is concerned. That is, the proceedings before the courts do not imply a revision of the criterion adopted by the general meeting; but to request a new calculation from the courts, calculation that is supposed to prevail over the company, but without implying, as expressly stated in Czech law, that the resolution is considered invalid or incorrectly adopted.

The distinction is not a trivial one. The Czech law could have followed a different approach, an approach that would imply a revision of the resolution adopted by the general meeting, a revision based on the same criteria used by the company’s body and with the result of the nullity of the decision, the necessity of a new resolution adopted by the general meeting or the substitution of the decision of the general meeting for that of the court. In this case it could be even possible a company’s liability based on the incorrectness of the resolution. But this is not the approach of Czech law.

In fact, the Czech legislation reproduced in the judgment of the EU Court does not mean that there is an obligation on the part of the company to set a "reasonable" price. The art. 183i.3 of the law that approves the Czech Commercial Code provides only that the decision of the general meeting by which the transfer of shares is agreed shall set the amount of the consideration; but it does not indicate that a "reasonable" amount should be set, which makes sense if one thinks that such a decision can be framed in a context in which, given the circumstances, it is appropriate to pay minority shareholders a

higher or lower price than the price which would be reasonable in objective terms. If the minority shareholders agree with the decision adopted, there would be no macule in relation to the general meeting's resolution, however irrational the compensation could result in objective terms. The Court of Luxembourg, however, is unaware of this and maintains that the general meeting had the obligation to set a reasonable consideration[11], despite the Czech regulation reproduced in the judgment does not include that obligation.

It is "reasonable", however, for the Luxembourg Court to introduce this assessment because otherwise there would be no basis for considering that the judicial decision affects the validity of the general meeting's resolution. If, as seems to come from Czech law, the decision of the shareholders' meeting and the judicial decision are based on different parameters, it would be meaningless to maintain that the judicial decision affects the validity of the social decision and, as we shall see, the Court of Justice had special interest in considering that the case was covered by article 22(2) of Regulation No 44/2001.

Additionally, it could be argued that in this decision the Court is going beyond the autonomous interpretation. This autonomous interpretation implies that the concepts of EU law must be interpreted independently of the domestic law of the Member States; but in this judgment this autonomous interpretation is invoked to reinterpret Czech law. That is, the Court maintains that despite the fact that in Czech law it is clearly established that the judicial decision on the rationality of the consideration does not affect the validity of the resolution adopted by the company's general meeting, actually this affection to the validity does exist. Properly, the Court does not interpret the concept of "validity" but maintains that the Czech regulation implies a questioning of the validity of the decision[12]. From the autonomous interpretation of European Law we have moved on to the European interpretation of national law.

It is true that the Luxembourg Court could have reached this same result following another way: maintaining that the concept "validity" of article 22(2) of Regulation 44/2001 should be interpreted as any affectation not only to the decision of the

[11] See number 37 of the judgment.

[12] It is pretty clear number 37 of the judgment: "Thus, in those circumstances, a court hearing such an application for review must examine the validity of a decision of an organ of a company in so far as that decision concerns the determination of the amount of the consideration, decide whether that amount is reasonable and, where necessary, annul that decision in that respect and determine a different amount of consideration". As we have seen, Czech law expressly states that the judicial decision shall not render the resolution of the general meeting invalid. That judicial decision will be no basis for a declaration of nullity of the general meeting's resolution.

company's organs, but also to the content of that decision. If the Court of Justice would have decided to follow this approach it could have been possible to maintain that the case we are dealing with enters within the scope of article 22(2). The resolution of the general meeting is not affected by the judicial decision, as we has just seen; but the content of the resolution, the compensation, could be modified by the judicial decision, so, if "validity" could be understood as including any affection to the matters regulated by the decision, then it would be possible to admit that article 22(2) of Regulation No 44/2001 would cover the case we are commenting. This approach would arrive at the same result but avoiding the "invasion" of Czech law. Anyway, that line of reasoning presents two problems.

The first one is that, as we have seen, exclusive jurisdiction grounds of jurisdiction must be interpreted strictly, so a reading of "validity" in the way we has just explained would imply an application beyond the wording of the article, and for this reason, difficult to reconcile with the maintenance of the criterion of strict interpretation of the precept. Instead, as we have seen, it has been preferred to keep the term "validity" intact and transfer the problem to Czech law.

