Themis Competition | Luxembourg 2015

European Civil Procedure

# Jurisdiction over Disputes against Consumers in the EU

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**Index**

## 1. Introduction

In recent years, Consumer law has become a significant and rapidly developing legal field on both national and European level. Consumers are protected both by means of substantive and procedural civil law. Thanks to the internal European market the disputes with international elements have become more frequent. Therefore already in 1968 the member states of the European Communities have concluded the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968) [1] (hereinafter *Brussels Convention*) which also included provisions regulating jurisdiction over consumer contracts.[2] In 2000 the European Council adopted Regulation (EC) No 44/2001 (hereinafter *Brussels I*) which replaces the 1968 Brussels Convention. Nowadays the legal framework of jurisdiction over consumer contracts is provided by Council Regulation (EC) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter *Brussels I bis*).

Taking into consideration that the main principles and ruling of the Brussels Convention, Brussels I and Brussels I bis are the same, the interpretation of the older provisions is also valid for the actual regulation Brussels I bis.[3] Therefore, the older decisions of the Court of Justice of the European Union (hereinafter the CJEU) are always applicable. Despite the regulation in Brussels I bis and increasing case law of the CJEU specifying rules concerning this subject, there are still areas which remain speculative.

The *purpose of our paper* is to critically revise Czech and European regulation from the practical point of view, ascertain and describe difficulties and propose functioning solutions. Furthermore, we want to bring into focus that not all of the rules regulating jurisdiction are crystal clear and some legal interpretation of actual situations may be ambiguous. We would like to focus on very practical questions and situations that can occur in everyday work of judges dealing with disputes against consumers with international elements. The text is based on our experience, which we would like to share. Due to practical constraints, this paper *cannot provide* a comprehensive review of the problems with prorogation of jurisdiction in disputes against consumers and of the

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1 The Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the accession of the Hellenic Republic and by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic Accession Convention. The 1968 Brussels Convention continues to apply to the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 355 of the TFEU.

2 Sec. 4, Art. 13-15 (Text as amended by Article 10 of the 1978 Accession Convention).

3 Case C−189/08 Zuid-Chemie [2009], paragraph 18.

insurance, as well as employment contracts, where the weaker party should be also protected by rules of jurisdiction.

## 2. Czech Procedural Regulation

From the point of view of a Czech judge, the simplest situation which can occur in disputes against consumers is when there is no international element. Basically, there is no special procedural consumer protection in the field of jurisdiction[4] in the Czech Civil Procedure Code (hereinafter as CPC), instead general regulations apply. The very first thing any Czech court must do after an action is brought before it is to examine *procedural conditions*.[5]

As stipulated in CPC, legal proceedings are held at the court of the subject-matter and territorial jurisdiction.[6] For determining the territorial and subject-matter jurisdiction, the factors are those existing at the start of the lawsuit.[7] The subject-matter jurisdiction is in the disputes against consumers unproblematic and in the vast majority of cases the disputes are dealt with by the district courts.[8]

As far as the territorial jurisdiction is concerned, the court with general jurisdiction over any defendant (natural person – consumer) is a court in a district of the person's domicile. If the persons are of no domicile, any court in a district they are staying in is considered to be the court with general jurisdiction, unless determined otherwise.[9] In relation to any disputes arising from the consumer contracts, the parties are not allowed to decide on a territorial jurisdiction of a different first instance court (*local prorogation*).[10] If the subjects of the proceeding are under the jurisdiction of the Czech courts (there is no international element), but the determining factors for the territorial jurisdiction are missing or cannot be found, i.e. if the first instance court cannot find either the location in which the defendant had a domicile or where they were staying or where they had their belongings the Supreme Court determines the territorial affiliation in regard to the economy of the proceedings.[11]

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4 With the exception of a test of unfairness of a term conferring jurisdiction according to the CJEU Case C-243/08 Pannon GSM Zrt. v Erzsébet Sustikné Győrfi [2004].

5 See sec. 103 CPC, i.e. whether parties have their procedural personality (sec. 19 CPC), whether the court has its subject-matter (104a CPC) and territorial jurisdiction (105 CPC), and last but not least whether court fee was paid (Act on Judicial Charges. No. 549/1991 Col.).

6 Sec. 11 CPC.

7 Sec. 11 CPC.

8 Sec. 9 subs. 1 CPC.

9 Sec. 85 subs. 1 CPC.

10 Sec. 89a a contrario, the territorial jurisdiction of a court of the first instance may be agreed only by the parties that pursue commercial or professional activities, see also the Resolution No. 93 Co 214/2014-25.

11 Sec. 11 subs. 1 CPC. From the practical point of view this provision is not often used because it can be presumed that the Supreme Court would decide that the first instance court, which already begun with the proceedings, should continue (in case there is no close connection to another district court in the country).

