

COMPARISON OF PROVISIONS ON PROROGATION IN CURRENT AND PROPOSED VERSIONS OF THE CZECH STATUTE ON PRIVATE INTERNATIONAL LAW AND REGULATION (EC) NO. 44/2001

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Abstrakt v rodném jazyce

Předmětem příspěvku je komparace ustanovení o prorogaci v rámci navrhovaného textu nového zákona o mezinárodním právu hmotném a procesní vzhledem ke stávajícímu textu zákona a Nařízení Brusel I. Je zkoumáno, zda nový text zákona vylepšuje stávající stav. Text návrhu je zkoumán jak z pohledu teoretických otázek, tak i z pohledu aplikační praxe. Srovnávány jsou následující oblasti: systematika norem, rozsah aplikace, subjekty, podmínky a omezení, forma, čas, důsledky a následky nedodržení.

Klíčová slova v rodném jazyce

Prorogace, derogace, mezinárodní pravomoc, mezinárodní příslušnost, fórum.

Abstract

The subject of this contribution is a comparison of provisions on prorogation in proposed text of new Czech statute on private international law to current text and Regulation Brussels I. It is examined whether the proposed text improves the current ones. The proposed text is examined from the point of view of both theory and needs of practice. Comparison is made in these areas: taxonomy of rules, scope of application, subjects, conditions and limitations, form, time, effects and consequences of breach.

Key words

Prorogation, derogation, jurisdiction, forum.

1. INTRODUCTION

Within the framework of a re-codification of the Czech civil law, a proposed text of a new Private International Law statute (hereinafter referred as “new PIL”) has been released to public. The new PIL should become effective at the same date as new Civil Code and Commercial statute¹. The new PIL should be more perfect and precise compared to the current one. Issues and problems arising under current statute both at theoretical and practical levels should be covered. Also the rules in the new PIL should be easier to be applied no matter if by professionals or amateurs. This article aims to evaluate, whether given targets and preconditions have been met insofar as prorogation provision is considered. The way of reaching this goal is based on a comparison of relevant provisions of the new PIL to relevant provisions of current text of the statute Nr. 97/1963Coll., on private international law (hereinafter referred as “current PIL”), and regulation (EC) Nr. 44/2001 on jurisdiction and enforcement of decisions in civil and commercial matters (hereinafter referred as “Regulation”).

¹ Ministerstvo spravedlnosti. Návrh zákona o mezinárodním právu soukromém. [online] 2008. <dostupné z: <http://obcanskyzakonik.justice.cz/cz/zakon-o-mezinarodnim-pravu-soukromem/text-navrhu-zakona.html>> [cit. 9.11.2008]

2. TAXONOMY OF PROROGATION PROVISIONS

New PIL covers the issue of prorogation in §86 and §87. Provision of §86 deals with prorogation of jurisdiction of Czech courts. Prorogation of foreign jurisdictions, therefore derogation of the jurisdiction of Czech courts is governed by §87 of new PIL. Both rules should be considered as general. Special prorogation rule on prorogation in labour relationships is to be found in §90 of new PIL.

Current PIL deals with prorogation of jurisdiction of Czech courts in §37 sub. 2. and with derogation of jurisdiction of Czech courts in §37 sub. 3. Both provisions are case a general rules, as current PIL includes no special provision on prorogation in specific area of relationship.

Regulation covers the topic of prorogation in general in Art.23. Some authors consider Art. 24 as a specific kind of a prorogation. Other authors describe Art. 24 as a subordinating clause and do not classify this provision under prorogation. Special rules governing prorogation in insurance, consumer and labour relationships are incorporated in Art. 13,17 and 21 of the Regulation. It is necessary to describe a relation among Art. 23 and Art. 13,17 and 21. Despite the fact that Art. 13,17 and 21 are preceding Art. 23, under my opinion they are *lex specialis* to Art. 23 as *lex generalis*². Therefore, in questions which are not fully covered by Art. 13,17 and 21 Regulation (i.e. question of form), Art. 23 is to be applied, should there be the question answered.

