

Jurisdiction over consumer contracts

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I. Consumer protection in the EU: A bird's eye view

Example

(based on CJEU case C-190/11 – Mühlleitner):

Ms. Mühlleitner (M), who lives in Salzburg, wishes to buy a used car for her private use. Browsing the internet, she finds an offer from Autohaus Yusufi (A), used car retailers in Hamburg. A has a website which includes an international dialling code. Upon contacting A by telephone, M learns that A has a car which suits her wishes for sale and that her Austrian nationality will not prevent her from buying a car from A. M travels to Hamburg and buys the car offered, immediately paying the purchase price of EUR 11,500 and taking delivery of the car. On her return to Austria, M discovers that the car was seriously defective and asks A to repair it. A refuses any repair because the contract signed by M contains a disclaimer exempting A from any liability for defects.

I. Consumer protection in the EU: A bird's eye view

Three pillars of consumer protection

Substantive law

- Consumer protection by transposition of EU directives into national law (eg Consumer Sales Directive 1999/44/EC, Consumer Rights Directive 2011/83/EU)
- Additional consumer protection provided by national legislation

Private international law

- In the absence of a choice of law, the law of the consumer's habitual residence applies (Art. 6(1) Rome I Regulation)
- Choice of law cannot deprive the consumer of the protection by mandatory rules of his habitual residence (Art. 6(2) Rome I Regulation)
- General rules (public policy, overriding mandatory provision)

Procedural law

- Jurisdiction of courts at the consumer's domicile (Art. 17, 18 Brussels Ia)
- Restrictions on choice-of-court agreements (Art. 25(4), 19 Brussels Ia)
- Extension to businesses domiciled in third states (Art. 6(1), 17(2) Brussels Ia)
- In addition: representative actions, alternative dispute resolution (eg Consumer ADR Directive 2013/11/EU)

II. Art. 17 ff. Brussels Ia in context

1. Protection of weaker parties

Recital 18 Brussels Ia:

“In relation to **insurance, consumer and employment contracts**, the **weaker party** should be protected by rules of jurisdiction more favourable to his interests than the general rules.”

Purpose: counterbalance the structural imbalance of the consumer as the party that is (typically) economically weaker and less experienced in litigation

Most importantly: Consumer is given a “home advantage” → boost consumer confidence

II. Art. 17 ff. Brussels Ia in context

2. Interplay with other provisions

- (1) Art. 24 (exclusive jurisdiction) takes precedence
 - (2) Art. 26 (jurisdiction by appearance) takes precedence (but see Art. 26(2))
 - (3) Art. 25 (choice-of-court agreements) is modified by Art. 19 but takes precedence if still applicable
 - (4) Art. 10 ff. (insurance) take precedence, if insurance contract is at the same time a consumer contract
 - (5) Art. 4 (general jurisdiction at defendant's domicile) as well as Art. 7 and 8 (special jurisdiction) are derogated from (exception: Art.7(5))
- Art. 17 ff. are self-contained rules of jurisdiction providing for a **preferential treatment of the consumer**
- In particular, Art. 4 and Art. 7(1) (place of performance for contractual obligations) are inapplicable, if consumer contract

II. Art. 17 ff. Brussels Ia in context

3. Regulatory technique

Art. 17: Scope of application

Is the matter within the scope of application of Art. 17 ff.?

Art. 18
Deroga-
tion
from
Art. 4,
7, 8

Art. 19
Partial
deroga-
tion
from
Art. 25

Special heads of jurisdiction

- Art. 18(1): Proceedings brought by consumer
- Art. 18(2): Proceedings brought by other party
- Art. 18(3): Counterclaims

Art. 19: Jurisdictional regime contained in Art. 18 may only be departed from by agreement, if conditions of Art. 19 are met

II. Art. 17 ff. Brussels Ia in context

4. Interpretation

- Autonomous interpretation
- Strict interpretation (reason: exception to the rule provided in Art. 4)
- CJEU case law regarding the Brussels Convention and the Brussels I Regulation can be used for interpreting Brussels Ia (see Recital 34)
- Coherence with Art. 6 Rome I? (cf. Recital 7 Rome I)

III. Specific consequences

1. Actions initiated by the consumer

Where can the consumer bring an action?

(1) Jurisdiction of the courts of the Member State in which the other party is domiciled; venue subject to national rules of that Member State, Art. 18 (1) (corresponds to Art. 4, but *lex specialis*)

- No problems with recognition and enforcement
- Will often entail application of foreign law (Art. 6 Rome I)

- or -

(2) Jurisdiction and venue of the courts for the place where the consumer is domiciled, Art. 18(1) (protective forum: “consumer may sue at home”)

- Preferential treatment; significant inroad into *actor sequitur forum rei*
- Increases access to justice (often consumer would not sue at all)
- Aligned with Art. 6 Rome I

- or -

(3) Jurisdiction and venue of the courts at the place of establishment under Art. 7(5), 17(1)

- Definition of establishment in CJEU case 33/78 – Somafer

III. Specific consequences

2. Actions initiated by the other party

Where can the other party bring an action?

Jurisdiction of the courts of the Member State in which the consumer is domiciled; venue subject to national rules of that Member State, Art. 18 (2) (corresponds to Art. 4, but *lex specialis*) (“consumer may only be sued at home”).

Art. 7 and 8 are not available.

III. Specific consequences

3. The case of Ms. Mühlleitner

Possible answer (provided Art. 17 ff. apply!):

Where can M bring an action against A?

(1) German courts; venue according to German national law in Hamburg (seat of A)

- or -

(2) Salzburg courts

Where could M be sued by A?

– solely Austrian courts; venue according to Austrian national law (domicile of M)

– No jurisdiction of Hamburg courts because Art. 7(1) not available

III. Specific consequences

4. Mandatory nature

- Restrictions on jurisdiction agreements in Art. 19 make this regime, in principle, mandatory (cf. Art. 25(4)). The trader must not be able to undermine the protection afforded by Art. 18.
- Jurisdiction agreements are only permitted if:
 - entered into after the dispute has arisen (voluntary choice by consumer who is aware of the dispute), Art. 19(1)
 - allowing the consumer additional jurisdictions (treatment of consumer even more favourable), Art. 19(2)
 - choice in favour of courts in the parties' common Member State at the time of conclusion of the contract (protecting against a later change of domicile), but additional check of validity under the national law of the selected forum, Art. 19(3)
- Moreover: control under Unfair Terms Directive 93/13/EEC (see CJEU case 240-244/98 – Océano Grupo).
- Jurisdiction by appearance in an action against the consumer only under the additional conditions of Art. 26(2).

IV. Scope: When do Art. 17 ff. apply?

1. Personal scope of application

Who is a consumer – Definition

- Starting point: weaker party
 - Only natural person (legal person does not need the same protection)
 - Decisive factor: “purpose” of the individual contract outside that person’s trade or profession
 - Need for protection not in the individual person, but in a typical person concluding a contract for that purpose.
 - A person may be a consumer in one case and not be a consumer in the other:
 - Carpenter buys wood for the fence of his family home.
 - Carpenter buys wood for his workshop.
 - Nature and value of the contract irrelevant (cf. CJEU case C-99/96 – Mietz: purchase of a yacht for 130 000 Euros).
- **“Private final consumer”**

IV. Scope: When do Art. 17 ff. apply?

1. Personal scope of application

Who is a consumer – Problems I

(1) Dual use

- CJEU case C-464/01 – Gruber/BayWa: Austrian farmer bought tiles for his farm near the German border from a German seller. About 60 % of the buildings are used for living. The rest is used as stables and storage.
- Partly (60%) private, partly (40%) professional purpose
- Consumer only „the trade or professional purpose is so limited as to be **negligible** in the overall context of the supply, the fact that the private element is **predominant** being irrelevant in that respect“.
- Reason: strict interpretation

(2) Relevant perspective

- CJEU case C-464/01 – Gruber/BayWa: Art. 17 ff. do not apply, if the other party does not know and ought not to have known that his counterparty is a consumer (eg office letterhead, delivery to business address)
- Reason: predictability

IV. Scope: When do Art. 17 ff. apply?

1. Personal scope of application

Who is a consumer – Problems II

(3) Claims brought by an assignee

- CJEU case C-89/91 – Shearson: Consumer assigned his damages claim to a company. Company could not rely on Art. 17 ff.
- Reason: Company not in a weaker position

(4) Further case law

- CJEU case C-419/11 – Česká spořitelna: natural person who guarantees obligations of a company with which he has close professional links is not acting as a consumer
- CJEU case C-269/95 – Benincasa: natural person who concludes a contract with regard to a future professional activity is not acting as a consumer

IV. Scope: When do Art. 17 ff. apply?

1. Personal scope of application

Who may be the other party?

(1) Trader (B2C)

(2) Also consumer (C2C)?

➤ CJEU case C-508/12 – Vapenik/Turner: no, because no imbalance between the parties

IV. Scope: When do Art. 17 ff. apply?

2. Territorial scope of application

General principles apply:

- Defendant domiciled in a Member State
- CJEU case C-478/12 – Maletic: Brussels Ia may apply if claimant and defendant are domiciled in the same Member State; place of performance abroad constitutes a sufficient foreign element

Two extensions with regard to consumer contracts:

(1) Art. 6(1):

- Brussels Ia applies for proceedings against a defendant domiciled in a third State.
- Consequence: Consumer may sue a trader domiciled outside the EU at home (Art. 18(1): “regardless of the domicile of the other party”).
- Problem: recognition and enforcement

(2) Art. 17(2):

- Trader who is domiciled in a third state but has a branch etc. in a Member State will be deemed to have domicile in that Member State for disputes arising out of the operation of that branch etc.
- Consequence: Consumer can sue in that Member State (or at home)

IV. Scope: When do Art. 17 ff. apply?

3. Situational scope of application

Problem:

Protection of consumers vs. predictability for traders

Solution:

Art. 17 ff. apply only in certain situations in which it is predictable for the trader that he may be sued abroad.

Art. 17(1)(a) and (b):

- certain types of contracts, irrespective of the circumstances

Art. 17(1)(c):

- (almost) all types of contracts, but only under certain circumstances
- exceptions:
 - For contracts concerning immovables see Art. 24
 - Insurance contracts (Art. 10 ff.)
 - Carriage contracts (Art. 17(3)), except certain package travel (transport and accommodation combined)
 - Farther-reaching exceptions in PIL (Art. 6(4) Rome I)

IV. Scope: When do Art. 17 ff. apply?

3. Situational scope of application

Art. 17(1)(a) and (b):

Sale of goods on credit and loans repayable by instalments to finance such sale

Definitions (autonomous interpretation):

- Sale: immediate transfer; also hire-purchase and sale-type lease; unclear if goods to be manufactured at the request of the consumer included
- Goods: movables; software; not: rights
- On credit: “transaction in which the price is discharged by way of several payments or which is linked to a financing contract” (CJEU case 150/77 – Bertrand/Ott); transfer of possession *before* payment of the full price (CJEU case C-99/96 – Mietz)

IV. