



Jurisdictional rules applicable to electronic consumer contracts

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1. Introduction

This paper examines the EU's jurisdictional rules applicable to electronic consumer contracts for the purchase of goods or services. It highlights the policy making and objectives of Articles 15 to 16 of Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereafter 'Brussels I'), and their implications for consumer electronic contracts. The main objective of this paper is to canvass whether Article 15(1)(c) of Brussels I is workable in its current form, and to explain its scope and true construction given that it has not been adjudicated by the European Court of Justice (hereafter 'ECJ'). In doing so, fundamentally, this paper provides an examination of Article 15(1)(c), and in particular it analyses the requirement of 'directs such activities', which is intrinsic to the above proviso.

Moreover, in the process of the above jurisdictional enquiry, this paper investigates the definitional problem of the concept 'consumer', and how it compels particular scrutiny in the framework of electronic transactions. For this purpose, theories of fairness, such as the doctrine of good faith, are emphasised in the course of aligning electronic transactions with their offline counterparts.

Thus the research highlights the obvious parallels between Internet-based jurisdictional enquiry and offline-based jurisdictional enquiry. One of the principal aims is to assess the level of adaptability of the traditional rules of jurisdiction to disputes relating to electronic transactions. Despite the tendency to apply in full the

traditional jurisdictional rules, attention must be given to ‘fairness theories’ in the assessment of the manner and extent of the application.

It is unfortunate that, despite the pivotal role played by the ECJ’s decision-making in shaping the legal principles in the EU, the ECJ has not had the opportunity to adjudicate a legal issue directly relevant to electronic consumer contracts. Thus it was imperative to examine the ECJ case law applied to traditional transactions, and examine how these could fit within the sphere of online transactions.

2. Consumer Contracts

The provisions dealing with consumer contracts are contained in Articles 15 to 17 of Brussels I, which confirm the traditional view that the consumer is the weaker party. Article 16 stipulates that a consumer can bring proceedings either in his own jurisdiction or in the place where the supplier is domiciled. Additionally, proceedings may be brought against a consumer by the business only in the courts of the Member State in which the consumer is domiciled, so that the consumer retains the right to be sued only in his own jurisdiction¹. It is noteworthy that the above rules cannot be altered or waived by an agreement on jurisdiction between the parties, unless the agreement fulfils one of the conditions laid down in Article 17 of Brussels I. The latter protection can be justified as necessary in order to avoid unfair bargains mainly caused by the consumer’s weaker bargaining power, and also in terms of efficiency because any contrary provision could render Article 15 ineffective².

Another protection to consumers, under the system of Brussels I, is available at the stage of recognition and enforcement of the judgment. Article 35 of Brussels I permits the addressed court to refuse enforcement if the decision at the original court conflicts with Sections 3, 4 or 6 of Chapter II of the Regulation, which includes the provisions on jurisdiction over consumer contracts³.

¹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 OJ L 12. Art. 16(1) and Art. 16(2) of Brussels I. Brussels I ensures the continuity of the judicial heritage contributed by the ECJ in its interpretation of the Brussels Convention. Consequently, where appropriate, this research often recurs to ECJ decisions, which were delivered under the Brussels Convention.

² The present writer proposes a reform to Art. 17 where the supplier is a small or a micro-sized business. This, however, falls outside the scope of this paper.

³ Stone, P., ‘Internet Consumer Contracts and European Private International Law’, 2000, *Information & Communication Technology Law*, Vol. 9, N1 1, 5, p. 7.

Article 15 of the Regulation is more protective of consumers than the previous arrangement under Article 13(3)(b) of the Brussels Convention . Under the Regulation, it is not a condition precedent that the consumer takes, in the state of his domicile, all the necessary steps for the conclusion of the contract. Consequently, in e-commerce contracts, there is no real significance as to where the consumer is sitting at the time of entering into the agreement. Some argue that this is most unfortunate for suppliers, because the consumer could conclude a Business to Consumer (hereafter, ‘B2C’) contract in the supplier’s establishment, whilst retaining his prerogatives under Article 15⁴.