New PIL keeps the taxonomy of current PIL, explicitly separating regime of prorogation from a regime of derogation of jurisdiction. Due to territorial limitation of effect of both PIL on the area of the Czech Republic only, is the separation of regimes of derogation and prorogation suitable, for its comprehensibility and ease of application. Avoidance of any provision on derogation in Regulation may be imputed to the purely international origin of the Regulation³. The Regulation is effective on the territory of EC except of Denmark⁴ and the expressed rule on derogation would cause problems and would make a system of prorogation more complicated compared to the rules with effects only on the territory of one state. Nevertheless new PIL might be inspired by Regulation as prorogation in labour relations are considered. Although prorogation in labour relations is enabled even in current PIL⁵, current PIL does not include any special rule.

3. SCOPE OF PROVISIONS

Scope of provisions defines the area of legal relationships in which a jurisdiction can be prorogated. It is a question of a vital importance. New PIL permits parties to conclude a choice of jurisdiction “in contractual relations” and “labour relations”. The report on new PIL do not specify terms. Current PIL enables prorogation in property litigations. Commentary as to property litigations states as follows “Property litigations shall be understood a

² Similarly Rozehnalová, N., Týč, V., Novotná, M. *Evropské mezinárodní právo soukromé*. Brno: MU v Brně, 2000. ISBN 80-210-1867-4. s.181.

³ The Regulation was created via transformation of Brussels Convention.

⁴ Pauknerová, M. *Evropské mezinárodní právo soukromé*. Praha : C.H. Beck, 2008. ISBN 978-80-7400-034-8. s. 127.

⁵ See below.

controversial litigations, where plaintiff seeks the defendant to be ordered to provide the plaintiff a proprietary fulfillments, mostly pecuniary, release of property or any other real fulfillment or restraining some activity. In general this institution covers all cases where plaintiff seeks a fulfillment of property nature or reflex....”⁶. The commentary enumerates explicitly also labour litigation, litigations arising of breach of IP laws and some institutes of family law as spouse’s maintenance etc. It can be summed up, that term “property litigations” shall be interpreted extensively. Common civil law theory distinguishes among in rem rights, contractual rights, heritage rights and IP laws⁷. Because of limitation on contractual rights is the new PIL to be considered as narrower as far as scope of prorogation is concerned, as some claims from IP laws are not covered by new PIL but are covered in current PIL. New PIL is a step back at this point. But it shall be reminded, that new Civil code is to be accepted together with new PIL. New Civil code has a completely new structure and receives family and labour law. It remains questionable, whether after accept of new PIL and new Civil code a litigation on for instance spouse’s maintenance or breach of IP law, will be available for prorogation? The report on new PIL states, that the scope of prorogation remains⁸. Should courts tend to interpret the term contractual relation in §86 and §87 of new PIL in an extensive way (as it did in current PIL), such a result would be possible. The another way is submit the term “contractual relation” in new PIL to autonomous interpretation. It is a role of judiciary power to answer this issue. But for now it seems that the scope of jurisdiction prorogation is narrower than in used to be.

The scope of Art. 23 in the Regulation and all other mentioned articles dealing with prorogation is given by the scope of Regulation expressed in Art. 1 sub. 1 - civil and commercial matters with limitation given in Art. 1 sub.2 Regulation. Term “civil and commercial matters” shall be interpreted autonomously⁹. ECJ in the judgement *Ce Cavel II*¹⁰ accepted application of Brussels Convention on preliminary ruling about monthly spouse’s maintenance payments. On the other hand, in judgement *De Cavel I*¹¹ ECJ denied to apply Brussels Convention in case of freeze order in divorce proceedings. Litigations from IP laws are falling within the scope of Regulation. As a summary it can be said, that Regulation has a narrower scope than current PIL but wider than new PIL.

4. SUBJECTS AND CONDITIONS/LIMITATIONS OF PROROGATION

New PIL does not give any limits towards subjects which may conclude prorogation agreement. There are no further conditions in §86 and §87. In special provision of §90 of new PIL a possibility to derogate a jurisdiction of Czech courts in labour relations is limited to

⁶ Kučera, Z., Tichý, L. Zákon o mezinárodním právu soukromém a procesním. Komentář. Praha: Panorama, 1989. ISBN 11-057-89. s. 222.

⁷ Plecítý, V., Vrabec, J. Salač, J. Základy občanského práva. Plzeň : Vydavatelství a nakladatelství Aleš Čeněk, 2005. ISBN 80-86898-25-3. s. 24.

