OPINION OF ADVOCATE GENERAL TRSTENJAK delivered on 8 September 2011 [1]

I — Introduction

1. The present reference for a preliminary ruling from the Okresní soud (District Court), Cheb ('the referring court') concerns the interpretation of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. [2]

2. The referring court essentially wishes to know whether the provisions of Regulation No 44/2001 preclude the application of national law under which, where an action is brought against a defendant of unknown address, a guardian *ad litem* can be appointed to represent that defendant in the proceedings. The present case is connected, in substantive terms, with Case C-292/10 *G.*, [3] in which partially similar questions are referred.

3. In this connection, the referring court further asks whether it can have jurisdiction under Article 24 of Regulation No 44/2001 in the case where such a guardian *ad litem* enters an appearance in respect of the substance of the case, without raising an objection that the referring court lacks jurisdiction ('entering of an appearance without raising an objection').

4. The court is further seeking to ascertain whether an agreement on local jurisdiction can be extended impliedly also to an agreement on international jurisdiction for the purposes of Article 17.3 of Regulation No 44/2001 and how the possible non-binding nature of the agreement on local jurisdiction may affect the validity of the agreement on international jurisdiction by virtue of its unfairness under Articles 3(1) and 6 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. [4]

1 — Original language: German; Language of the case: Czech.

2 — OJ 2001 L 12, p. 1.

3 — OJ 2010 C 346, p. 23.

4 — OJ 1993 L 95, p. 29.

II — Applicable law

A — *European Union law* [5]

1. Charter of Fundamental Rights

5. Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') lays down the right to an effective remedy and to a fair trial. The first and second paragraphs of Article 47 provide:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.'

2. Regulation No 44/2001

6. Regulation No 44/2001 contains rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. [6] Recitals 2, 3, 11 and 13 in the preamble thereto state:

'(2) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.

(3) This area is within the field of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.

...

(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this

5 — Pursuant to the TEU and TFEU descriptions, the term 'European Union law' is used as a generic term for Community and European Union law. Where, in what follows, individual provisions of primary law are concerned, the provisions applicable *ratione temporis* will be cited.

6 — The provisions of Regulation No 44/2001 applicable *ratione temporis* are reproduced below.

ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

…

(13) In relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.'

7. Chapter II of the regulation contains rules on jurisdiction. Section 1 of this chapter sets out general provisions. Articles 2, 3 and 4 of the regulation, which are in this section, provide as follows:

'*Article 2*

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.'

'*Article 3*

1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.

2. In particular the rules of national jurisdiction set out in Annex I shall not be applicable as against them.'

'*Article 4*

1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.

2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in Annex I, in the same way as the nationals of that State.'

8. Section 4 governs jurisdiction over consumer contracts. It contains Articles 15, 16 and 17. Article 15 states:

'1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:

...

(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

(c) 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.'

Article 16(2) of the regulation states:

'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.'

Article 17.3 of that regulation is worded as follows:

'The provisions of this Section may be departed from only by an agreement:

...

3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.'

9. Section 7 of Chapter II of Regulation No 44/2001 concerns prorogation of jurisdiction and comprises Articles 23 and 24.

10. Article 23(5) of the regulation stipulates:

'Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.'

11. Article 24 of the Regulation provides:

'Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.'

12. Article 26(1) and (2) of that regulation states:

'1. Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation.

2. The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.'

13. Chapter V of the regulation contains general provisions. Article 59 of the regulation, which features in Chapter V, states:

'1. In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law.

2. If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State.'

14. Chapter VII of the regulation governs its relations with other instruments. Article 67, which is contained in this chapter, states:

'This Regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in Community instruments or in national legislation harmonised pursuant to such instruments.'

3. Directive 93/13

15. Directive 93/13 is directed against unfair terms in consumer contracts.

16. Article 3 of Directive 93/13 states:

'1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

…

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.'

17. According to point 1(q) of the annex, terms referred to in Article 3(1) of the directive are terms which have the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

18. The first and second sentences of Article 5 are worded as follows:

'In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.'

19. Article 6(1) of Directive 93/13 provides:

'Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.'

B — *National law*

20. Paragraph 173(1) of the Občanský soudní řád (Rules of Civil Procedure; 'the OSŘ') provides that a payment order must be served on the defendant personally.

21. Under Paragraph 29(3) of the OSŘ, a guardian *ad litem* may be appointed for a defendant whose domicile is not known, on whom it has not been possible to serve proceedings at a known address abroad, who suffers from a mental disorder, who is unable, on other health grounds, to participate in proceedings even for a temporary period, or who is unable to express himself in a comprehensible manner.

III — Facts, proceedings before the referring court and questions submitted

A — *Facts*

22. The applicant in the main proceedings is a legal person incorporated under Czech law and established in the Czech Republic. The defendant in the main proceedings is a German national.

23. On 19 August 2005 the applicant and the defendant in the main proceedings entered into a mortgage loan contract. The loan was intended to finance the purchase of immovable property. At the time when that contract was concluded, the defendant in the main proceedings was domiciled in the Czech Republic.

24. In Article VIII, point 8, of that mortgage contract, the applicant and the defendant in the main proceedings agreed that, in the event of a dispute, the court within whose territorial jurisdiction the registered office of the applicant in the main proceedings was situated, as entered in the commercial register at the time of lodging of the claim, was to have jurisdiction.

B — *Proceedings before the referring court*

25. On 16 September 2008, the applicant in the main proceedings brought before the referring court an action against the defendant in the main proceedings for payment of CZK 4 383 584.60, plus default interest, for failure to fulfil the obligations arising from the mortgage loan contract. On 16 October 2008 the referring court issued a corresponding payment order.

26. It was not possible to serve the order personally on the defendant in the main proceedings, as required under Paragraph 173(1) of the OSŘ. The defendant in the main proceeding was no longer resident at Žižkova 356, Velká Hleďsebe (CZ), the address which the applicant in the main proceedings had given as the defendant's domicile. In the Central Population Register the address Třída Vítězství 30/30, Mariánské Lázně, is entered as the habitual residence of the defendant in the main proceedings. However, information provided by the foreigners service of the Czech police on 20 February 2009 indicated

that the defendant was not resident at that address either. According to information provided by the police on 2 June 2009, the defendant in the main proceedings stays only in guest houses and private apartments when he comes to the Czech Republic. According to information provided by the prisons service of the Czech Republic on 20 February 2009, up to 18 February 2009 the defendant had not been serving a prison sentence or been in detention in the territory of the Czech Republic. Nor has the referring court been able to ascertain whether the defendant has any relatives in the territory of the Czech Republic who might inform it as to his place of residence. According to the information provided by the referring court, under national law none of the abovementioned addresses could be regarded as his place of residence. Consequently, the referring court concluded that the defendant in the main proceedings is not domiciled anywhere in the territory of the Czech Republic.

27. On 8 September 2009 the payment order was set aside on the ground that it could not be served. In order to be in a position to continue the proceedings, the referring court decided, on 3 June 2009, to appoint Josef Heyduk as guardian *ad litem* for the defendant in the main proceedings, as a person whose domicile was unknown, pursuant to Paragraph 29(3) of the OSŘ. By a deposition of 26 October 2009, the guardian *ad litem* raised factual objections to the accessory part of the claim.

C — *Questions submitted*

28. In an order for reference, received at the Registry of the Court on 5 July 2010, the referring court submitted the following questions for a preliminary ruling:

‘(1) If one of the parties to court proceedings is a national of a State other than the one in which those proceedings are taking place, does that fact provide a basis for the cross-border element within the meaning of Article 81 (formerly Article 65) of the Treaty [on the Functioning of the European Union], which is one of the conditions for the applicability of Council Regulation [No 44/2001]?

(2) Does Regulation [No 44/2001] preclude the use of provisions of national law which enable proceedings to be brought against persons of unknown address?