Secondly, the inclusion of the content of the resolution of the organ of the company in an exclusive forum would contradict the doctrine set out in the *Hasset and Doherty* judgment[13], in which the EU Court specified that it was not possible to interpret all litigation related to a decision adopted by an organ of a company as being included in the exclusive ground of jurisdiction[14]. If we follow this interpretation, it would result that the only article applicable to disputes in which one of the parties is a company would be article 22(2) of Regulation 44/200.

Thus, the Court of Luxembourg tries another approach: the autonomous interpretation of the Regulation is used to reinterpret the Czech domestic law in a way that makes possible to apply article 22(2) of Brussels I Regulation without extending the wording

[13] EUCJ (First Chamber) of 2 October 2008, C-372/07, *Nicole Hasset and South Eastern Health Board and others*. See number 23 of the judgment: "if all disputes involving a decision by an organ of a company had to be treated as coming within the scope of point 2 of Article 22 of Regulation No 44/2001, that would in reality mean that all legal actions brought against a company –whether in matters relating to a contract, or to tort or delict, or any other matter- would almost always come within the jurisdiction of the courts of the Member State in which the company has it seat".

[14] See EUCJ (Third Chamber) of 12 May 2011, C-144/10, *Berliner Verkehrsbetriebe (BVG), Anstalt des öffentlichen Rechts and JPMorgan Chase Bank NA, Frankfurt Branch*. In this decision, the Court of Luxembourg denied that when a Company plead as a preliminary issue that the decision of tis organs that led to the conclusion of a contract or to the performance of an allegedly harmful act are invalid, that confers exclusive jurisdiction upon the courts where the Company has its seat (number 34 of the judgment).

of the article. I am not sure whether this could be considered as correct from a formal point of view, but in any case, this option is linked to a certain conception of competence regulation in corporate matters. We will examine it in the following epigraph.

III. INTERNATIONAL JURISDICTION AND LITIGATION IN CORPORATE MATTERS

1. A specific basis of jurisdiction for internal disputes within companies?

In Regulation No 44/2001 the only specific forum in corporate issues is article 22(2). Excluding the cases of exclusive jurisdiction in regard to validity, nullity and dissolution of companies; as well as the validity of decisions adopted by their organs, the criteria of competence are the general ones; that is, the domicile of the defendant, the *forum connexitatis* and also the basis of jurisdiction derived from the party autonomy. It is also possible to explore the application of the rules of jurisdiction for contracts and torts. The forum based on the party autonomy is especially important, since more than twenty years ago has been admitted the possibility of including in the bylaws of the company clauses designating the competent courts for the disputes between the company and their shareholders. This kind of clauses favours legal certainty[15]. We will have to go back to this idea later.

Beyond these criteria, therefore, there is no specific forum for internal disputes within companies. The legislator did not opt for this possibility neither in the Brussels Convention nor in Regulation No 44/2001 nor in Regulation No 1215/2012. It is not, either, something strange, since there are other relevant issues that lack a specific forum in these instruments. Thus, for example, disputes over real rights over movable property.

This situation does not satisfy either Advocate General Whatelet or the Court of Luxembourg. Both of them criticized (in the Opinion delivered by the Advocate General and in the Judgment) the absence of this forum. The Advocate General is clear: "The present request for a preliminary ruling highlights a structural problem of

[15] See EUCJ de 10 de marzo de 1992, C-214/89, *Powell Duffryn plc y Wolfgang Petereit*.

Regulation No 44/2001 (which continues to exist under 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, namely the absence of a basis of jurisdiction dedicated to the resolution of internal disputes within companies, such as disputes between shareholders and directors or between the company and its directors" [16]. The Advocate General develops this assertion in the Opinion and finally proposes to abandon "a strict and formalistic interpretation of its wording" (the wording of article 22(2) of Regulation 44/2001)[17] and to move on to more flexible interpretation that would transform this article 22(2) in a specific ground of jurisdiction for internal disputes within companies[18]. The justification for this change is that the courts of the State of the company's domicile are the best placed to resolve the internal disputes within the company[19]. The Advocate General thinks that this interpretation does not harm the objective of foreseeability pursued by Brussels I Regulation "since the shareholders in a company, especially the principal shareholder, can easily foresee that the courts for the company's seat will be the courts with jurisdiction to decide any internal dispute within the company"[20].