⁸ Ministerstvo spravedlnosti. Důvodová zpráva k návrhu zákona o mezinárodním právu soukromém. [online] 2008. [cit. 9.11.2008] Dostupný z: <http://obcanskyzakonik.justice.cz/cz/zakon-o-mezinarodnim-pravu-soukromem/duvodova-zprava.html> s. 23.

⁹ Pauknerová, M. Evropské mezinárodní právo soukromé. Praha : C.H. Beck, 2008. ISBN 978-80-7400-034-8. s. 128

¹⁰ Pauknerová, M. Evropské mezinárodní právo soukromé. Praha : C.H. Beck, 2008. ISBN 978-80-7400-034-8. s. 130.

¹¹ dtto

meeting the criteria, which has to be met cumulatively - the employee has to carry out his work abroad and the employer must not have a seat or domicile in the Czech Republic. Should these conditions be met, parties may even in labour relations prorogate any jurisdiction they like.

Current PIL empowers only legal persons to derogate the jurisdictions of Czech courts. New PIL preserved the rule prohibiting choice of the competence in judicial hierarchy in case of prorogation of Czech jurisdiction. Under my opinion it is a good rule, as the competence in judicial hierarchy is purely domestic issue and cannot be changed even in domestic litigation. Neither new PIL nor current PIL do not limit the choice of jurisdiction, even in labour issues as well, as already stated.

Regulation does not include any explicit rule on derogation of jurisdiction. Regulation does not distinguish between natural and legal persons either. Condition of applicability of art. 23 sub. 1 is that at least one party (no matter whether plaintiff or defendant) must be domiciled in the member state. If no party is domiciled in member state, Art. 23 sub. 1. is inapplicable. Regulation also limits the variety of choice of jurisdiction as only jurisdiction of member states is allowed to be chosen. This limitation is logical towards the nature of the Regulation. Special rules on prorogation given in Art. 13, 17, 21 Regulation all regulates relations where one of the subjects is weaker, typically from the economical point of view. In order to protect the weaker party do these rules set further limitations and conditions. In insurance, consumer and labour relations may a jurisdiction be prorogated only after a dispute arises and on behalf of weaker party, so that weaker party may commence a proceedings in other jurisdiction than determined by regulation¹².

There is no other way than to confess, that the current PIL is old and unacceptable, since it limits too much the autonomy of will of natural persons. Under new PIL and Regulation natural persons are allowed to conclude a choice of jurisdiction, but rules are trying to prevent misusage of power of stronger party. Regulation is more consistent in this issue.

5. FORM OF PROROGATION AGREEMENT

New PIL requests a prorogation agreement to be in writing. There is no duty the agreement to be on one paper. Agreement may be concluded even orally, if confirmed in writing. New PIL does not deal with modern ways of communication. Whereas fax may be taken as writing, e-mail depends on whether was digitally signed or not. There is no progress in this issue compared to current PIL. Current PIL does include one deviation. If jurisdiction of Czech courts is to be derogated, the agreement has to be in writing only for Czech party. The request placed on agreement is met even if foreign party did the agreement orally¹³, should such an expression of will be valid under law of state, where such an expression of will was made.

Regulation is obviously more benevolent in this issue. Regulation on first place requests the prorogation to be made in writing as well, but by the means of practice between parties or customs in the field of business an oral or even concludent agreement is acceptable as well. Regulation also expressly covers the topic of electronic ways of communication, which

¹² For further details please see Regulation

¹³ Kučera, Z., Tichý, L. Zákon o mezinárodním právu soukromém a procesním. Komentář. Praha: Panorama, 1989. ISBN 11-057-89. s. 225

provided a permanent record of communication can be made are placed on the same level with writing. Also here agreement on one or more documents is acceptable.

It is common to all provisions under this comparison, that does not cover a prorogation clause included in general commercial terms on the backside of the form contract. It is not stated anywhere, but courts came to this conclusion¹⁴ and there is no sign of breach in the near future.

The most progressive seems to be Regulation, because of free form of prorogation agreement. It is a shame, that a new PIL does not absorbed a system, where under practices and customs agreement in writing is not necessary. Also a silence on modern ways communication is to criticize.