The domicile of a natural person (consumer) is ascertained as follows. A court always identifies the defendant´s address in the *central register of citizens*. However, only the permanent residence addresses are provided there. The difference between domicile and permanent residence is explained as follows: The *domicile* of a natural person is a municipality in which the person resides with the intention of staying permanently.[12] However, the *permanent residence* is used by regulations of the administrative law in charge of record keeping of the citizens. Location in which a natural person is staying is a location where the person is staying without the intention of having a permanent residence there. Furthermore, a natural person is allowed to have more than one domicile whereas a natural person is not allowed to have more than one permanent residence address.[13] This distinguishing is not mere theory, but it has the actual impact on proceedings: only on the basis of knowledge of permanent residence address a court cannot declare its lack of territorial jurisdiction.[14] That means the court is obliged to find out where the defendant really resides with the intention of staying permanently so that the proceeding can continue. The instruments that a court has for it are not many. In practice, the court tries to serve the defendants with the document which instituted the proceedings. From the acknowledgement of receipt, it can be ascertained, whether the defendants have accepted the summons with their signature or at least that they have a mailbox at the address the court knows.

The *responsibility of the participant for the existence of the delivery address* was introduced into the Czech civil law in 2009.[15] The amendment to the CPC has introduced a possibility of delivering by means of *legal fiction***.** If the delivery service cannot reach the recipient, it stores the documents and leaves a written notice at the recipient's, announcing the delivery together with an appeal for collecting the documents. If the recipient does not request the documents within the next 10 days after the delivery, the documents are considered delivered on the 10th day after the delivery time, even if the recipient does not respond to the appeal.[16] After an expiration of the delivery time, the documents are delivered to the mailbox used by the recipient.[17]

Delivering by legal fiction is often connected with the use of "*Qui tacet, consentire videtur clause*". Specifically, if the court asks a participant to respond to a motion that is relevant to procedure in the proceedings it is allowed to send it with an attachment giving the participants a

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12 Sec. 80 subs. 1 of the Czech Civil Code No. 89/2012 Col.

13 Decision of the Czech Supreme court of 2.6.2005, NS 30 Cdo 444/2004.

14 Nevertheless some district courts tend to do it, what end up in a long dispute, because the controlling mechanism of the higher courts return the file back (see sec. 105 subs. 3 CPC).

15 No 7/2009 Col., effective from 1 July 2009.

16 With an exception of some special decisions that cannot be delivered by fiction (such as payment order).

17 If there is no such box, the documents are returned to the court and a notification of it is placed on the official board of the court.

time period in which they are allowed to raise an objection. If they do not respond in the given time frame, it is considered as if there was no objection.[18] In other words, courts are enabled to derive procedurally relevant conclusions of inactivity of a participant. It undoubtedly makes all procedure easier but, on the other hand, the guarantee of a right to a fair trial could be challenged.[19] Consequently, no exchange of pleadings takes place and a court decides by clear and convincing evidence given by the plaintiff. Eventually, if there is no appeal (e.g. in disputes for payment up to 10.000 CZK)[20] the matter is concluded by enforcement of the judgement.

All things considered, defendants (who are consumers) that do not actually reside at the permanent resident address (that is the official delivering address) find out about judgement as late as they become judgment debtors and an execution procedure against them already takes place (warrant of *execution*). On the top of that it is ordered that the defendant recovers the payments.

Apparently, legal theory and judicial practice diverge. Even though a domicile should be the determining factor for the territorial jurisdiction, in fact, the *permanent residence is more functional* and actually used. The institute of domicile was introduced to our law to provide higher protection of consumers; however, in the end it brings legal uncertainty. The possible solution for this difficult situation is to introduce permanent residence address as determining factor.

## 3. International Procedural Regulation (international element)

In case there is an *international element* in a dispute (e.g. the plaintiff is a citizen of another country) the trial could have absolutely different ending – as in the following case.

A British plaintiff brought an action against a Czech consumer before the District Court in Cheb. The court granted an application by the way of payment order. However, as the payment order was not able to be served personally[21] it was set aside. After that, the court assigned a guardian ad litem.[22] The guardian raised objections to the claim of the plaintiff. The court concluded it does not have jurisdiction over the case and ceased the proceedings.[23]

In contrast, the CJEU held in its judgement that the courts of the Member State in which the consumer had his last known domicile have jurisdiction to deal with proceedings in the case where they were unable to determine the defendant's current domicile and also had no firm evidence allowing them to conclude that the defendant was in fact domiciled outside the European Union.

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18 Sec. 101 sub. 4 CPC.
19 Surprisingly, it was not challenged yet.
20 That equals ca. € 350.
21 As required by Sec. 173 subs. 1 CPC.
22 In accordance with Sec. 29/3 CPC.
23 Judgement of the District Court in Cheb no. 15 C 45/2006 which was upheld by judgement of the Regional Court in Pilsen no. 25 Co 215/2007.

Moreover, CJEU ruled that the application of a provision of national procedural law of a Member State which, with a view to avoiding situations of denial of justice, enabled proceedings to be brought against, and in the absence of, a person whose domicile was unknown, if the court seized of the matter is satisfied, before giving a ruling in those proceedings, that all investigations required by the principles of diligence and good faith were undertaken to trace the defendant.[24]

That leads us to a broader issue of which legislation should be applied in which case. There are *three main sources of procedural law* in the Czech Republic – abovementioned CPC, Brussels I bis and bilateral conventions and agreements. The distinction between the CPC on one hand and Brussels I bis and bilateral agreements, on the other hand, is based on whether an international element exists.