The Judgment follows also this reasoning. Thus it establishes that the subject matter of the litigation has a close connection with the courts of the domicile of the company[21], a link that is reinforced by the fact that the resolutions adopted were based on the provisions of the law of the State of the company's registered office, and that this same law is the one that will be applied in the litigation before the courts[22]. For all these reasons, the Czech courts, the courts of the company's domicile, are the best placed to resolve the issue. This interpretation also facilitates a sound administration of justice[23] and it is consistent with the objectives of predictability and legal certainty[24]. Here the

[16] See number 21 of the Opinion.
[17] See number 32 of the Opinion.
[18] See number 36 of the Opinion: "For those reasons I consider that the present case gives the Court an opportunity to clarify the applicability of Article 22(2) of Regulation No 44/2001 to internal disputes within companies. I propose that it should be interpreted as meaning that those disputes, in particular, those between a principal shareholder and the minority shareholders in a Company in the context of a squeeze-out, fall within its scope"
[19] See numbers 32 and 33 of the Opinion.
[20] See number 35 of the Opinion.
[21] See number 39 of the Judgment.
[22] See numbers. 40 and 41 of the Judgment.
[23] See number 42 of the Judgment.
[24] See number 43 of the Judgment.

Judgment relays expressly in the Opinion of the Advocate General[25]. To round up the argument, the Judgment indicates that the general forum of the domicile of the defendant is not appropriate in this case since it may change during the existence of the company[26].

2. Specific ground of jurisdiction for internal disputes within companies, general forum and party autonomy

According to what we have seen in the last epigraph, the Court of Justice tried to resolve the problems derived of the lack of a specific forum for corporate issues. The Court interpreted article 22(2) of Regulation 44/2001 in a broad sense, transforming it in something close to a ground of jurisdiction for internal disputes within companies. The idea of a interpretation beyond the article's wording is clear in the Opinion of the Advocate General; and not so clear in the Judgment, but the final result is that article 22(2) will cover cases in which the validity of resolutions adopted by a company's organ are not in question, at least from a formalistic perspective. So we are facing a clear judicial activism that could be object of some criticism.

First, in the Opinion of the Advocate General and in the Judgment we find some assertions that deserve a comment. Thus, for example, the Opinion states that a "strict and formalistic" interpretation of the wording of article 22(2) should be abandoned. In short, that the article has to be applied beyond what its literal content allows. I think that it is not advisable to make the rules say something different from their wording. Usually, it is quite complicated to understand the different meanings that fit in the wording, so it is not a good idea to make even more difficult the application including meanings that are beyond that wording. In addition, following this approach implies harming predictability. What can be expected is to apply the rules according with their wording. The Opinion delivered by the Advocate General in this case maintains that the shareholders can foresee that the disputes related with the functioning of the company should be resolved in the State where the company has its domicile; but it could be asked: what is the basis of this forecast? If we assume that the wording does not support

[25] See number 43 of the Judgment, with a reference to number 35 of the Opinion of the Advocate General.
[26] See number 44 of the Judgment.

this interpretation of the rule[27], what elements will the shareholder take into account to make this forecast? Is not the wording of the rules the basis on which predictability is based? Of course, when the wording is ambiguous it is possible to consider all the different meanings of the wording, but in no case it is foreseeable what falls outside the wording.

Secondly. The Court of Justice bases the jurisdiction of the courts of the company's domicile on arguments that are not usually used as justification for a specific ground of jurisdiction. Thus, the application of Czech law to the case (which is taken for granted although there is no specific justification for that application) or the existence of a "close link" between the litigation and the Czech courts, “close link” derived from the circumstance that the company was established in Czech Republic.

It is true, as the Court reminds us, that the connection between the company and the State of its domicile justifies the exclusive jurisdiction of the courts of such domicile in disputes relating to the validity, nullity or dissolution of the company and those that deal with the validity of the resolutions adopted by the company’s organs; but there is no argument that justify that this connection should be used also for other issues related with the functioning of the company. In any case, these arguments in the Opinion of the Advocate General and in the Judgment should have some link with the wording of the Regulation. It would be necessary some anchoring in the text in order to avoid the impression that we are facing a pure exercise of judicial decisionism.

Finally, the Court of Luxembourg introduces a specific basis of jurisdiction for internal disputes within companies through article 22(2) of Regulation 44/2001. So, as this is an exclusive ground for jurisdiction it is necessary not only to justify that the issue presents a meaningful link with the forum, but also that alternative forums should not be considered. For this reason we must consider the relationship of this forum with the ground of jurisdiction based on the defendant’s domicile and with the party autonomy. As we are going to see, the Judgment considers the first problem (the relationship between the specific forum for internal disputes within companies) but there is no reference to the other question.