6. TIME OF CONCLUDING PROROGATION AGREEMENT AND THE RANGE OF RELATIONS UNDER PROROGATION AGREEMENT

Time covers a huge variety of possibilities when a prorogation agreement could be concluded. It may happened in the beginning of relationship before negotiating subject of the contract. Often is the prorogation agreement concluded and incorporated in the contract. Prorogation agreement may be concluded at the time a dispute appears or even when proceedings has been commenced. Not all of these possibilities must be necessary be accessible. It depends on legal rules on prorogation, whether they do not place limits.

Concerning the range of relations under prorogation agreement it is generally true, that prorogation agreement may be concluded as framework agreement for several mutual legal relations, for particular relation or only a part of legal relation.

New PIL does not cover the time issue at all. Even in labour relations, under protection of weaker party is the new PIL silent as the time dimension is in case. The same applies to current PIL. No limits are imposed even as to range of relations under prorogation.

Situation is much more complicated as Regulation is concerned. Art. 23 says "... which have arisen or which may arise in connection with a particular legal relationship..." There is no doubt that the prorogation may be concluded both before or after the dispute appears. The linguistic method of interpretation leads us to the conclusion, that prorogation agreement may be validly agreed only for the relationship, but not as a framework agreement. I am no aware of any decision, which tried to interpret the wording "particular relationship" in an extensive way. Therefore it has to be confirmed, that above given interpretation is correct and the Regulation does not allow parties to conclude a prorogation in the framework agreement¹⁵. Under my opinion this is a serious drawback of the Regulation.

Other limits are in the Regulation imposed in provisions concerning consumer, labour and insurance contracts. In such a relations a prorogation agreement may be concluded, but for the protection of weaker party only after a dispute has appeared.

¹⁴ Rozehnalová, N., Týč, V., Novotná, M. *Evropské mezinárodní právo soukromé*. Brno: MU v Brně, 2000. ISBN 80-210-1867-4. s. 201

¹⁵ Rozehnalová, N., Týč, V., Novotná, M. *Evropské mezinárodní právo soukromé*. Brno: MU v Brně, 2000. ISBN 80-210-1867-4. s. 197.

7. EFFECTS OF THE PROROGATION AGREEMENT

Prorogation agreement is an agreement with procedural effects, therefore will be governed by *lex fori*. The essence of a prorogation agreement lies in determination of a forum, which is to deal with the dispute on which a prorogation agreement has been concluded. There are two approaches to the prorogation agreement in the theory. Under first theory, the only forum which is entitled to deal with a dispute is a prorogated forum and other forums must not take a jurisdiction on the case. Under this theoretical approach the choice of jurisdiction made by a prorogation agreement is exclusive. Under second theory may any forum take a jurisdiction over the dispute, shall the dispute be presented, despite the existence of a prorogation agreement. This theoretical approach makes the prorogation agreement non-exclusive. This question is a rare subject of parties agreements and so it is a forum and its laws which decides, whether the prorogation is exclusive or not. From the judicial point of view, it would be better to speak of derogation of their jurisdiction, since under the concept of state sovereignty one state's courts cannot bind courts of other state¹⁶. As a result court, when a dispute is presented with prorogation agreement of another jurisdiction, do first a research whether their jurisdiction is derogated or not.

The analysis of §87 of new PIL seem vital to decide whether new PIL falls within the theory of exclusive jurisdiction based on prorogation or not. Under §87 sub. 2 letter a) new PIL Czech courts shall despite a derogation of their jurisdiction take a dispute if parties declare that they do not insist on prorogation agreement. Under my opinion this provision does not interfere with the concept of exclusive prorogation as the subject of parties declaration is a change of the prorogation agreement¹⁷. Under letters b) and c) the Czech court will deal with the case if the foreign decision cannot be recognized in the Czech Republic or if foreign court denied to deal with the case [although foreign court was prorogated] Both possibilities mean interference with a concept of exclusive prorogation. In the strict point of view, it would seem that new PIL accepted the non-exclusive theory. The report to new PIL on §87 says that letters a)-c) are exceptions to the concept of exclusive prorogation and were incorporated from a practical reasons¹⁸. This proves the first sentence of §87 sub. 2 of new PIL, that states the exclusivity of prorogation.