The *necessity of international element* derives from the Jenard report on the Convention[25] and was held by the CJEU in many decisions.[26] Without that element, the court should apply national regulation of civil proceeding. There is no complete list of possible international elements suitable to identify the authority of European civil procedure either in Brussels I bis or in CJEU judgements. But the CJEU developed few examples over the years. The international element in the abovementioned sense could be without any doubts for example foreign domicile of any party to a dispute,[27] the fact that the events at issue occurred in foreign state,[28] or that the defendant is a foreign national.[29] Especially the last one seems to be odd. *Foreign nationality* as an important element is even literally refused from consideration in many articles of Brussels I bis.[30] To solve that dilemma we must reveal the distinction between the conditions under which the rules of jurisdiction pursuant to that regulation must apply and the criteria by which international jurisdiction is determined under those rules.[31] Foreign nationality is decisive only for the former conditions.

The most important international element for Brussels I bis is the *domicile*. According to a general rule[32] if the defendant is not domiciled in any member state, the jurisdiction should be determined by the law of the court where an action was brought. But that general rule is not applicable to the consumers due to the specific role of consumer protection. Even if the consumer is

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24 Case C-327/10 Hypoteční banka a.s. v Udo Mike Lindner [2011].
25 Jenard, P. (1979) Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed at Brussels, 27 September 1968. Official Journal C 59, 5 March 1979. Also published as Bulletin of the European Communities Supplement 12/72.
26 E.g. case C-281/02, Owusu [2005] or case C-327/10, Hypotéční banka [2011].
27 Art. 4 and 6 Brussels I bis.
28 Case C-281/02, Owusu, 1 March 2005.
29 Case C-327/10, Hypotéční banka, 17 November 2011.
30 E.g. Art. 4 sec. 1 or Art. 6 sec. 2 Brussels I bis.
31 Case C-327/10, Hypotéční banka, 17 November 2011, paragraph 31.
32 Art. 6 sec. 1 Brussels I bis.

not domiciled in the state of a court that considers its jurisdiction Brussels I bis should be applied instead of the national regulation of civil proceeding. It works perfectly in case where the defendant has a nationality of a member state.

In other cases, the situation could be a bit more problematic. The best way to explain that would be through an example. If a Czech court deals with international civil proceeding, it is very often in disputes against Ukraine citizens. It arises from common work migration from the Ukraine to the Czech Republic. That type of migration is usually temporal and defendants are not domiciled in the Czech Republic at the time when an action is brought in such cases. These cases usually go as follows. A Ukrainian citizen moves into the Czech Republic, registers his or her residence here and shortly after the registration he or she takes a loan from a bank to finance a purchase of a tool he or she needs for his or her job. Six months later he or she moves out to Germany and stops paying the instalments. An action is brought against him or her to a Czech court.

The last piece of the puzzle is *bilateral agreement* on legal assistance in civil cases, adopted in Kiev, 28 May 2001.[33] That agreement incorporates separate provision on civil jurisdiction. Jurisdiction has the court of defendants domicile, permanent residence or the court in which defendants have any property.[34] The question is whether the court should apply Brussels I bis or the abovementioned agreement. Brussels I bis shall not affect the application of bilateral conventions and agreements between a third State and member state concluded before the date of entry into force of Regulation (EC) No 44/2001 which concerns matters governed by Brussels I bis.[35] Thus in such cases as described above a court should consider its jurisdiction according to the bilateral agreement.

To sum up if Czech courts consider their jurisdictions with an international element in cases where a consumer is in a position of a defendant with the nationality of another state, they should first look for international agreement. If there is no such agreement, or if an agreement exists but it is not relevant (applicable), then Brussels I bis should be applied.[36] From aforesaid it should be obvious that *Brussels I bis is the main source of international civil proceeding* regulation in any European country.

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[33] Treaty between the Czech Republic and Ukraine on legal assistance in civil cases, Kiev, 28 May 2001 No. 123/2002 Coll. of Int. Treaties.

[34] Article 48 sec. 5 of abovementioned treaty.

[35] Article 73 sec. 3 of Brussels I bis.

[36] See also Staudinger, A.; Steinrötter, B. Europäisches Internationales Zivilverfahrensrecht: Alles „Brüssel“, oder was? (European International Civil Procedure Law: Everything 'Brussels', or what?), in: Juristische Arbeitsblätter 2012, 241. or Rauscher T.; Wax, P. and others: Münchener Kommentar zur Zivilprozessordnung (Commentary to the German Civil Procedure Code), 4. Edition 2012. EuGVO Art. 15, Rn. 1-19.

### 3.1. Consumers as Defendants in Brussels I bis

The civil proceeding against a consumers is ruled by Articles 17, 18 and 19 of Brussels I bis. The leading idea of these articles is that the consumers can be sued only in the courts of the member state in which they are domiciled.[37] That regulation stands on an assumption that consumers know the law system of a state of their domicile better than the law system of a state of plaintiffs and that the overall cost of dispute should be lower for consumers if they defend their case in the state of their domicile.[38] Article 17 Brussels I bis contains the definition of a consumer applicable for Brussels I bis and as such it is a key to understanding of consumer protection in the European civil proceeding.