However, in some cases a supplier can avoid the ruggedness of the previous stipulation, by including a jurisdiction clause conferring jurisdiction on the courts of its place of business. This is possible because Article 17(3) of the Regulation stipulates that the parties can depart from Section 4 where, at the time of the conclusion of the contract, both parties were domiciled or habitually resident in the same Member State. In the case of individuals, Brussels I does not establish a uniform definition of the concept of ‘domicile’, and thus, the term ‘domicile’ receives a national interpretation, which under some laws (including English law), a consumer could have more than one domicile⁵. However, it is less likely for an online business to benefit from the exception in Article 17(3), where the consumer has only tenuous contacts with the business’s domicile. This can be manifested by the scenario where a consumer, domiciled in Spain, purchases goods online from Amazon.co.uk at Heathrow Airport, while changing planes on a journey from Frankfurt to Madrid. However, whatever the final outcome might turn out to be, online businesses should always include a jurisdiction clause, hoping that it would be caught by the exemption in Article 17(3).

⁴ Foss, M., & Bygrave A. L., International Consumer Purchases through the Internet: Jurisdictional Issues pursuant to European Law’, Electronic Commerce Legal Issues Platform (Eclip), ESPRIT Project 27028, p. 28.

⁵ Brussels I, Art. 59. For relevant measures applicable in England see ‘Civil Jurisdiction and Judgements Order’ 2001, SI 2001/3929, Sch. 1, para. 9(2), (6).

2.1 The concept of ‘Consumer Contract’

As is elsewhere apparent within the system of Brussels I, the concept of consumer must be interpreted schematically, in accordance with the objectives of the Regulation. Thus, the concept must receive an interpretation which ensures that it is uniformly applied in all Member States, and which avoids the multiplication of jurisdictions, which is one of the main objectives of the Regulation. Brussels I is hostile to an interpretation which favours the attribution of jurisdiction to the courts of the claimant’s domicile, and, thus, reiterates the objective principle enshrined in Article 2 of the Regulation, which favours attribution of the allocation of jurisdiction to the courts of the defendant’s domicile.

Therefore, the paradigm which is found under Articles 15-17 of the Regulation must be interpreted restrictively, and must only include situations where it is apparent that the ‘consumer is economically weaker and less experienced in legal matters’ than the commercial party to the contract⁶. The concept of ‘consumer contract’, under Article 15, is a contract entered into by an individual, not acting in the course of business, whereby he acquires goods or services for his own private consumption, from a supplier acting in the course of a business⁷. The ECJ, in *Benincasa*, concluded that in determining the status of the purchaser, the court must assess the position of the purchaser ‘having regard to the nature and aim of the contract, and not the subjective situation of the person concerned’⁸.

The difficulty which may arise, specifically, when concluding electronic transactions, is how to determine such a relationship, and how to reach an equilibrium which favours the objectives of Brussels I. There are instances, for example, where the electronic transaction is intended both for domestic and for commercial purpose. Or, due to the lack of direct contact between online merchants and their purchasers, where vendors may find it difficult to accurately classify the electronic transaction⁹, for example, where the business, in good faith, mistakenly believes that the other party is

⁶ Case C-89/91, *Shearson Lehmann Hutton Inc v. TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligung mbH*, [1993] ECR I-139, para. 18.

⁷ Article 15 of Brussels I.

⁸ Case C-269/95, [1997] ECR I-3767, paras. 17-18.

⁹ See above n. 4, or (2000) IJL&IT 2000 8(99), paras. 2.1-2.2.

acting for commercial purposes, when, in fact, they are acting in the capacity of a consumer.

With regard to the first scenario, where the contract has a mixed purpose, the European Court of Justice has followed the schematic approach discussed above. In *Johann Gruber v. Bay Wa AG*, the ECJ ruled that, as a matter of principle, the Regulation, under Articles 15-17, intends to protect the party who is presumed to be in a weaker bargaining position. Consequently, a party which concludes an agreement, which is partly for his commercial use and partly for his personal consumption, falls outside the realm of this protection, unless the trade or professional purpose of the person concerned was insignificant or marginal¹⁰. Moreover, the Court further ruled that there is no need, where there is a business purpose, to determine whether the vendor could have been aware of the commercial purpose of the other party¹¹.

Following the second scenario, where the business has been unaware of the domestic purpose of the supply, and the individual has misrepresented, even innocently, that he was acting for commercial purposes, the transaction is taken outside the protective scheme of Articles 15-17, insofar as the business was acting in good faith¹².

3. Article 15(1)(c) of the Brussels I

Article 15(1)(c) arguably brought significant changes to the Brussels Convention, in both substantive terms and conceptual ones, which provoked strong concern within the business community. It follows, as with other areas in private international law, a consumer protectionist approach, assuming that the consumer is in an 'economically weaker position' than the business when entering into the transaction¹³. It is tantalising to read predictions of its future implications on e-commerce. Some, astonishingly, argue that the adoption of Article 15(1)(c) allocates the jurisdiction of the consumer's domicile in respect of all electronic transactions with a website

¹⁰ Case C-464/01, *Johann Gruber v. Bay Wa AG*, delivered on 20 Jan. 2005, para. 39. Compare with Giuliano/Lagard Report on the law applicable to contractual obligations (Official Journal 1980 C 282, p. 23, para. 2), where the report manifests similar construction.