(3) If Question 2 is answered in the negative, can the making of submissions by a court-appointed guardian *ad litem* of the defendant in the case be regarded on its own as submission by the defendant to the jurisdiction of the local court for the purposes of Article 24 of Regulation [No 44/2001], even where the

subject-matter of the dispute is a claim arising out of a consumer contract and the courts of the Czech Republic would not have jurisdiction under Article 16(2) of that regulation to determine that dispute?

(4) Can an agreement on the local jurisdiction of a particular court be regarded as establishing the international jurisdiction of the chosen court for the purposes of Article 17.3 of Regulation [No 44/2001] and, if so, does that apply even if the agreement on local jurisdiction is invalid on the ground that it conflicts with Article 6(1) of Directive [93/13]?'

IV — Procedure before the Court

29. Written observations were submitted by the applicant in the main proceedings, the Czech, Danish, French, Hungarian and Netherlands Governments, and by the European Commission.

30. On 25 May 2011 a hearing took place, at which the Czech and Danish Governments and the Commission appeared, supplemented their written observations and answered questions.

V — Principal arguments of the parties

A — *First question*

31. By the first question submitted, the referring court wishes to know whether the rules of jurisdiction in Regulation No 44/2001 are applicable. It considers that, for them to apply, there must be a foreign element, but is uncertain as to whether this can lie in the fact that the defendant in the main proceedings holds the nationality of another Member State.

32. In the view of the applicant in the main proceedings, of the Czech, Danish, French and Hungarian Governments, and of the Commission, in order for the rules of jurisdiction in Regulation No 44/2001 to apply there must be a foreign element, the Commission expressing the view that that element must be determined in the light of the circumstances of the individual case.

33. In the view of the applicant in the main proceedings, of the Czech and French Governments, and of the Commission, it suffices, for there to be such a foreign element, that the case raises questions as to the international jurisdiction of the court, which may obtain if the defendant in the main proceedings is a national of another Member State. The Commission further notes that in the present case there is uncertainty as to where the defendant is domiciled.

34. By contrast, in the view of the Hungarian, Danish and Netherlands Governments the fact that a defendant holds the nationality of another Member State should not be sufficient per se to establish the applicability of the rules of jurisdiction in Regulation No 44/2001. Nationality, it is argued, is irrelevant under the rules of jurisdiction in the regulation.

B — *Second question*

35. By the second question submitted, the referring court wishes to know whether the provisions of Regulation No 44/2001 preclude the application of national provisions such as Paragraph 29(3) of the OSŘ. These provisions enable proceedings to be brought against persons of unknown domicile by appointing a guardian *ad litem* for them. The referring court is uncertain whether such a provision is compatible with, in particular, Article 2 of the regulation.

36. All of the parties to the proceedings which have made or submitted observations argue that such a national rule is compatible with the requirements of European Union law. Procedural law, they point out, has not been fully harmonised by the regulation and consequently continues to be governed by national law. Provided that the Member States take account of the requirements of Regulation No 44/2001, the application of such national rules is within their discretion.

37. As regards the rules on international jurisdiction in the regulation which have to be taken into account, the Czech and Danish Governments contend that jurisdiction is determined in principle by the defendant's domicile. Therefore, the referring court must first examine whether the defendant is domiciled in the Czech Republic or in another Member State, in which case the law of the relevant Member State is to be applied, pursuant to Article 59 of the regulation. If the referring court concludes that a defendant is not domiciled in a Member State, international jurisdiction is to be determined by national law, pursuant to Article 4 of Regulation No 44/2001. The Czech Government suggests an approach whereby the national court could, in such a case, adopt the fiction that the defendant is domiciled in a Member State, although it acknowledges that this

approach constitutes a *de lege ferenda* solution. In this connection, the applicant argues that the defendant in the main proceedings, who is not a consumer within the meaning of the regulation, is domiciled in the Czech Republic. By reason of the long-term agreement concluded with the defendant in the main proceedings, the applicant could reasonably expect that the defendant would remain on a long-term basis in the territory of the Czech Republic.

38. As regards the defendant's rights of defence, the applicant in the main proceedings and the Hungarian, Netherlands, French and Danish Governments contend that, where such a national rule is applied, account must be taken also of Article 26(2) of Regulation No 44/2001 and the defendant's rights of defence expressed therein. Under that provision, a national court must take all necessary steps to enable the defendant to arrange for his defence against the action. Where such measures are taken, the defendant's rights of defence under the second paragraph of Article 47 of the Charter will be afforded adequate protection. However, the regulation cannot be interpreted as meaning that an applicant is unable to take action against a party whose domicile is unknown. Account must also be taken of the applicant's right to effective legal protection under the first paragraph of Article 47 of the Charter.

39. By contrast, the applicant in the main proceedings and the French Government contend that the defendant's rights of defence are not restricted by the appointment of a guardian *ad litem* pursuant to Paragraph 29(3) of the OSŘ. On the contrary, this appointment serves to safeguard the rights of defence. The Czech Government argues that where jurisdiction is determined by national law pursuant to Article 4 of the regulation, Regulation No 44/2001 does not apply in any event.

40. Finally, the Netherlands and Hungarian Governments argue in this connection that a judgment given pursuant to a national rule such as Paragraph 29(3) of the OSŘ cannot be recognised and enforced in another Member State under Article 34.2 of Regulation No 44/2001. The Commission also argues that Article 34.2 of the regulation can apply in particular cases.

C — *Third question*

41. By the third question submitted, the referring court wishes to know whether it has jurisdiction under Article 24 of Regulation No 44/2001 by virtue of the fact that the guardian *ad litem* appointed pursuant to Paragraph 29(3) of the OSŘ entered an appearance without raising any objection. In this connection, it notes that the mortgage

loan contract between the applicant and the defendant in the main proceedings is a consumer contract within the terms of Article 15(1)(c) of Regulation No 44/2001. Therefore, under Article 16(2) of that regulation jurisdiction is vested in the courts of the Member State in which the consumer is domiciled.

42. The Commission and the Hungarian, French and Czech Governments take the view that Article 24 of Regulation No 44/2001 applies also to consumer contracts.

43. In the view of the Czech, Netherlands and French Governments and the Commission, the entering of an appearance by a guardian *ad litem* does not, however, constitute entering of an appearance within the meaning of Article 24 of Regulation No 44/2001. In this connection, the Commission contends that the concept of the defendant entering an appearance before a court for the purposes of Article 24 of the regulation must be given an autonomous interpretation. In a case such as the present, protection of the rights of the defence requires that it be assumed that the defendant has not entered an appearance within the meaning of Article 24 of the regulation, irrespective of the position of a guardian *ad litem* under national law.

44. By contrast, the Hungarian Government and the applicant in the main proceedings take the view that the entering of an appearance by a guardian *ad litem* confers jurisdiction on the referring court under Article 24 of Regulation No 44/2001. The powers of the guardian *ad litem* must be determined pursuant to national law.

45. In the view of the Danish Government, the question whether the entering of an appearance by a guardian *ad litem* establishes jurisdiction under Article 24 of Regulation No 44/2001 must be considered on a case-by-case basis.

D — *Fourth question*

46. By its fourth question, the referring court wishes to know, first, whether an agreement on the local jurisdiction of a particular court can also be regarded as an implied agreement on the international jurisdiction of the Member State concerned for the purposes of Article 17.3 of Regulation No 44/2001. It further wishes to know whether the non-binding nature of the agreement on local jurisdiction can, by virtue of unfairness within the meaning of Article 3(1) of Directive 93/13, also affect such an implied agreement on international jurisdiction.