There are three main sources of *misinterpretation* of aforesaid article by Czech civil courts: different specifications of a consumer in the European civil procedure and in the European or Czech substantive law, complex text of Article 17 sec. 1 let. c) Brussels I bis and the necessity of the existence of international element.

The *definition of a consumer* used in substantive law differs significantly from the one used in European civil proceeding. To be more precise, the definition in the latter case is much narrower than in the former one. As a consequence not all contracts, which are consumer contracts according to substantive law, are consumer contracts in the meaning of civil proceeding. According to the CJEU the case must meet all these three conditions for consumer protection to be applicable in the procedural law: first, a party to a contract is a consumer who is acting in a context which can be regarded as being outside his trade or profession, second, the contract between such a consumer and a professional has actually been concluded and, third, such a contract falls within one of the categories referred to in Article 17 sec. 1 letters a) to c) Brussels I bis.[39] The first condition is, in fact, the very definition of a consumer taken from the substantive law, whereas the second and the third conditions are the narrowing ones.

There are no serious problems with the first part of the definition. To find out if there is any consumer in a dispute is usually quite intuitive, and CJEU has already pronounced a lot of judgements on that topic,[40] so this part does not rise many interpretational troubles anymore.

The necessity of contract to be concluded rises from the text of Article 17[41] Brussels I bis, which is de jure an exception from the general provision of Article 4 Brussels I bis.[42] And as such it

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[37] Article 18 sec. 2 of Brussels I bis: 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.

[38] See also BOGDAN, M.: Concise Introduction to EU Private International Law. Groningen: Europa Law Publishing, 2006, p. 57.

[39] Case C-419/11, Česká spořitelna, a.s. [2013].

[40] Case C-89/91, Shearson Lehman Hutton [1993]; case C-464/01, Gruber, [2005]; or more recent ones case C-419/11 Česká spořitelna [2013]; or case C-375/13, Kolassa v Barclays Bank plc, [2015].

must be interpreted restrictively.[43] In the cases *Rudolf Gabriel, C-96/00,* and *Renate Ilsinger v Martin Dreschers, C 180/06*, CJEU explained that condition more specifically. These two cases are very similar – there are consumers as plaintiffs, the professional had a domicile in a foreign member state and he sent the customer a letter with the business proposal that was addressed to a customer in person. In both cases, the professional promised to pay a winning prize to a customer. The only difference was in the nature of the offer – in the former case the customer was told that he would obtain the prize if he ordered any goods. In the latter case, there was no such condition, so no contract between the consumer and the professional existed there. More precisely there was no contract which would give rise to reciprocal and interdependent obligations between the parties. That slight detail leads to a different decision - unlike the former case, the article 17 Brussels I bis is not applicable in that latter case.

The last condition mentioned above (a contract must fall within one of the categories referred to in Article 17 sec. 1 letter a) to c) of Brussels I bis) is, in simplified way, a question of legal interpretation. While there are no main troubles in interpreting first two letters of the Article, there are some misunderstandings in the last one.[44]

On the first reading, it seems that this letter widely extends the application area of a consumer protection. It even seems to be possible that provision should protect such a citizen of the Slovak Republic domiciled in the Czech Republic who took out a loan without any additional conditioning[45] from the Czech loan provider and subsequently moved out from the Czech Republic. The dispute over such case was discussed in Czech legal theory in 2010[46] and had also practical consequences. For a complete picture of that case, the very *specific relation between the Czech and the Slovak Republics should be explained*. Until 1 January 1993 the Czech and Slovak Republics had formed one state and there is no significant language barrier between these two states. Due to historical, cultural and geographical closeness, there is frequent migration between these two states.

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41 In matters relating to a contract concluded by a consumer.

42 See also Drápal, L., Bureš, J. and others: Občanský soudní řád I, II Komentář (Czech Civil Procedure Code I, II, Commentary). Publ. 1. Praha : C. H. Beck, 2009, p. 2933.

43 Case C-150/77, Bertrand [1978], or more recent case C-190/11, Mühlleitner [2012].

44 Article 18 sec. 2 should be used 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.

45 Such as that the loan was made to finance the sale of goods.

46 Staněk, J.; Stehlík, O.: Mezinárodní příslušnost ve spotřebitelských věcech dle nařízení „Brusel I." (International Jurisdiction in Consumer Matters under the Regulation "Brussels I") in Obchodněprávní revue 3/2013, p. 71, or Havelka, L.; Kondelová; A., Pavel, A.; Šipulová, K.: Aplikace práva EU v rozhodovací praxi českých civilních soudů v letech 2009-2011 (Application of EU Law in the Czech Practice of Civil Courts in 2009-2011), in: Právní rozhledy 10/2014, p. 370.

And this frequent migration often raises international civil disputes. So the case described in the example is quite common in Czech legal practice.

Czech courts of the first and second instances ruled that in the above-mentioned case they do not have the jurisdiction. They based their decision on the text of article 15 sec. 1 letter c) of former Brussels I.[47] Their judgement was eventually corrected by the Supreme Court in its decision no. 32 Cdo 1318/2011,[48] but it can serve here as a good example of misunderstanding of consumer protection in the European proceeding. Heart of the problem lays in not quite precise translation of above mentioned Article 15 sec. 1 letter c) Brussels I. In Czech language version it is possible to read that article 16 sec. 2 of Brussels I should be applied to all *the contracts that have been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile*. But that strict textual interpretation does not seem to be right. If the legal opinion of the courts of the first two instances prevailed, it would mean, that first two letters of the article 15 of Brussels I would be obsolete; all consumer contracts would be ruled by the last letter of the above-mentioned article. But if that interpretation was correct, there would be no reason for the first two letters to exist in the first place. It could still be said that first two letters of Article 15 of Brussels I just put stress on particular types of consumer contracts, but this would be rather a weak defence of that opinion.