For sure, there is something we are missing in the decision. In a case like this, usually the action for a review of the compensation would be addressed not only against the principal shareholder but also against the company. As the company has its seat in the

[27] See number 22 of the Opinion.

Czech Republic, the *forum coneexitatis* of article 6(1) of Regulation 44/2001 would allow that the courts of the Czech Republic would have jurisdiction to decide the issue. The judgment does not explain the reasons for not considering this article 6(1) and finally only article 22(2) has been used to justify the jurisdiction of the Czech courts and, as we have just seen, that implies that the ground of jurisdiction based in the defendant's domicile must be excluded, and this is not problem-free.

If we assume the convenience of a modification of the Brussels I Regulation in the sense of including a special jurisdiction for internal disputes within a company, this forum should not, initially, exclude the general forum of the domicile of the defendant. It seems that since the Court cannot create such a special forum the only way to establish in this case the jurisdiction of the Czech courts is article 22(2) of Regulation No 44/2001. As this article establishes an exclusive ground of jurisdiction is necessary to justify the inadequacy of the forum of the defendant's domicile. I think that the reasons provided to justify that this forum is not adequate are not convincing enough

The Court of Justice affirms that the courts of the domicile of the defendant are not the best placed to hear the case and resolve[28] and that, as we have seen, the forum of the defendants domicile is not the most foreseeable, taking into consideration that the main shareholder of the company can change during its existence. Actually, these circumstances - foreseeability and connection to the case - would be more appropriate to justify a special forum based on the matter of the case, than to deny relevance to a general forum such as the domicile of the defendant.

This kind of forum (the general forum) is not justified by the connection with the case, but for procedural reasons (the claimant must follow the defendant, *actor sequitur forum rei*) [29]. Additionally, foreseeability does not seem to be an argument against the defendant's domicile forum. In fact, it is expected that the courts of the defendant's domicile had jurisdiction to decide the dispute. This jurisdiction will also facilitate the execution of the decision.

If the intention is to justify an exclusive ground of jurisdiction would be necessary to explain that the jurisdiction of courts others than the courts of the company's domicile will cause some kind of inconvenience. These problems could be linked to the

[28] See number 34 of the Opinion.

[29] See, J. Kropholler, *Europäisches Zivilprozeßrecht*, Heidelberg, Recht und Wirtschaft, 7ª ed. 2002, p. 113; P. Vlas, "General Provisions", in U. Magnus/P. Makowski (eds.), *Brussels I Regulation*, Munich, Sellier, 2007, pp. 69-77, p. 71; P. Makowski, in Th. Rauscher (ed.), *Europäischez Zivilprozess- und Kollisionsrecht EuZPR/EuIPR Kommentar*, Munich, Sellier, 2011, p. 173. Only by way of exception could be refused the jurisdiction of the courts of the defendant's domicile (*cf.* P. Vlas, *loc. cit.*).

execution of the decision issued (as it happens in the case of the exclusive jurisdiction on rights *in rem* in immovable property) or to the respect of the sovereignty of the countries (as in the case of the exclusive jurisdiction in proceedings concerned with the enforcement of judgments)[30]. Does the EU Court of Justice think that these reasons justify the exclusive ground of jurisdiction for internal disputes within companies and for these reasons is not adequate to maintain for these cases the basis of jurisdiction of the defendant's domicile? It seems so, even in the absence of an indication in this regard by the European legislator.

The approach of the Luxembourg Court not only goes beyond the wording of the rule, as explicitly stated by the Advocate General; it also incurs in certain contradiction with previous decisions of the court itself. Specifically, the one that held that it was possible to conclude choice of court agreements in relation to the litigation that arises between the company and its shareholders, when they were acting in their condition of shareholders. The aforementioned *Powell Duffryn* judgment[31] established that it was possible to include in the statutes of accompany limited by shares a clause conferring jurisdiction on a court of a Member State to settle disputes between the company and its shareholders[32]. I do not believe that it raises many doubts that the disputes referred to in the *Powell Duffryn* judgment were internal disputes within the company. In that case the action introduced was aimed to obtain from the shareholder the payment of the amounts due in respect to the increase in capital of the company and the recovery of dividends wrongly paid[33].