47. The Czech, Danish and French Governments, together with the Commission, argue that such an agreement constitutes an implicit agreement on jurisdiction for the purposes of Article 17.3 of Regulation No 44/2001. In the view of the Hungarian Government, the following distinction must be drawn in this respect: where a foreign element exists, such a term can be a term conferring international jurisdiction for the purposes of Article 17.3 of the regulation. Where no such element exists, such a term can be regarded as a term granting international jurisdiction only in the case where it does not run contrary to the will of the parties.

48. The French Government and the Commission further submit that the national court must examine of its own motion whether the term is unfair within the meaning of Article 6 of Directive 93/13.

49. In the view of the applicant in the main proceedings, such a term is not to be regarded as an unfair term within the meaning of Article 6 of Directive 93/13 since, firstly, there is no consumer contract and, secondly, the distance between the established office of the applicant in the main proceedings in Prague and the domicile of the defendant in the main proceedings is not particularly great.

50. Finally, the Czech and Hungarian Governments express the view that such an agreement on international jurisdiction is valid even if the agreement on territorial jurisdiction is invalid pursuant to Article 6(1) of Directive 93/13. In that respect, Article 17.3 of Regulation No 44/2001 must be regarded as a *lex specialis* in relation to Articles 3(1) and 6 of Directive 93/13. Against this, the Danish and French Governments and the Commission argue that a term which is invalid for the purposes of Article 6(1) of Directive 93/13 likewise cannot constitute a valid agreement on international jurisdiction for the purposes of Article 17.3 of Regulation No 44/2001.

VI — Legal assessment

51. A distinctive feature of the dispute in the main proceedings is that the applicant has brought before the referring court proceedings against a defendant whose place of residence is unknown. Under Paragraph 29(3) of the OSŘ, in such a case the referring court may appoint a guardian *ad litem* for the defendant. However, it is uncertain whether it is consistent with the requirements of European Union law, and in particular with Regulation No 44/2001, for the proceedings against the defendant to be continued in such circumstances.

52. Since the four questions referred by the national court in this connection are closely connected, I shall examine them together. Consideration must first be given to the question whether application of a rule such as Paragraph 29(3) of the OSŘ is in principle compatible with Regulation No 44/2001. This question must be answered in the affirmative. However, in its application of such a rule, a national court must satisfy the requirements of European Union law which arise in particular from the regulation. These include the rules of jurisdiction laid down in the regulation (B) and also the minimum requirements relating to the defendant's rights of defence (C).

A — *Compatibility in principle of a provision such as Paragraph 29(3) of the OSŘ with European Union law*

53. As is apparent from the order for reference, the appointment of a guardian *ad litem* pursuant to Paragraph 29(3) of the OSŘ makes it possible to continue proceedings against the defendant even though his address is unknown and the application initiating proceedings has not itself been served on him.

54. The rules in Regulation No 44/2001 do not in principle preclude the application of such a national rule. The object of Regulation No 44/2001 is to unify the rules on determining which court has jurisdiction in disputes concerning civil and commercial matters in intra-Community relations and to facilitate the enforcement of judgments, not to harmonise further the procedural law of the Member States. [7] Consequently, it is in principle within the discretion of the Member Sates to lay down a rule of procedural law such as Paragraph 29(3) of the OSŘ, under which a guardian *ad litem* can be appointed for a defendant of unknown domicile so that the proceedings against him can be continued. [8]

55. However, when applying its national law a national court must ensure the full effectiveness of European Union law. In a case such as the present, it must, in particular, take account of the rules of jurisdiction laid down in Regulation No 44/2001 and safeguard protection of the defendant's rights of defence. [9]

7 — Case C-18/02 *DFDS Torline* [2004] ECR I-1417, paragraph 23. As regards the Brussels Convention, see Case C-365/88 *Hagen* [1990] ECR I-1845, paragraph 17, and Case C-68/93 *Shevill and Others* [1995] ECR I-415, paragraph 35.

8 — See in this connection Case 49/84 *Debaecker and Plouvier* [1985] ECR 1779, paragraph 10 et seq., in which the Court acknowledged the existence of such rules and held that they are not incompatible in principle with the scheme of the Brussels Convention.

9 — *Hagen*, cited in footnote 7, paragraph 20, and *Shevill*, cited in footnote 7, paragraph 36.

B — *Taking account of the rules of jurisdiction in Regulation No 44/2001*

56. The appointment of a guardian *ad litem* for the defendant in the main proceedings does not release the referring court from its obligation to comply with the rules of jurisdiction in Regulation No 44/2001. Those rules are applicable in a case such as the present (1). Therefore, the referring court will have to examine whether it has jurisdiction under those rules (2).

1. Applicability of the rules of jurisdiction in Regulation No 44/2001

57. As is clear from the first question referred, the referring court wishes to know whether the rules of jurisdiction laid down in Regulation No 44/2001 must apply in a case such as the present.

58. That question must be answered in the affirmative.

59. According to the Court's case-law, [10] which, although adopted in relation to the rules of jurisdiction in the Brussels Convention, is transferable to Regulation No 44/2001, [11] there must be a foreign element in order for those rules to apply. [12] For such a foreign element to exist, it is sufficient for the court of a Member State to raise questions as to its international jurisdiction. [13]

60. A case such as the present raises such questions.

61. Such questions can arise not only where other States are involved by virtue of the parties' domicile, the reason for the dispute or the place where the events at issue occurred. The facts that the defendant in the main proceedings holds the nationality of another Member State [14] and that his place of residence is not known to the referring court are also capable of raising such questions as to the international jurisdiction of a court.

62. Furthermore, the spirit and purpose of Article 16(2) of Regulation No 44/2001, which must be taken into account in a case such as the present, militate in favour of applying the rules of jurisdiction in the regulation in a case such as the present. Under this rule, a consumer can in principle be sued

10 — Case C-281/02 *Owusu* [2005] ECR I-1383, paragraph 25 et seq.

11 — As regards the transferability in principle of that case-law, see Case C-189/08 *Zuid-Chemie* [2009] ECR I-6917, paragraph 18, and Case C-180/06 *Ilsinger* [2009] ECR I-3961, paragraph 41.

12 — *Owusu*, cited in footnote 10, paragraph 25.

13 — Ibid., paragraph 26.

14 — This would also appear to be consistent with the comments on p. 8 of the Jenard Report (OJ 1979 C 59, p. 1), according to which a foreign element for the purposes of the Brussels I Convention exists where the defendant is a foreign national.

only in the courts of the Member State in which he is domiciled. If those provisions were inapplicable in a case such as the present, in which the national court has merely found that the defendant is not domiciled in the Member State of that court, a defendant could be sued before a court of that Member State even though he might be domiciled in another Member State. That would undermine the protective purpose of Article 16(2) of the regulation.

63. Firstly, the Hungarian Government objects that the rules of jurisdiction in Regulation No 44/2001 are not applicable in a case such as present because, under Article 2(2) thereof, the same rules are to apply to foreign nationals and to a country's own nationals who are domiciled in the same Member State. Secondly, the Netherlands Government argues that the rules on international jurisdiction laid down in the regulation are linked in principle to domicile and take no account of nationality.

64. These objections are unconvincing.

65. A distinction must be drawn between the conditions under which the rules of jurisdiction in Regulation No 44/2001 must apply, on the one hand, and the criteria by which international jurisdiction is determined under these rules, on the other. The provisions invoked by those governments contain the criteria governing international jurisdiction *in so far as* the rules of jurisdiction in the regulation apply. However, the answer to the question when the rules of jurisdiction in the regulation apply at all cannot be deduced from those criteria.

66. As an interim conclusion, it must therefore be stated that the rules of jurisdiction in Regulation No 44/2001 are applicable in a case such as the present and must be complied with by the referring court.