The courts of the first and second instance also did not take into the consideration that for Article 15 sec. 1 letter c) of Brussels I to apply, there must be present an *international element* in the form of international contract. That rule is not mentioned in article 15 or anywhere else in the Brussels I (or Brussels I bis), but without that rule the article does not make any sense. Such interpretation could lead into absurd conclusion that provisions of Brussels I bis should be applied on the contracts concluded between two citizens of the same member state with the domicile in the same state. But that is clearly a domain of the national law, as was explained above. If we refused that argument, it would significantly limit consumers in the position of plaintiffs.[49] To sum up for a letter Art. 17 sec. let. c) Brussels I bis to be applied, there must be a significant international element present.

The provisions of Articles 17 -19 are not the only cases of consumer civil procedure protection in Brussels I bis. There is at least one more hidden provision. An insurer may bring proceedings only to the courts of the Member State in which the defendant is domiciled, irrespective of whether

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[47] Articles 15 - 17 of Brussels I are exactly the same as Articles 17-19 of Brussels I bis. All the further references to Brussels I is fully applicable on Brussels I bis.

[48] Decision of the Czech Supreme court from 29.02.2012, r.n. 32 Cdo 1318/2011 denied the previous opinion of courts of lower instances and returned the case for further proceedings.

[49] According to Art. 16 sec. 2 of Brussels I consumer would have to bring an actions against the other party only to the court of his domicile.

he is the policyholder, the insured or a beneficiary.[50] Consumers are always in the position of policyholders, the insured or beneficiaries, so in cases of disputes in matters relating to insurance an action against them may be brought only in the state of their domicile.

### 3.2. Unidentified Defendant

When the court comes to the conclusion that an international element is present in a dispute against a consumer and therefore Brussels I bis is applicable, there are still other procedural conditions to be proved. As it was already mentioned, it is a court's obligation to examine whether the parties designated by the plaintiff in the written suit can be subjects of the procedural law, i.e. if they have *procedural personality*. The procedural personality in the Czech procedural law is based on a general legal personality.[51] The lack of procedural personality leads to the discontinuation of the proceedings that is declared by the court of its own motion.

In case of proceedings against consumers as natural persons[52] the *central register of citizens* is searched. If there is no valid result, the court examines the *central register of foreigners* (hereinafter as the Register) which should embrace the data about all foreigners that have been registered to any kind of residence on the Czech territory. The data in the Register are collected as a consequence of the reporting duty according to the Act on the Residence of Foreign Nationals.[53]

Anyone who has fulfilled his or her reporting duty should be found in the Register and, therefore, his or her legal (and procedural) personality can be proved. However, it is unfortunately not rare that the searched individual is not found through the remote access to these above-mentioned registers. In such a case, the court uses the informal *request to the Ministry of the Interior and to the Foreign Police Department*. These institutions have more alternatives since the remote access from the court is restricted in order to protect personal data.[54] In practice, it means that the first name, the surname and the exact date of birth of the person have to be entered in order

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50 Art. 14 sub. 1 of Brussels I bis.

51 CPC sec. 19 "Whoever has legal personality can be a party to the legal proceedings; otherwise just a person provided by law".

52 Art. 1 e) of the Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers.

53 Act. No. 326/1999 Col. Act. One of the obligations ensuing from the Act on the Residence of Foreign Nationals for citizens of the EU, Iceland, Norway, Liechtenstein, or Switzerland is the reporting requirement cases where the length of the intended stay in the Czech Republic is longer than 30 days. In this situation, an individual is required to report his presence to the appropriate Foreign Police Department within 30 days from entering the Czech Republic. This obligation does not apply if the person providing accommodation submits the registration forms on behalf of the foreigner (sec. 93 subs. 2. of the Act on the Residence of Foreign Nationals). Nationals of the third countries are obliged to report their presence in the Czech Republic to the appropriate Foreign Police Department that holds jurisdiction over the location of the place of their stay, within a timeframe of 3 working days after their entry into the Czech Republic (sec. 93 subs. 1. of the Act on the Residence of Foreign Nationals).

54 Act on Data Protection, 101/2000 Col. Sec. 5 and following.

to be able to look up any person in the registers. The reason why the remote access to the registers fails is in most cases the missing date of birth[55] or misspelling of names in the suit.