¹¹ *Ibid.*

¹² Opinion of AG Jacobs in Case C-464/01, above n. 62, delivered on 16 Sept. 2004, para. 51. See also the decision of the Court, paras. 51-2.

¹³ Stone, P., above n. 3, p. 5.

established in a Member State, for no other reason than having being accessible (online presence)¹⁴. Another puzzling argument is that this provision subjects businesses to the laws of the Member State where the consumer is domiciled. Whilst the former argument has some truth, insofar as the website is seemingly interactive, the latter is erroneous in principle, because it confuses the courts' jurisdictional powers, which are governed by Brussels I, with the substantive law applicable to the electronic contract, which is governed by the Rome Convention¹⁵. However, it is understandable that the new provisions could pose some problems for businesses seeking to benefit from the global nature of the Internet¹⁶.

It is common to apply two theories in order to determine the scope of Article 15(1)(c). The first school of thought basically advocates that jurisdiction should be allocated to the place of destination of the electronic transaction. In contrast, the other theory advocates that jurisdiction is proper at the place from which the electronic transaction had originated¹⁷. The first, obviously, is favourable to consumers, whereas the latter mainly supports business interests. Although these two theories are frequently workable, this writer holds a different view, because the above dichotomy does not precisely express the legal norm stipulated in Article 15(1)(c). In addition, these two schools are materially deficient, for instance, where the consumer concludes an online transaction in a Member State, other than his Member State of domicile. In the latter situation, Articles 15-16 could be invoked in order to bring proceedings at the courts of his domicile.

Unlike Article 2, which mostly builds on power theories, Articles 15-17 have their basis in fairness theories. Power theories envisage that jurisdiction *in personam* can be properly exercised over a defendant if the 'legal order' has directly, or indirectly, an effective hold over the defendant. Save for the requirement of 'domicile' in Article 2 of the Regulation, there is little consideration for litigation fairness and convenience. Conversely, Articles 15-17 serve to fulfil a different function, which distinguishes between general jurisdiction, which allocates jurisdiction over any type

¹⁴ Mitrani, A., 'E-commerce, E-contracts and the Controversy of Multiple Jurisdiction', [2001] *Int.T.L.R.*, p. 53.

¹⁵ 80/934/EEC, Convention on the Law Applicable to Contractual Obligations, (1980) L 266 1.

¹⁶ Motion, P., 'The Brussels I and E-Commerce- A Premature Solution to a Fictional Problem', [2001] *C.T.L.R.* 209, p. 212.

¹⁷ *Ibid.*

of controversy, and specific jurisdiction, where the forum asserts jurisdiction in a particular situation¹⁸. This is precisely what the above provisions set out to achieve. It gives jurisdictional rights to Member States where their consumers have entered into a contract with a business domiciled in another Member State, and where the difference in the bargaining power, and the inherent litigation inconvenience of requiring the consumer to litigate in a foreign jurisdiction, necessitates an order where consumers can bring their actions in the Member State of their domicile, whilst precluding businesses from initiating proceedings other than in the courts where the consumer has his domicile.

Although jurisdictional rights of the courts of the Member States, and the fairness of their assertion, are almost presumed in all B2C transactions, theories of fairness may still play a significant role in giving a precise construction of the extent of Article 15(1)(c), which will be discussed in the proceeding paragraphs.

3.1 The Provision itself

Article 15(1)(c) states that jurisdiction is established over consumer transactions if 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 15(1)(c) is perhaps the most significant change made to the Brussels Convention, giving effect to the new challenges brought about by e-commerce¹⁹. However, it is important to stress that Article 15(1)(c) is only designed to accommodate e-commerce among all other types of communication, and does not, in any shape or form, attempt to create a special regime for online contracts or electronic transactions. Therefore, any interpretation given to Article 15(1)(c) must conform with the objectives of the Regulation, and must also reflect the special status provided to consumers as being a weaker bargaining party.

¹⁸ Von Mehren, T., A., ‘Adjudicatory Jurisdiction: General Theories Compared and Evaluated’, (1983) *Boston University Law Review*, Vol. 63, no. 2, 279, pp. 285-87.