2. Jurisdiction of the referring court

67. Consequently, the referring court must examine whether it has jurisdiction under the rules of Regulation No 44/2001.

68. As is clear from the third question referred, it first wishes to establish in this connection whether it may have acquired jurisdiction under Article 24 of Regulation No 44/2001 on the ground that the guardian *ad litem* who was appointed for the defendant without the latter's consent or knowledge entered an appearance without raising any objection (a). By the fourth question referred,

it further seeks to ascertain whether it could have international jurisdiction by virtue of an international agreement on jurisdiction under Article 17.3 of the regulation (b).

69. If the referring court is unable to base its jurisdiction on one of the abovementioned provisions, it will have to take account of the rule on jurisdiction in Article 16(2) of Regulation No 44/2001. Under that provision, 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 (c). If this provision does not apply either, then in my view Article 4 of the regulation applies, under which international jurisdiction is governed by that national law of the referring court (d).

(a) Entering of an appearance without raising an objection under Article 24 of Regulation No 44/2001

70. Under Article 24 of Regulation No 44/2001, a court has jurisdiction if the defendant enters an appearance before it. This rule does not apply where appearance was entered in order to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.

71. The referring court wishes to establish whether Article 24 is applicable also to consumer contracts. The answer must be that it is (i). However, there is also the broader question whether the entering of an appearance by the guardian *ad litem* appointed for the defendant without his consent or knowledge can constitute the entering of an appearance within the meaning of that provision (ii).

(i) Applicability to consumer contracts

72. First, it must be observed that Article 24 of Regulation No 44/2001 applies also to consumer contracts within the meaning of Section 4 of Chapter II thereof.

73. In its judgment in the '*Bilas*' case, the Court found that Article 24 of the regulation is applicable to consumer contracts within the meaning of Section 3 of Chapter II thereof. [15] This case-law is transferable to consumer contracts within the meaning of Section 4 of the same chapter. As the Court emphasised in that judgment, the first sentence of Article 24 of the regulation provides for a rule of jurisdiction in respect of all disputes where the jurisdiction of the court seised is not derived from other provisions of that regulation. That provision applies also in cases where the

15 — Case C-111/09 *ČPP Vienna Insurance Group* [2010] ECR I-4545, paragraphs 19 to 33.

court has been seized in breach of the provisions of that regulation. It implies that the entering of an appearance by the defendant may be considered to be a tacit acceptance of the jurisdiction of the court seised and thus a prorogation of that court's jurisdiction. [16] The Court further held that, although the second sentence of Article 24 of the regulation provides for an exception to the principle of entering an appearance without raising an objection, that exception, which must be interpreted restrictively, applies only to the cases expressly listed therein. [17] However, it does not refer to non-compliance with the rules on insurance matters within the meaning of Section 3 of Chapter II of the regulation or non-compliance with the rules on consumer contracts within the meaning of Section 4 of Chapter II thereof.

74. Consequently, Article 24 Regulation No 44/2001 is applicable also to consumer contracts within the meaning of Section 4 of Chapter II of the regulation. [18]

16 — Ibid., paragraph 21.

17 — Ibid., paragraphs 23 to 26.

18 — Geimer, R., in: Geimer, R., Schütze, R., *Europäisches Zivilverfahrensrecht,* Beck, 2nd edition 2004, Article 24, paragraph 36, and Staudinger, A., in: Rauscher, T., *Europäisches Zivilprozess- und Kollisionsrecht,* Sellier 2011, Article 24, paragraph 11, concur. For an overview of the state of opinion, with a majority of concurring views, see Mankowski, P., 'Besteht der Europäische Gerichtsstand der rügelosen Einlassung auch gegen von Schutzregimes besonders geschützte Personen?', *Recht der Internationalen Wirtschaft* 2010, p. 667 et seq., who, however, himself criticises the inadequate account taken of the intended protection of the consumer as the weaker party.

(ii) Concept of the entering of an appearance by the defendant

75. However, the further question arises whether, in a case such as the present, there is an entering of an appearance by the defendant within the meaning of Article 24 of Regulation No 44/2001. Although the referring court has not expressly raised this question, in preliminary-ruling proceedings the Court can provide the referring court with all the guidance that it deems useful for the resolution of the main proceedings. [19]

76. The concept of entering of an appearance by the defendant within the meaning of Article 24 of Regulation No 44/2001 is an independent concept of European Union law which must be interpreted uniformly. According to settled case-law, the provisions of the regulation must be interpreted independently, by reference to its scheme and purpose. [20] The situation is different where express reference is made to national law or it is clear from the relevant provisions that the European Union legislature intended to leave this matter to the law of the Member States. This is not apparent with regard to the concept of entering of an appearance by the defendant within the meaning of Article 24 of the regulation.

19 — Case 294/82 *Einberger* [1984] ECR 1177, paragraph 6, and Case C-187/91 *Belovo* [1992] ECR I-4937, paragraph 12.

20 — Case C-189/08 *Zuid-Chemie* [2009] ECR I-6917, paragraph 17; Case C-372/07 *Hassett and Doherty* [2008] ECR I-7403, paragraph 17; and Case C-167/08 *Draka NK Cables and Others* [2009] ECR I-3477, paragraph 19.

77. Consequently, the independent concept of the entering of an appearance by the defendant within the meaning of Article 24 of Regulation No 44/2001 gives rise to minimum requirements of European Union law which the Member States must take into account. [21] However, this does not mean that national procedural law is completely disregarded. Rather, it applies in a supplementary manner. [22]

78. In a case such as the present, the question arises as to whether it is compatible with these minimum requirements of European Union law to assume that the defendant has entered an appearance within the meaning of Article 24 of the Regulation No 44/2001 also where that appearance has been entered by a guardian *ad litem* appointed for the defendant consumer without his consent or knowledge.

79. In its judgment in *Hendrikman* [23] the Court found that the entering of an appearance by a representative who was not himself authorised by the defendant, could not be interpreted as constituting an entering of an appearance by the defendant for the purposes of Article 27(2) of the Brussels I Convention, the predecessor provision to Article 34(2) of Regulation No 44/2001. [24]

80. In the light of this case-law, I take the view that the concept of the entering of an appearance by the defendant in Article 24 of Regulation No 44/2001 should be interpreted as meaning that a guardian *ad litem* who has been appointed for a defendant consumer without the latter's consent or knowledge cannot enter an appearance on that defendant consumer's behalf. The present case, admittedly, concerns a court-appointed guardian *ad litem* and not an unauthorised lawyer, as in the *Hendrikman* case. The present case also concerns the interpretation of Article 24 of Regulation No 44/2001, which applies in initial proceedings, and not that of Article 34.2 of the regulation, which applies in enforcement proceedings. Nevertheless, the reasoning underlying that case-law can, in my opinion, be transferred to a case such as the present.

21 — Case 150/80 *Elefanten Schuh* [1981] ECR 1671, paragraph 16. See also Geimer, R. cited in footnote 18, Article 24, paragraph 30.

22 — Calvo Caravaca, A.L., Carrascosa Gonzalez, J., in Magnus, U., Mankowski, P., *Brussels I Regulation,* Sellier 2007, Article 24, paragraph 10; Kropholler, J., *Europäisches Zivilprozessrecht,* Verlag Recht und Wirtschaft, 8th edition 2005, Article 24, paragraph 7. Nor does this finding appear to be militated against by the comments on p. 38 of the Jenard Report, cited in footnote 14 above, according to which the question of how the concept of appearance is to be interpreted is governed by national law. In my view, this cannot be understood as meaning that the question whether or not an appearance has been entered is governed solely by national law. Rather, it ought to be understood as meaning that European Union law lays down conditions relating to the concept of entering of an appearance, which, however, may be supplemented by the relevant national rules on procedure.

23 — Case C-78/95 *Hendrikman and Feyen* [1996] ECR I-4943.