On the grounds of the Treaty on Mutual Legal Assistance Provided by the Judicial Authorities concluded with the Slovak Republic on 5 April 1993[56] with an amendment of 1 December 2014 there is also a possibility to *request the Slovak authority* to require data in the Slovak register of citizens. This instrument is used in cases when there is information in a file that could lead to the conclusion that the defendant is a Slovak citizen. It can be for example a typical Slovak name or an address in Slovakia that appears in the evidence.[57]

Despite all above mentioned legal instruments, the situation that the person designated in the written suit as a *defendant who cannot be identified* can take place. There are two possible solutions in that case. The first one leads to discontinuation of the proceedings because of lack of legal personality on the side of the defendant. It is typical for the cases where no other piece of information about the defendant is available apart from his first name, surname and address provided by the plaintiff and on the basis of these data no concrete individual can be identified. Then, it is appropriate to conclude that the designated person does not exist at all and the proceedings cannot be conducted.[58] This conclusion is in compliance with the adversarial principle.[59]

The second solution lies in an assignment of a *guardian ad litem* to a person of an unknown residence. This should be used in cases where the evidence leads to the undoubted conclusion that the natural person really exists, but it cannot be found in any of the above-mentioned registers. The reason for appointing a guardian ad litem is on one hand the prohibition of the denial of justice (*denegatio justitiae*) and on the other hand to ensure the procedural rights of the defendants[60] that cannot be served by post because their real address is unknown. From the point of view of the

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55 According to the CPC sec. 79 subs. 1 it is for the formal requirement of the legal action sufficient, when the plaintiff defines the defendant with its first name, surname and address, the date of birth is not required.

56 Published under No. 209/1993 Sb. (Art. 16).

57 There are no formal requirements for the request. The Czech court and the Slovak authority communicate through regular post which causes increased costs and it is not exactly time-efficient. Therefore, it would be more convenient if the registers of citizens of our two countries was available online.

58 According to the CPC sec. 104 subs. 1 and 19, eg. judgment of the Supreme Court of 31 October 2011 file no. 33 Cdo 3038/2010 or of 10 January 2011 33 Cdo 3072/2009.

59 According to this principle, the initial burden to identify the defendant in a suit is on the plaintiff. The court must be focused on speedy process. For practical and economic reasons, the court cannot investigate on data about defendant instead of the plaintiff. This is not the purpose of civil proceedings. In other words, it is the plaintiffs´ duty to know their debtors.

60 See also the decision of the Czech Constitutional Court of 31 March 2005 no. II. ÚS 629/04.

procedure, it is also necessary to assign a guardian ad litem in order to be able to serve the represented defendant with the judgment (so it can become legally effective).[61]

### 3.3. Identified Defendant

In case the court has identified the person of the defendant and comes to the conclusion that the Brussels I bis is applicable (due to the existence of an international element) and the defendant is a consumer in the point of view of the Art. 17 of the Brussels I bis, it is necessary to ascertain the international *jurisdiction*. In disputes against consumers, it is rather rare that there is an exclusive jurisdiction (Art. 24 Brussels I bis). Therefore, the court can only examine its jurisdiction according the Art. 28 sec. 1 Brussels I bis. The subsequent conditions have to be simultaneously met to declare that the court has no jurisdiction: (A) a defendant domiciled in one member state (B) is sued in a court of another member state and (C) does not enter an appearance, unless (D) its jurisdiction is derived from the provisions of the Brussels I bis.

In cases against consumers, the fourth (D) condition is not necessary to examine, because according Art. 18 sec. 2 Brussels I bis the proceedings may be brought against a consumer only in the courts of the member state in which the consumer is domiciled. In the vast majority of cases, the third (C) condition is fulfilled. The fact that the actual address of the defendant is not known results in the impossibility to serve the defendant with the document which instituted the proceedings and the summons at all. Therefore, the defendant *cannot enter an appearance*.

The fulfillment of the first and the second (A, B) conditions is, however, very problematic. First of all the real domicile of the sued consumers who have not been identified in any of the registers (but its existence has been proved) is very difficult to find out. The defendants themselves do not communicate with the court and there is usually no evidence that could without a reasonable doubt prove where the defendants have their real domicile. A serious weakness of this mechanism is that the court *cannot declare that it has no jurisdiction*, because the (non) jurisdiction is connected with the (unknown) domicile of the defendant. Therefore, the court has to decide the case meritoriously, although the final judgment will very likely not be enforceable in a foreign country.[62]

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[61] In practice, the procedural guardian can be chosen from all attorneys of law and they are entitled to a reward. It is to say that the institute of assigning guardian ad litem is not just a formality which enables the court to give a ruling. The attorneys are obliged to protect and promote the rights and legitimate interests of their clients. They should use all legal means to protect clients´ interests and could possibly be beneficial to them.

[62] In the EU member states Art. 45 sec. 1 letter i) or b) Regulation No 1215/2012 (Brussels I bis).

### 3.3.1. Finding the Domicile

In practice, it happens very often that the defendant is identified in the Register, but the address stated in the evidence is not his real address. Regarding the fact it is unknown where the defendant is domiciled. Within the bounds of the examination of the jurisdiction, the court has to, first of all, decide if the jurisdiction will be determined by the Brussels I bis or by the *law of the member state*. According to the Art. 6 Brussels I bis, the jurisdiction of the courts shall be determined by the law of the member state if the defendant is not domiciled in a member state. To apply national law, it has to be evident that the defendant is domiciled in a third country. Therefore, in practice it is very rare that national law comes to application because in the lack of evidence the court has no other option but presuming that the defendant (consumer) is domiciled in the state of the address given by the plaintiff, unless proved otherwise. The only significant exclusion is the application of the bilateral treaty that was already mentioned above.[63]

The general rule that determinates the jurisdiction in the disputes against the consumer is contained in the Art. 18 sec. 2 of the Brussels I bis. It says that 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*. That implies, where proceedings against a consumer are brought before a national court, the court is obliged to determine whether the defendant is domiciled in the state of the court. Doing so, the court uses, in accordance with Art. 62 sec.1 the Brussels I bis, its own law. Secondly, if the court concludes that the defendant is not domiciled in the state of the court, it must be examined whether he is domiciled in another member state. In this case, the law of the other member state shall be applied in accordance with Art. 62 sec. 2 of the Brussels I bis.