¹⁹ Opinion of the Economic and Social Committee on the ‘Proposal for a Council Regulation (EC) on jurisdiction and recognition and enforcement of judgments in civil and commercial matters’, 2000 OJ C 117, 06-11, para. 4.2.1.

The present writer starts by drawing attention to the difficulty faced by businesses of knowing, with legal certainty, whether the party at the other end of the transaction is, in fact, acting in the capacity of a consumer²⁰. This is mainly due to the fact that, when concluding an online B2C contract, there is no material contact between the business and the consumer. This uncertainty is intensified because the Regulation does not require that the business directs its activities to the specific consumer. Therefore, Brussels I alleviates the burden on the consumer to show that the advertisement on the website was specifically addressed to him. It suffices, for the purpose of the provision, that the online vendor directs its activities to the Member State, or any part of it where the consumer is domiciled. Therefore, the ‘territorial requirement’, that the conclusion of the contract is to have been preceded by a specific invitation addressed to the consumer, is lessened under Article 15(1)(c) of Brussels I²¹.

However, this does not imply that businesses cannot prevent undesirable contacts. The Commission has explained that the concept of activities pursued in, or directed towards, a Member State is designed to include consumer contracts concluded via ‘interactive websites accessible in the state of the consumer’s domicile’²². It is also important to emphasize, that there are methods available for businesses to prevent certain consumers from accessing their website, or to prevent the conclusion of contracts with consumers from specific jurisdictions. These methods are referred to as ‘jurisdictional avoidance’ or ‘ring-fence mechanisms’²³.

It also follows, that contrary to the desperate line of reasoning against the adoption of Article 15(1)(c) evoked by business lobbies, Article 15(1)(c) does not assert jurisdiction everywhere a website is capable of being accessed. Nonetheless, businesses should follow a website design which implements adequate mechanisms, in order to prevent contracts being concluded with consumers domiciled in jurisdictions with legal systems the business is unfamiliar with²⁴.

²⁰ Statement of the Internet Law and Policy Forum, ‘Hague Conference on Private International Law’ available at www.ilpf.org.

²¹ See discussion on the ‘territorial requirement’, in Stone, p., *Civil Jurisdiction And Judgments In Europe*, Longman, 1998, p. 91.

²² COM(1999) 384 final, 14 July 1999, p. 16.

²³ St Oren, J., ‘International Jurisdiction over Consumer Contracts in E-Europe’, [2003] *ICLQ* 52.3(665), title VII, para. B.

²⁴ *Ibid.*, para. D.

3.2 The requirement of ‘directs such activities’

Taking into account the general desire of the Regulation to protect consumers as the weaker party, the words ‘directs such activities’ should be interpreted to include all cases where a website has entered into an online contract with a consumer, whether purposefully targeting the consumer’s jurisdiction or in absence of such an intention.

This construction is supported by the Commission’s rejection of the proposed amendments put forward by the European Parliament at the time of drafting of the Regulation. The European Parliament favoured an approach under which a website operator is haled under Article 15(1)(c) to the consumer’s jurisdiction, only where the website operator has purposefully targeted its activities in a substantial way to the Member State where the consumer is domiciled. The Commission took the view that the proposed amendment is a reproduction of the American concept of a business activity as a general connecting factor determining jurisdiction, which runs contrary to the philosophy of Article 15(1)(c)²⁵. The Commission did not clarify what it meant by the ‘philosophy of the provision’, but, it is safe to argue, that this philosophy is concerned with the nature of the relationship between the parties. Consequently, each electronic contract concluded with a consumer (which this writer refers to as the ‘single contract’ rule) places the online business within the meaning of ‘directs such activities’. The opposite argument is equally correct. A website is not accountable, under Article 15(1)(c), if it has targeted the consumer’s domicile but, nevertheless, did not enter into a contract with the consumer²⁶. Therefore, factors, such as, the language of the website, currency used, country specific domain names and the use of geographically limited credit cards, are not essential considerations in the assessment²⁷.

However, there are exceptions to the ‘single contract’ rule where the consumer acts in bad faith, for example, by providing false information on his place of domicile,

²⁵ Amended proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (presented by the Commission pursuant to Article 250 (2) of the EC-Treaty), [2001] OJ E 62, p. 243-75, para. 2.2.2.

²⁶ Joint Council and Commission Statement on Articles 15 and 73 of 14 Dec. 2000, available at <http://register.consilium.eu.int/pdf/en/00/st14/14139en0.pdf>, Annex II, p. 5 of the statement. Last visited on 1 Sept. 2005.