Taking into consideration what the Court of Luxembourg maintains in the judgment we are commenting here, the disputes in *Powell Duffryn* would be considered as issues covered by article 22(2) and as a consequence the choice of court would not be possible since, as is known, the choice of court agreements are not admissible in matters covered by an exclusive ground of jurisdiction[34]. Certainly, on that moment this question was

[30] The justification of an exclusive ground of jurisdiction derives not only from the connection of the case with the forum, but also from sovereignty reasons (P. Mankowski, en Th. Rauscher (ed.), *op. cit.*, p. 469) or from the nature of the matter in dispute (L. de Lima Pinheiro, in U. Magnus/P. Mankowski (eds.), *op. cit.*, p. 348).

[31] See *supra* footnote number 15.

[32] See number 3 of the *Vid.* number 3 of the ruling in the Judgment *Powell Duffryn*: "The requirement that a dispute arise in connection with a particular legal relationship within the meaning of Article 17 is satisfied if the clause conferring jurisdiction contained in the statutes of a Company may be interpreted as referring to the disputes between the Company and its shareholders as such".

[33] See number 2 of the judgment *Powell Duffryn*.

[34] See G.A.L. Droz, *Compétence judiciaire et effets des jugements dans le Marché Commun*, Paris, Dalloz, 1972, p. 127.

not raised, since no one seemed to assume that litigation in corporate matters could constitute the subject of an exclusive forum; but the generalization of the doctrine given on the *E.ON Czech Holding AG* judgment would imply that the companies bylaws could no longer be used to determine the competent forum for internal litigation within companies.

It is true that, as long as the clauses of choice of court agreements in the statutes of companies will usually confer jurisdiction to the courts of the domicile of the company, the election will lead us to the "new" exclusive ground of jurisdiction for company litigation: the company's domicile; but we can not fail to take into account that the determination of the domicile will be made in each State in accordance with its domestic law[35], which could imply that several States consider the company as simultaneously domiciled in each one of them. It is true that the case law of the Luxembourg Court on freedom of establishment of companies could be projected on this issue, limiting this reference to the domestic law and obliging in intra-community cases to consider that the company is domiciled in the territory of the State in which it has been incorporated[36]. However, this solution could be subject to nuances depending on the matters dealt with, so it could not be ruled out that in internal disputes within the company, courts of different Member States could claim jurisdiction to resolve the controversy; all of them applying the ground of jurisdiction of article 22(2)[37]. In these cases the choice of court in the company bylaws could eliminate or reduce the uncertainties that would be derived from this multiplicity of forums. Maybe unfortunately, the doctrine contained in the judgment of 7 March 2018 will difficult this election, because, as we have seen, this choice of forum cannot be used in matters covered by the exclusive grounds of jurisdiction[38].

IV. CONCLUSION

The absence in the Brussels I Regulation of a specific basis of jurisdiction dedicated to the resolution of internal disputes within companies is per perceived by the

[35] Article 22(2) *in fine* of Regulation No 44/2001: "In order to determine that seat, the court shall apply its rules of private international law". The wording in Regulation 1215/2012 is the same.

[36] Thast is the proposal of A. Espiniella Menéndez, "Perspectiva judicial de la libertad de establecimiento", in R. Arenas García/C. Górriz López/J. Miquel Rodríguez (coords.), *La internacionalización del Derecho de sociedades*, Barcelona, Atelier, 2010, pp. 129-155, pp. 131-134.

[37] *Ibidem*, pp. 139-143.

[38] See article 23(5) of Regulation No 44/2001 and article 25(4) of Regulation No 1215/2012.

Luxembourg Court as a problem. The judgment of 7 March 2018 has allowed the Court to move towards the construction of that forum through a "broad" interpretation of the exclusive ground of jurisdiction for the validity, nullity and dissolution of companies and the validity of the decisions of their organs. This broad interpretation is very clear in the Opinion of the Advocate General, but the judgment opts for a more "discreet" approach that, however, ends up leading to a reinterpretation of the domestic law of the national court. It is doubtful whether this “European reinterpretation” of national law is justified according to an autonomous interpretation of the European law.

This broad interpretation could challenge the possibility of introducing clauses of election of the court in the statutes of the companies; so, in some way this decision affects the doctrine established in *Powell Duffryn*.

This ruling confirms, therefore, the "quasi-legislative" nature of the Court of Luxembourg, which on this occasion expresses - albeit in the Opinion of the Advocate General - its purpose of correcting those "defects" that could be found in European Law.