In practice there is the problem that most of the defendants do not respond to any correspondence because neither the address which was given by the plaintiff nor the address from the Register are relevant. According to CJEU[64] in the described situation the court is obliged to examine all available evidence in order to *find out real domicile of the defendant* (in the member states or in any other state). This leads into a very complicated situation in practice. The only way to find out where the defendant is domiciled is to serve him with the document which instituted the proceedings and the summons asking the defendant for telling his domicile to the court. The service of judicial documents in the EU (with the exception of Denmark) is regulated by the Regulation (EC) No 1393/2007.[65] Despite rather short terms in the regulation,[66] it can practically take even a

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63 See p. 8, (Art. 73 (3) Brussels I bis).

64 The Judgment of the Court (First Chamber) of 17 November 2011, Case C-327/10 (Hypoteční banka a.s. v Udo Mike Lindner).

65 Regulation (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents).

few months before the defendant is served. In addition to the long period of waiting for the answer[67] may the addressee refuse to accept the document to be served if it is not written in a language which the addressee understands or in the official language of the member state addressed.[68] The costs of the translations have to be paid by the court which wants to serve the defendant with the documents.

Serving the defendant to a non-EU member state according the Convention on the Service Abroad of Judicial and Extrajudicial Documents (1965)[69] is connected with even more *time and financial effort*. Any court should be diligent in finding the real domicile of the defendant, however, in the same time, duration and costs of the proceedings should not exceed an acceptable limit. This standard will be of course always subjective. In that regard, it must be on one hand taken into account that all the provisions of the Brussels I bis express the intention to ensure that proceedings leading to the delivery of judicial decisions take place in such a way that the rights of the defense are observed.[70] On the other hand, the requirement that the rights of the defense must be observed, as laid down also in Article 47 of the Charter of Fundamental Rights of the European Union, must be implemented in conjunction with respect for the right of the applicant to bring proceedings before a court in order to determine the merits of its claim in an adequate term.

When the court is successful and establishes the real domicile of the sued consumer, three situations may arise. The first possibility is that the court finds out that the *domicile of the defendant is in the Czech Republic*. In that case (presuming the existence of an international element)[71] the jurisdiction of the Czech courts is determined by Art. 18 sec. 2 Brussels I bis. The second possibility is that the real domicile of the defendant is *in another member state*. In this case the court serves the defendant with the document which instituted the proceedings and the summons[72] and if the defendant does not enter an appearance, the court declares that it has no jurisdiction[73] according to Art. 28 sec. 1 and Art. 18 sec. 2 Brussels I bis. Finally, the third possibility is that the *domicile of the defendant is in a non-member state*. If this happens, the Czech court determines the

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66 E.g. according to the Art. 6 sec. 1 of the Regulation No. 1393/2007 a receiving agency shall, as soon as possible and in any event within seven days of receipt, send a receipt to the transmitting agency by the swiftest possible means of transmission.

67 That in the most cases does not come at all, because the real address of the defendant is unknown.

68 Art. 8 sec. 1 of the Regulation No. 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

69 Convention of 15th November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

70 See Case 125/79 Denilauler [1980] ECR 1553, paragraph 13, and Case C-394/07 Gambazzi [2009] ECR I-2563, paragraph 23.

71 E.g. the defendant and the plaintiff are foreign citizens.

72 According the Regulation No 1393/2007 on service of the documents.

73 The active participation in the proceeding leads to the conclusion that a tacit prorogation does apply (Art. 26 Brussels I bis Regulation).

jurisdiction according to Art. 6 Brussels I bis, which means the court uses the national Czech law.[74] In the cases against consumers the local jurisdiction of a Czech court can be given, if the defendant has the residence in the district of the court[75] or the defendant has a property in this district.[76]

### 3.3.2. Unknown Domicile

In the majority of cases when the defendant (consumer) is inactive, there is no information about his real domicile in the file and neither his address from the written suit nor the address in the register are actual. Due to the lack of instruments and limited possibilities of the court it is *impossible to establish the real domicile of the defendant*. Although there is no proof of the fact that the consumer is sued in accordance with Art. 18 sec. 2 Brussels I bis and he does not enter an appearance, the court of a member state can still have the jurisdiction. According to the already mentioned Judgment Hypoteční banka a.s. v Udo Mike Lindner where the national court, on one hand, is still unable to identify the place of domicile of the consumer and, on the other hand, also has no firm evidence to support the conclusion that the defendant is in fact domiciled outside the European Union, it is necessary to interpret the Art. 18 sec. 2 Brussels I bis in a way that the rule on the jurisdiction of the courts also covers the consumer's last known domicile.