Current PIL does not explicitly solve the issue of exclusivity of prorogation agreement. Courts has decided, that valid prorogation agreement toward foreign jurisdiction prevent Czech courts to deal with the case¹⁹. It means that current PIL is under theory of exclusivity as well. For the autonomy of will applies, the exclusivity remains unless parties agreed otherwise. Commentary to current PIL holds the same²⁰.

¹⁶ Kučera, Z., Tichý, L. *Zákon o mezinárodním právu soukromém a procesním. Komentář*. Praha: Panorama, 1989. ISBN 11-057-89. s. 225.

¹⁷ The extraordinality of this provision lies in the ability to change an written agreement by a oral statement.

¹⁸ Ministerstvo spravedlnosti. *Důvodová zpráva k návrhu zákona o mezinárodním právu soukromém*. [online] 2008. [cit. 9.11.2008] Dostupný z: <http://obcanskyzakonik.justice.cz/cz/zakon-o-mezinarodnim-pravu-soukromem/duvodova-zprava.html> s.23

¹⁹ Judgement of the Highest court 1 Odon 39/97 dated 28.5.1997

²⁰ Kučera, Z., Tichý, L. *Zákon o mezinárodním právu soukromém a procesním. Komentář*. Praha: Panorama, 1989. ISBN 11-057-89. s.225.

The Regulation does expressly state in Art. 23, that jurisdiction based on the prorogation agreement is exclusive unless agreed otherwise. Art. 24, called subordinating clause, provides the same rule as given in §87 sub. 2. letter a) new PIL. Towards the prorogation agreement which do not fall within the scope of the Regulation²¹, but are choosing the jurisdiction of the member state is in Art. 23 sub. 3 Regulation regulated the situation similarly to §87 sub. 2. letter c) new PIL.

It can be summarized, that all rules share the concept of exclusive prorogation. I find the new PIL as the most advanced as it covers issues of real application.

8. CONSEQUENCES OF BREACH OF PROROGATION AGREEMENT

Although all rules award the prorogation agreement by exclusivity, it cannot be prevented that some court would breach the prorogation agreement and take a jurisdiction. Under §16 sub. 1 letter a) new PIL the court shall not recognize in-force foreign decisions, if “the case belongs to exclusive jurisdiction of Czech courts”. Breaching the derogating agreement of Czech courts do not prevent recognizing such a decision in the Czech Republic. But what happens if Czech courts are prorogated but foreign court decides? In the light of preceding paragraph, should Czech courts be the only one to decide because of the prorogation agreement. It is questionable whether courts will not interpret the term “exclusive jurisdiction” in the narrow way, which means for example only on in rem disputes. Under my opinion Czech courts should not recognize decision of foreign courts in matters where a jurisdiction of Czech court was agreed. Because the new PIL text is taken over from current PIL, above written applies to current PIL as well.

In the regime of Regulation a decision issued by a court dealing with the matter despite of agreed prorogation will be recognized, because chapter 7 of Regulation, covering the prorogation, is not mentioned in the chapters which if not observed prevent member states from recognizing such a decision. This is probably caused because of the effort to grant an easy circulation of decisions. It is necessary, that chapter on recognizing in Regulation is purely intra-community and so covers only decisions of other member states. Stemming out of the premise that there is a certain minimal level of justice on procedural and substantive law in all member states, it is quite logical, that decision of other jurisdiction does not create such a problem. On the opposite, states must draft their rules so that they can handle possible decisions from all states on the world - even those with questionable judicial system- and so under my opinion should be the breach prorogation in these rules awarded by refusing the recognition of decision.

Under Regulation, breach of provision on prorogation in matters of insurance and consumer contract prevent decision to be recognized.

9. CONCLUSION

The provision on prorogation in new PIL may seem as more modern and more progressive than in current PIL. At the second sight must this conclusion be revised. It is positive that natural persons are in new PIL entitled to derogate Czech jurisdiction. Also §87 sub. 2. of new PIL is a positive sign. But there are a big drawbacks as well. Two the biggest drawbacks are reduction of the scope of relations allowed to prorogation and necessary written form of the

²¹ None of parties has a domicile in the member state.

prorogation agreement. New PIL is not the most progressive even in protection of weaker parties. In summary the new PIL is not, under my opinion, a big step forward and is in some points a big step back

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