²⁷ Debussere, F., ‘International Jurisdiction over E-consumer Contracts in the European Union: *Quid Novi Sub Sole?*’, IJL&IT 2002 10 (344), para. 4.2.2.

which, for the business, is a determining factor on whether to go ahead with the transaction. Or, where the consumer deliberately circumvents the jurisdictional avoidance techniques employed by the business. Moreover, although the enquiry of jurisdictional rights is a procedural matter, courts must discover whether the consumer had acted contrary to the agreement of use, or the contractual terms, placed on the website. Under these exceptions, the consumer is estopped from relying on the protection afforded to him in Articles 15 and 16²⁸.

The underlying principle, which patently governs the exceptions discussed above, is the principle of good faith. It is also noticeable, that this principle has gained momentum in the ECJ jurisprudence in its interpretation of Brussels I. In *Segoura v. Bonakdarian* for instance, the ECJ, in an *obiter dictum* on Article 23 (ex. 17), argued that it would be contrary to good faith for the recipient of a confirmation in writing, who did not reject its content as part of a general framework of a continuing business relationship, to deny the existence of a jurisdiction clause, even if he had not accepted the confirmation in writing²⁹.

If the principle of good faith can be used in order to overcome a formal requirement, such as that in Article 17, it can surely have a significant role in interpreting Article 15(1)(c). Nevertheless, it is unlikely that it will have a far reaching role, which would impose a positive requirement on consumers to act in good faith, but, rather, that it will prevent a consumer from acting in bad faith. Notwithstanding that the above discussion analyses the law as it stands under the Regulation, this writer prefers a system which would impose a positive requirement on consumers, as well as on businesses, to look after the interests of each other in conformity with the principle of good faith³⁰. Drawing on the definition of the principle of ‘good faith’ in *Director General of Fair Trading v. First National Bank plc (English decision)*³¹, ‘fair and

²⁸ See above n. 3, p. 9.

²⁹ Case 25/76, [1976] ECR 1851, para. 11. This statement was subsequently applied in the decision of Case 71/83 *Tilly Russ v. Haven*, [1984] ECR 2517, and Case 221/84 *Berghoefer v. ASA*, [1985] ECR 2699.

³⁰ For further discussion on ‘a good faith regime’ which is ‘dictated by the critical morality of co-operation’, see, Brownsword, R., *Contract law: Themes for the Twenty First Century*, Butterworths, 2000, pp. 115-20.

³¹ [2001] 1 All ER 97.

open dealing’, and the prevention of ‘unfair surprise’, must feature prominently in the interpretation of Article 15(1)(c)³².

At first sight, the above conclusion seems to overburden small enterprises by them having to deal with the legal systems of multiple jurisdictions³³. This author endorses some form of a relaxation for small-sized enterprises, but not within the context of Article 15. It is best to offer relief to small-sized enterprises in the context of Article 17. This is so, because Article 15 is a default provision, and all businesses must not take the risk of trading online without first assessing the legal risk. Also, it would be unfair to transfer this risk to the consumer, which could rise to an ‘unfair surprise’.

4. Conclusion

The main EU policy consideration underlying consumer protection rests on several premises. The most prominent one is based on fairness theories. Consumers are the weaker party and hence must be protected from unfair allocation of jurisdiction. In tandem with these policy considerations, and in particular within the context of Article 15(1)(c), electronic consumer contracts conducted over the Internet should not be treated any differently from consumer contracts concluded by traditional means, otherwise, an unfair competitive advantage would be awarded to online businesses.

Consequently, Article 15(1)(c) should be applied in a manner which would allocate jurisdiction to the courts of the consumer’s domicile in all cases where the business has entered into an electronic contract with that consumer, except where the consumer has acted in bad faith. In essence the above stipulation is applicable even where the only contact made by the online business with the consumer’s Member State, is an electronic contract.

³² Beatson, J., *Anson’s Law of Contract*, Oxford University Press, 27th ed., 1998, p. 293.

³³ Powell, D., M., and Turner-Kerr, M., P., ‘Issues in E-Commerce-European Union, Putting the E- in Brussels and Rome’, *Computer Law & Security Report*, Vol. 16, no. 1, 2000, 23, p. 26. It is often used in favour of businesses that Article 15(1)(c) prejudices SMEs. This acknowledges the problem only where the online business is a small enterprise. There is no evidence to suggest that medium-sized enterprises are affected by these provisions.