This solution is, as the ECJ decided, in accordance with the objective of strengthening the legal protection of persons established in the EU, by enabling the applicant to identify easily the court in which he may sue and the defendant reasonably to foresee at which court he may be sued.[77] This interpretation should prevent the situation, in which a consumer tries to escape from the jurisdiction of the court renouncing his domicile before the proceedings against him were brought. In conclusion, the jurisdiction of the court can be based on the *last known domicile* of the consumer if he does not inform the other party of the contract about the change of his domicile.

## 4. Conclusion

To conclude, we would like to describe the most common situations that occurs during the judicial process against consumers. On the plaintiff side there is a domestic plaintiff and on the side of the defendant there is an inactive consumer (according to the substantive law). In case of no international element, the jurisdiction will be decided by the domicile of the defendant. If the

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[74] According to Sec. 6 of the Act on Private International Law No. 91/2012 Sb. the Czech courts shall have jurisdiction in proceedings when the Czech procedural provisions stipulate a local jurisdiction (venue) of a court in the territory of the Czech Republic.

[75] CPC sec. 84 and 85 subs. 1.

[76] CPC sec. 86 subs. 2.

[77] See also, Joined Cases C−509/09 and C−161/10 eDate Advertising and Others.

domicile is not found, the court in the district of the address of the defendant listed in one of the registers is given the jurisdiction. If there is an international element present and the Brussels I bis is applied (i.e. no international contract to be applied exists), it is necessary to find out if the defendant is a consumer in the meaning of Article 17 sec. 1 of Brussels I bis.

The proceeding works as follows: a citizen of the Slovak Republic with a temporary residence in the Czech Republic takes a loan to finance the purchase of a personal computer. According to Art. 17 sec. 1 b) of Brussels I bis, he is considered as a consumer in the meaning of this regulation and as such he will be under the protection of Art. 18 sec. 1 of Brussels I bis. If the defendant moves back to Slovakia after the contract formation, he can only be sued in the Slovak Republic because his domicile is there. On other hand, if the same citizen takes a loan without a specific purpose, the situation will be treated differently. The citizen can only be treated as a consumer within the meaning of Article 17 sec. 1 c) of the Brussels I bis, if there is a strong international element present. The nationality is not such a strong element. As a result of that, he can still be sued in the Czech Republic in accordance with the Article 7 sec. 1 of Brussels I bis. This could be seen as not fully justified disproportion and de lege ferenda the extension of the consumer protection could be considered in the definition of the consumer. De facto, the person not being given a specific-purpose loan (often provided by large financial banks) is put into much worse situation, as the short-term loans provided by non-bank financial institutions are often provided by institutions under less surveillance and monitoring.

If we reach the conclusion that the defendant can be treated as a consumer, the jurisdiction will be decided solely by the domicile of the defendant (Article 18 sec. 2 of Brussels I bis). A problem might occur with identification of the defendant as a subject of the proceeding, as he might not be found in any register. In such case, it is in order to ask the plaintiff for additional proof of the procedural personality of the defendant or use the tools available to the court to obtain the jurisdiction. If there is no additional evidence in the files that would attest to existence of the person (apart from a name, address and a date of birth), the proceedings should be ceased in accordance with the domestic law (sec. 104 sub. 1 CPC).

If the sued consumer is identified, it is necessary to verify the jurisdiction of the Czech court. That is, as mentioned previously, dependent on the domicile of the consumer. In practice it is often complicated to determine the domicile of the defendant, mostly when he refuses to communicate with the court and the documents cannot be served to him. The inactivity of the defendant can in no case lead to the suspension of the proceeding. In certain situations, the CJEU judicature allows for the use of the last known domicile. In practice, it means that to such consumer a guardian ad litem should be assigned. However, that leads to issuing a judgement that cannot be executed in foreign

countries. Due to the high costs needed to issue such ruling judgement (locating the domicile, costs for the guardian ad litem) it is questionable if the judgement is of a high impact and if it is worth the time and money for the participants of the proceeding.

This paper has raised important questions about the legal regulation of disputes against consumers. It is definitely very complex legal area and offers several places for improvement - both at the level of national law and at the level of European law. In the Czech law the concept of domicile should be clarified in order to better suit our modern era. At the level of European law, *harmonization* of servicing should be done. Servicing as it is regulated in the Regulation (EC) no. 1393/2007 seems to be in practice relatively functional. However, due to inconsistencies in the servicing methods in different member states, it does not always help to determine whether the consumer is domiciled in a member state. Other options to improve the servicing could be the introduction of *European Delivery Service* (kind of European mail). Nevertheless, it is to say, that both of these projects would be extremely expensive and it would be difficult to enforce them on political level.

Another option how to facilitate the civil proceedings with an international element would be to facilitate the access to information on the domicile or residence of the parties. Introduction of an electronic register to which all of the courts of the member states would have access is again probably too large and difficult project. An easier way would be implementing a fast mechanism that enables asking specialized administrative body or court directly (like it is between the Czech and the Slovak Republic). This procedural regulation would be significant improvement and it would mean only minimum intervention to the status quo. Such a procedure would help especially in case of unknown domicile of the consumer.

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