24 — Ibid., paragraph 18. In this connection, the judgment in *ČPP Vienna Insurance Group*, cited in footnote 15, paragraph 33, should not go unmentioned. According to that judgment, a national court does not have to ascertain of its own motion whether the defendant, who is to be considered to be the weaker party for the purposes of Sections 3 to 5 of Chapter II of Regulation No 44/2001, is in a position to be fully aware of the effects of his defence as to substance. However, the national court is free, bearing in mind the objective expressed in those provisions, to ensure stronger protection for the party considered to be the weaker party and to ensure that the defendant being sued before it in those circumstances is fully aware of the consequences of his agreement to enter an appearance.

81. An important objective of Regulation No 44/2001 is to protect the defendant's rights of defence [25] which are enshrined in primary law in the second paragraph of Article 47 of the Charter. In my view, it is not possible to reconcile with this objective the fact that, in a case such as the present, the entering of an appearance by a guardian *ad litem* who has been appointed without the consent or knowledge of the defendant is attributed to the latter. Firstly, the defendant is unable, in such a case, to make a conscious decision as to the conduct of proceedings. Secondly, a guardian *ad litem*, who has no contact with the defendant, will not normally have the information necessary to assess whether the act of entering an appearance, within the meaning of Article 24 of the regulation, can be in the defendant's interest. Thirdly, such a lack of information could make it more difficult for the guardian *ad litem* to contest the jurisdiction of the court concerned.

82. Furthermore, Article 16(2) of Regulation No 44/2001 is intended to protect the consumer from being sued before courts other than those of his Member State. If the entering of an appearance by a guardian *ad litem* appointed without the defendant's consent or knowledge were attributed to the defendant, and the jurisdiction of the court which appointed that guardian *ad litem* were thus established, the practical effect of Article 16(2) of the regulation could be restricted.

83. In addition, the entering of an appearance within the meaning of Article 24 of Regulation No 44/2001 determines the forum, and thus also the *lex fori*, and this can have far-reaching consequences for the outcome of the dispute.

84. For the foregoing reasons, the entering of an appearance by a guardian *ad litem* appointed without the consent or knowledge of the defendant cannot in principle be attributed to the defendant under Article 24 of the regulation as amounting to an entering of an appearance by the defendant himself.

(iii) Conclusion

85. It must be stated, by way of conclusion, that, although Article 24 of the regulation applies to consumer contracts, the entering of an appearance by a guardian *ad litem* appointed without the defendant consumer's consent or knowledge cannot be attributed to the defendant as an entering of an appearance within the meaning of Article 24 of Regulation No 44/2001. Consequently, the referring

25 — *Hendrikman*, cited in footnote 23, paragraph 18.

court cannot rely on that provision for the purpose of establishing its jurisdiction. [26]

(b) Agreement on international jurisdiction under Article 17.3 of the regulation

86. As is clear from the fourth question, the referring court also asks whether it can base its international jurisdiction in a case such as the present on an agreement on international jurisdiction within the terms of Article 17.3 of Regulation No 44/2001.

87. According to the information provided by the referring court, the present case relates to a consumer contract within the meaning of Article 15(1)(c) of Regulation No 44/2001 and therefore the special provisions in Section 4 of Chapter II of Regulation No 44/2001 apply. Under Article 16(2) of the regulation, a consumer can in principle be sued only in the courts of the Member State in which he is domiciled. However, jurisdiction may be vested elsewhere subject to the conditions laid down in Article 17 of the regulation. For example, under Article 17.3 of the regulation the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, can agree that the courts of that Member State are to have jurisdiction, provided that such an agreement is not contrary to the law of that Member State.

(i) Scope of Article 17.3 of the Regulation No 44/2001

88. In a case such as the present the question first arises as to whether Article 17.3 of Regulation No 44/2001 can also apply where the defendant in the main proceedings may no longer have been domiciled in a Member State at the time when the action was brought.

89. That question must be answered in the affirmative.

26 — Consequently, for the purposes of the present case it is also irrelevant whether or not Article 24 of the regulation can at all apply where the defendant is not domiciled in a Member State. On this question, see Geimer, R., cited in footnote 18, Article 24, paragraphs 22 to 25; Calvo Caravaca, A. L., Carrascosa Gonzalez, J., cited in footnote 22, Article 24, paragraph 28 et seq.

90. In order for this provision to be applicable, it is sufficient that both parties were domiciled in the territory of the Member State concerned at the time of conclusion of the contract. [27] Such an interpretation is consistent with the purpose of the provision, which is to protect the party concluding the contract with the consumer. [28] This objective can be effectively attained only if such an agreement is not affected by a subsequent change of domicile and if that change is not made to a non-member country. [29]

(ii) Domicile of the consumer and the party concluding the contract with him in the same Member State

91. According to the information provided by the referring court, both the applicant and the defendant in the main proceedings were domiciled in the Czech Republic at the time when the contract was concluded, with the result that the first requirement of Article 17.3 of Regulation No 44/2001 is satisfied.

(iii) Implied agreement on the international jurisdiction of the Czech courts

92. The referring court asks whether an agreement on territorial jurisdiction, under which the court for the place where the applicant in the main proceedings was established at the time when the action was lodged is to have jurisdiction in respect of disputes, can constitute an agreement on international jurisdiction for the purposes of Article 17.3 of Regulation No 44/2001.

93. The referring court will first have to examine whether the applicant and defendant in the main proceedings agreed that the Czech courts were to have international jurisdiction in respect of disputes arising from the mortgage loan contract. In the absence of relevant rules of European Union law, it is for the referring court to examine, on the basis of its national rules, whether an implied agreement on international jurisdiction can be derived from the agreement on territorial jurisdiction. According to the information provided by the referring court, this would appear to be possible under Czech law. Indeed, two parties, both of which are domiciled in the same Member State, will normally wish to determine, by agreeing on the court which will have jurisdiction in the event of

27 — See also, to this effect, Geimer, R., cited in footnote 18, Article 17, paragraph 10.

28 — See p. 33 of the Jenard Report, cited in footnote 14; Geimer, R., cited in footnote 18, Article 17, paragraph 7.

29 — As a consequence, Article 4 of the regulation, under which the jurisdiction of the courts of each Member State is be determined by the law of that Member State where the defendant is not domiciled in a Member State, must be interpreted as applying only subject to an agreement within the meaning of Article 17.3.

a dispute, not only the court having territorial jurisdiction but, by implication, also the courts having international jurisdiction.

94. The question also arises as to whether such implied agreements under Article 17.3 of Regulation No 44/2001 can be taken into account. That question must be answered in the affirmative. The wording of that provision does not provide for a restriction to explicitly worded agreements. Furthermore, a restriction of the scope of that provision to explicitly worded agreements would unduly limit its practical effect. As a general rule, Article 17.3 of the regulation will apply in cases in which no foreign element yet existed at the time of conclusion of the agreement and arose only later as a result of the consumer transferring his domicile to another Member State. In such an initial situation, the parties to the contract will not normally consider it necessary to agree on the international jurisdiction of the courts of the Member State in which they are both domiciled. A restriction to explicitly worded agreements would also hardly be compatible with the provision's objective of protecting the party concluding a contract with the consumer against a transfer of jurisdiction, which may occur when the consumer moves from a Member State. [30]

30 — See p. 33 of the Jenard Report, cited in footnote 14.

(iv) Validity of the agreement under national law

95. Should the referring court conclude that the applicant and defendant in the main proceedings concluded an agreement on the jurisdiction of the Czech courts, it will then have further to examine, under Article 17.3 of Regulation No 44/2001, whether such a term is valid under Czech law.

96. The referring court expresses doubts as to whether such an agreement is binding. In this connection it points out that the contractual term granting local jurisdiction, under which the court for the applicant's place of establishment is to have jurisdiction, might be unfair within the meaning of Article 3(1) of Directive 93/13 and thus not binding within the meaning of Article 6 thereof inasmuch as, at the time of conclusion of the contract, the applicant in the main proceedings had its place of establishment in Prague and the defendant in the main proceedings was domiciled in Mariánské Lázně.

97. In this connection, the question firstly arises whether and to what extent the implied agreement on international jurisdiction itself must be assessed in the light of the requirements of Directive 93/13. The question secondly arises as to whether the possibly non-binding nature of the agreement on local jurisdiction may also affect the implied

agreement on international jurisdiction. Thirdly, I shall examine the criteria by which the unfairness of the agreement on local jurisdiction is determined.

— Examination of the agreement on international jurisdiction in the light of Directive 93/13

98. Under Article 17.3 of Regulation No 44/2001 the agreement on international jurisdiction must not be contrary to national law. Since the Member States must comply with the requirements of European Union law when formulating their national law, particular account must be taken in this connection of the requirements of Directive 93/13. [31] Consequently, terms granting international jurisdiction which fall within the scope of this directive, that is to say, those which are used in the seller's or supplier's general terms and conditions of business, are in principle to be reviewed in the light of fairness under Article 3(1) thereof and in the light of the requirement relating to plain, intelligible language under Article 5 thereof.

99. However, in assessing the fairness of such a term, it is not possible to ignore the fact that, in adopting Article 17.3 of Regulation No 44/2001, the European Union legislature intended to enable the party concluding a contract with the consumer to prevent any transfer of international jurisdiction in the event that the consumer should move away from the common Member State. In the light of this appraisal by the legislature, a term granting international jurisdiction which falls within the scope of Directive 93/13 cannot be regarded as unfair within the meaning of Article 3(1) solely on the ground that it provides that the courts of the Member State in which both the seller/supplier and the consumer were domiciled at the time of conclusion of the contract are to have international jurisdiction in respect of disputes between them. If the application of Article 17.3 of the regulation were to be restricted to agreements which do not constitute general terms and conditions of business for the purposes of Directive 93/13, the practical effectiveness of Article 17.3 of Regulation No 44/2001 would be severely curtailed.

31 — See in support of this view: Heinig, J., *Grenzen von Gerichtsstandsvereinbarungen im Europäischen Zivilprozessrecht*, Jenaer Wissenschaftliche Verlagsgesellschaft 2010, p. 337 et seq.; Staudinger, A., in: Rauscher, T., cited in footnote 18, Article 17, paragraphs 3 and 6; Nielsen, P. A., in: Magnus, U., Mankowski, P., cited in footnote 22, Article 17, paragraph 4. See against this view: Geimer, R., cited in footnote 18, Article 17, paragraph 3, with reference to the *lex posterior* principle. However, this principle cannot justify Directive 93/13 being superseded completely by Regulation No 44/2001 since Article 17.3 of the regulation expressly lays down the proviso that such an agreement must not be contrary to national law.

100. Similar considerations apply to the requirement which the first sentence of Article 5 of Directive 93/13 lays down as regards

the use of plain, intelligible language in a term granting international jurisdiction which is agreed impliedly when laying down a term granting local jurisdiction. In this connection too, account must be taken of the appraisal by the legislature arising from Article 17.3 of Regulation No 44/2001. An approach which precluded the inclusion of such a term granting international jurisdiction which had been agreed implicitly would unduly restrict the scope of Article 17.3 of the regulation. [32]

— The effect which the possibly non-binding nature of the agreement on territorial jurisdiction may have on the agreement on international jurisdiction

101. In the present case the question also arises whether the possibly non-binding nature of the agreement on territorial jurisdiction under Article 3(1) of Directive 93/13 may affect the agreement on international jurisdiction which was agreed implicitly.

102. Under Article 6(1) of Directive 93/13, unfair terms used in a contract concluded with a consumer by a seller or supplier must not be binding on the consumer. However, the contract is otherwise to continue to bind the parties if it is capable of continuing in existence without the unfair terms. Under these requirements of European Union law, where the term granting local jurisdiction is not valid the crucial factor is whether the agreement on local jurisdiction and the term granting international jurisdiction agreed impliedly can be regarded substantively as a single term or whether the term granting international jurisdiction can be considered as forming part of the contract and consequently continues to produce effects between the consumer and the other party to the contract, notwithstanding the non-binding nature of the term granting local jurisdiction.

103. The answer to the question whether or not the term granting local jurisdiction and the term granting international jurisdiction implicitly agreed are to be regarded as a substantive unit will ultimately depend on the intention of the parties. In the absence of relevant provisions of European Union law, the referring court will have to examine that intention pursuant to the relevant national laws. In this connection, however, the referring court will have to bear in mind that in a case such as the present the fact that the term granting international jurisdiction is

32 — In this connection, reference can be made to the reasons set out in point 94 of this Opinion.

derived in particular from the term granting local jurisdiction is not sufficient per se for the two terms to be regarded as constituting a substantive unit. A term granting local jurisdiction and a term granting international jurisdiction perform different functions. Although a term granting international jurisdiction also has the effect of determining the courts having local jurisdiction in accordance with State boundaries, the parties will normally also pursue other objectives by means of a term granting international jurisdiction. The selection of courts with international jurisdiction has a large number of consequences in law and in fact, and these may have a bearing on how the dispute is dealt with and on the outcome of the proceedings. They include, in particular, determination of the *lex fori*, of the conflict rules applicable in the judicial district, and of the language of the proceedings. [33]

104. If, in the light of the foregoing, the referring court should conclude that the agreement on local jurisdiction and the agreement on international jurisdiction do not form a substantive unit according to the intention of the parties, the non-binding nature of the term granting local jurisdiction would not affect the term granting international jurisdiction. [34]

— Unfairness of the agreement on territorial jurisdiction

105. In the light of the above considerations, in a case such as the present the possible unfairness of the agreement on local jurisdiction will probably not affect the agreement on international jurisdiction. However, this possibility cannot be ruled out completely. Moreover, since it seems logical to assume that the referring court will assess the unfairness of the term granting local jurisdiction in terms of such jurisdiction, I would now like to examine briefly the assessment of the unfairness of agreements on local jurisdiction.

33 — See, further, Heinig, J., cited in footnote 31, pp. 62 and 69.

34 — If, on the other hand, the referring court were to conclude that the term granting local and the term granting international jurisdiction do constitute a single term, that term would in principle not be binding under Article 6(1) of Directive 93/13. In that case the question would arise as to whether this single term can be reduced in a manner which retains validity so that the international element remains valid. The fact that the seller or supplier would not be sufficiently deterred from using unfair clauses in principle militates against the compatibility of such a reduction with Article 6 of the directive.

106. Under Article 3 of Directive 93/13, a contractual term is to be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Consequently, this provision merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated. [35] In this connection, Article 3(3) of the directive refers to an annex setting out a list of the terms which may be regarded as unfair. Point 1(q) of the list mentions terms which have the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract. However, this list is merely indicative and non-exhaustive. [36] As to the question whether a particular term in a contract is, or is not, unfair, Article 4 of Directive 93/13 provides that the answer should be reached taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract. It should be pointed out in that respect that the consequences of the term under the law applicable to the contract must also be taken into account. This requires that consideration be given to the national law. [37]

107. In the light of the framework of European Union law set out above, the Court merely interprets, in requests for a preliminary ruling, the general criteria used by the European Union legislature in order to define the concept of unfair terms. It is for the national courts to assess the unfairness of a term in the light of those criteria. As the Court has repeatedly made clear in its recent case-law, this division of functions applies also to the assessment of terms which confer exclusive territorial jurisdiction. [38]

108. As is clear from the Court's consistent case-law, the national court must, when assessing the unfairness of terms granting

35 — Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3403, paragraph 19.

36 — Ibid., paragraph 20.

37 — Ibid., paragraph 21.

38 — See Case C-243/08 *Pannon* [2009] ECR I-4713, paragraph 42 et seq., and Case C-137/08 *VB Pénzügyi Lízing* [2010] ECR I-10847, paragraph 42 et seq. In these judgments the Court departed from its view expressed in Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraph 21 et seq., that the final assessment of a term granting jurisdiction by the Court itself must be possible where it is a term which is solely to the benefit of the seller and contains no benefit in return for the consumer, as such a term, whatever the nature of the contract, undermines the effectiveness of the legal protection of the rights which Directive 93/13 affords to the consumer.

exclusive territorial jurisdiction, bear in mind the fact that the consumer may incur disproportionately high costs in entering an appearance if the court in question is a long way from his domicile and disputes concerning limited amounts of money are involved. In those circumstances, a term granting exclusive territorial jurisdiction may make it difficult for the consumer to enter an appearance and may even be a deterrent and cause him to forgo any legal remedy or defence. [39]

109. However, a case such as the present does not involve a limited amount of money but, on, the contrary, a large amount, namely CZK 4 383 584.60, plus default interest. Therefore, it cannot be deduced from the ratio between the amount in dispute and the cost which would be incurred by the consumer in entering an appearance by virtue of the term granting local jurisdiction that he is *de facto* excluded from all legal remedy.

110. None the less, in assessing the unfairness of a term granting territorial jurisdiction, as in the present case, the referring court will have to bear in mind that a term of this type enables the seller or supplier to deal with all the litigation relating to his trade, business or profession in a single court which is not that within the jurisdictional area of which the consumer resides. Even if this does not, in a case such as the present, result in *de facto* exclusion from all legal remedy, it can make it difficult for the consumer to enter an appearance and increase his costs. Furthermore, a term of this type can make it easier for the seller or supplier to arrange to enter an appearance and make it less onerous for him to do so. [40]

(v) Conclusion

111. As an initial interim conclusion, it may be stated that agreements on international jurisdiction for the purposes of Article 17.3 of Regulation No 44/2001 can also arise implicitly from agreements on territorial jurisdiction where this is consistent with the intention of the parties, this being a matter for determination by the national court.

39 — *Océano Grupo Editorial and Salvat Editores*, cited in footnote 38, paragraph 22; *Pannon*, cited in footnote 38, paragraph 41; and *Pénzügyi Lízing*, cited in footnote 38, paragraph 54.

40 — *Océano Grupo Editorial and Salvat Editores*, cited in footnote 38, paragraph 23, and *Pénzügyi Lízing*, cited in footnote 38, paragraph 55.

112. Secondly, the non-binding nature of an agreement on local jurisdiction by reason of unfairness within the meaning of Articles 3(1) and 6 of Directive 93/13 can affect the validity of an implicitly concluded agreement on international jurisdiction only where this is the intention of the parties, something which cannot normally be assumed.

(c) Taking account of the jurisdiction for the consumer's domicile under Article 16(2) of Regulation No 44/2001

113. In so far as the referring court is unable to base its international jurisdiction on an agreement on international jurisdiction between the applicant and the defendant in the main proceedings, it will have to have regard for the requirements of Article 16(2) of Regulation No 44/2001. Under that provision, proceedings may be brought against a consumer only in the courts of the Member State in which the consumer is domiciled. Two requirements in respect of a national court follow from this: one which establishes its jurisdiction, and one which excludes it.

114. First, it follows from that provision that a national court has international jurisdiction if the consumer is domiciled in the Member State of the court. A national court must therefore first examine whether the defendant is domiciled in the territory of its Member State. To that end, it applies its internal law pursuant to Article 59(1) of Regulation No 44/2001.

115. In this connection the question arises whether it can follow from the circumstances under which the contract was concluded, and in particular from the term under which the defendant is required to inform the applicant of a change of domicile, that the parties agreed that the domicile was to be the defendant's domicile at the time when the contract was concluded. I would observe firstly that, under Article 59(1) of the regulation, determination of the defendant's domicile is governed by national law and therefore it must, in principle, be assessed by the referring court pursuant to its national law. In its order for reference the referring court has stated that the defendant in the main proceedings is not domiciled in the Czech Republic. In any event, an approach whereby an agreement on change of domicile is inferred from an obligation to notify a change of domicile would appear difficult to reconcile with the requirements of European Union law. In so far as this is a term which falls within the scope of Directive 93/13, such an approach would not

be consistent, in particular, with the requirement relating to plain, intelligible language laid down in Article 5 of Directive 93/13.

116. It also follows from Article 16(2) of Regulation No 44/2001 that the court of a Member State does not have international jurisdiction in the case where the consumer is domiciled in another Member State. Therefore, the referring court will also have to examine whether the defendant in the main proceedings is domiciled in another Member State.

117. In carrying out this examination, the referring court must apply the law of the relevant Member State pursuant to Article 59(2) of the regulation.

118. Moreover, it follows from Article 26(1) of the regulation that the referring court must carry out this examination of its own motion. This provision lays down an obligation to carry an examination of a court's own motion only where the defendant is domiciled in a Member State. However, the protective purpose behind this provision requires that this obligation be assumed until such time as the referring court is fully satisfied that the defendant is not domiciled in another Member State.

119. The regulation contains no further express requirements relating to the conduct of this examination. Consequently, the referring court will have to answer, pursuant to its applicable national law, the questions whether the relevant facts in this context are to be established of its own motion, whether it is possible to make it easier for the applicant to furnish evidence that the defendant is not domiciled in another Member State, and what level of evidence is required to show that the consumer is not domiciled in another Member State. [41]

120. However, when applying national law the referring court must ensure that Article 16(2) of Regulation No 44/2001 has the required effectiveness. In this connection particular account must be taken of the aim of this provision, namely to protect a consumer from being sued before the courts of a Member State other than that of his domicile. It should further be noted that in a case such as the present the defendant did not instruct the guardian *ad litem* and the guardian *ad litem* will receive no information from him. In such

41 — Queirolo, I., in: Magnus, U., Mankowski, P., cited in footnote 22; Mankowski, P., in: Rauscher, T., cited in footnote 18, Article 26, paragraph 5.

a case the national court is not bound by the information provided by the applicant. It will not be able to accept the information set out in the application without examination and will have to resolve its suspicions that it may none the less lack international jurisdiction. [42]

121. If the referring court is unable to conclude with the certainty required under the relevant national procedural law that a consumer is not domiciled in another Member State, it must then declare of its own motion that it does not have jurisdiction pursuant to Article 26(1) of Regulation No 44/2001. This also applies where the court has appointed a guardian *ad litem* for the defendant pursuant to a provision such as Paragraph 29(3) of the OSŘ.

(d) Article 4(1) of Regulation No 44/2001

122. If the court is satisfied that the defendant in the main proceedings is not domiciled in the Czech Republic or in any other Member State, the question then arises as to the criteria by which international jurisdiction is to be determined in such a case.

123. *De lege ferenda*, various possibilities arise in this connection. It would be conceivable to take as a basis the habitual place of residence of the defendant rather than his domicile or to accept that the courts of the relevant Member State have emergency jurisdiction. [43] *De lege lata*, however, such a case appears to me to be covered by Article 4(1) of Regulation No 44/2001. Under that provision, where the defendant is not domiciled in a Member State, the international jurisdiction of a court is to be determined by the law which governs that court.

124. If Article 4 of Regulation No 44/2001 applies, it is compatible with the rules of jurisdiction in the regulation for the referring court to appoint a guardian *ad litem* for the defendant pursuant to a provision such as Paragraph 29(3) of the OSŘ and to declare that it has jurisdiction pursuant to national law.

3. Conclusion

125. In a case such as the present, the continuation of proceedings against the defendant will be consistent with the rules of jurisdiction in Regulation No 44/2001 if the referring court has jurisdiction either by virtue of an agreement on international

42 — Mankowski, P., in: Rauscher, T., cited in footnote 18, Article 26, paragraph 6.

43 — As regards possible approaches see Staudinger, A., in: Rauscher, T., cited in footnote 18, Article 59, paragraph 8; Kropholler, J., cited in footnote 18, Article 59, paragraph 9.

jurisdiction for the purposes of Article 17.3 of the regulation or, under Article 4 of the regulation, by virtue of its domestic law. For Article 4 of the regulation to apply, the referring court must have satisfied itself, by means of an examination to be carried out of its own motion pursuant to Article 26(1) thereof, that the defendant is not domiciled either in the Member State of that court or in any other Member State.

C — Observance of the defendant's rights of defence

126. When applying a national rule such as Paragraph 29(3) of the OSŘ, account must be taken of the defendant's rights of defence in addition to the rules of jurisdiction in Regulation No 44/2001. Two situations must be distinguished in that regard.

127. In the first situation, the court is not, as a result of its examination, satisfied that the defendant is not domiciled in another Member State. This will be so in a case such as the present in particular where the court bases its international jurisdiction on an agreement for the purposes of Article 17.3 of Regulation No 44/2001 without examining where the defendant is domiciled. In this situation the referring court will have to take account of Article 26(2) of the regulation. Under that provision, the court is to stay the proceedings so long as it is not shown that the defendant has been able to receive the application instituting proceedings in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to that end. It is true that Article 26(2) of the regulation applies only where the defendant is domiciled in a Member State. However, for the reasons cited above, [44] this provision must be interpreted, in the light of its protective purpose, as meaning that the referring court must take account of its provisions until such time as it is fully satisfied that the defendant is not domiciled in another Member State.

128. Under Article 26(2) of Regulation No 44/2001, the court can continue proceedings when the defendant has received the application instituting proceedings in sufficient time to enable him to arrange for his defence. This provision is designed to enable the defendant to mount an effective defence.

44 — See point 118 of this Opinion.

129. The serving of an application instituting proceedings on a guardian *ad litem* who has been appointed by a court without the consent or knowledge of the defendant will in principle not satisfy those conditions. [45] For the reasons already set out above [46] an effective defence of the defendant will not normally be safeguarded in such a situation.

130. Furthermore, the referring court can continue proceedings under Article 26(2) of Regulation No 44/2001 where all the necessary steps have been taken to enable the defendant to arrange for his defence. Consequently, it is not a mandatory requirement that the defendant must in fact have received the initiating application in such a way that he can effectively arrange for his defence. Article 26(2) of the regulation does not therefore in principle preclude a national provision such as Paragraph 29(3) of the OSŘ, under which a guardian *ad litem* is to be appointed for a defendant of unknown domicile. However, the referring court must ensure that all the investigations required by good conscience and good faith have first been undertaken to trace the defendant. [47] Similar requirements apply in this regard as in the context of the examination, to be conducted pursuant to Article 16(2) of the regulation, as to whether the defendant is domiciled in another Member State. Therefore, at the present juncture I would like to refer to the matters addressed at point 116 et seq., and in particular point 120, of this Opinion.

131. Such an interpretation of Article 26(2) of Regulation No 44/2001 is also compatible with the defendant's rights of defence enshrined in primary law in the second paragraph of Article 47 of the Charter. Although the serving of an initiating application on a guardian *ad litem* appointed without the consent or knowledge of the defendant interferes with the defendant's rights of defence safeguarded in the second paragraph of Article 47 of the Charter, such interference is justified in view of the applicant's right to effective legal protection under the first paragraph of Article 47 thereof. [48] If an applicant were unable to bring an action against a defendant who cannot be traced even after all investigations required by good conscience and good faith have been undertaken, the applicant's right to effective legal protection could be rendered

45 — According to the Jenard Report, cited in footnote 14, p. 40, the requirement is that notification should have been given to the defendant in person or at his domicile. On the other hand, it is not necessary that the defendant should actually have received notification in sufficient time.

46 — See point 81 of this Opinion.

47 — See p. 40 of the Jenard Report, cited in footnote 14.

48 — As regards the requirements for justification of such interference, see Article 52(1) of the Charter and Case C-394/07 *Gambazzi* [2009] ECR I-2563, paragraph 28 et seq.

entirely devoid of meaning. Moreover, this could be open to abuse if a person wishing to avoid proceedings were deliberately to give up or regularly change his domicile. [49]

132. In a second situation, by contrast, Article 26(2) of the regulation does not apply directly. This is so where the referring court bases its jurisdiction not on an agreement on international jurisdiction under Article 17.3 of Regulation No 44/2001, but on its domestic law pursuant to Article 4 thereof. Article 4 of the regulation presupposes that the defendant is not domiciled in a Member State. However, according to its wording, Article 26(2) of the regulation applies only where the defendant is domiciled in a Member State. In this connection, the question arises as to whether Article 26(2) of the regulation should be applied by analogy, having regard to the rights of defence conferred by the second paragraph of Article 47 of the Charter, or whether the second paragraph of Article 47 of the Charter should be applied directly. [50]

133. However, for the purposes of the present case it is not necessary to examine these questions in detail. Article 4 of Regulation No 44/2001 can apply only where the referring court is already satisfied that such application is not precluded by Article 16(2). In that context the referring court will have to carry out the examination described in point 116 et seq., and in particular point 120, of this Opinion. This imposes similar requirements to Article 26(2) of the regulation or the second paragraph of Article 47 of the Charter. Consequently, the referring court will have already satisfied the requirements of those provisions in establishing the domicile.

49 — Queirolo, I., in: Magnus, U., Mankowski, P., cited in footnote 22, Article 26, paragraph 20.

50 — The scope of the fundamental rights of European Union law ought to be open in a case such as the present, in which a national from another Member State has availed himself of the rights of free movement conferred on him. Nor should the application of the second paragraph of Article 47 of the Charter be precluded by Article 51(1) thereof, under which only the bodies and institutions of the European Union and the Member States are bound by the fundamental rights. The present case concerns a right relating to the administration of justice and thus the relationship between a citizen and the courts of a Member State.

VI — Conclusion

134. In the light of the foregoing considerations, I propose that the Court answer the questions referred in the following terms:

'1. In order for the rules on jurisdiction set out in Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to apply, there must be a situation in which the national court is able to raise questions as to its international jurisdiction. That must be assumed to be so in a case such as the present, in which an action has been brought before a court of a Member State against a national of another Member State who was previously domiciled in the Member State of the court but whose present domicile is unknown to the court of the Member State.

2. Regulation No 44/2001 does not in principle preclude application of a national rule such as Paragraph 29(3) of the Czech Občanský soudní řád, under which a guardian *ad litem* may be appointed for a defendant whose domicile is unknown. However, in the application of that rule, it is necessary to satisfy the requirements of European Union law which arise in particular from the rules on jurisdiction in Regulation No 44/2001 and from the defendant's rights of defence.

3. Article 24 of Regulation No 44/2001 must be interpreted as being applicable to consumer contracts within the meaning of Section 4 of Chapter II thereof. However, the entering of an appearance by a guardian *ad litem*, who has been appointed for the defendant without his consent and knowledge, does not constitute an entering of an appearance by the defendant for the purposes of that provision and consequently cannot establish the jurisdiction of the court before which the guardian *ad litem* enters an appearance.

4. In so far as an agreement on the local jurisdiction of a court also demonstrates the intention of the parties to conclude an implied agreement on the international jurisdiction of the courts of the Member State concerned, such an implied agreement on the international jurisdiction of a court of that Member State may be established under Article 17.3 of Regulation No 44/2001. The non-binding nature of the agreement on local jurisdiction, by reason of unfairness under Articles 3(1) and 6 of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, will not normally affect the agreement on international jurisdiction, unless the intention of the parties indicates otherwise.'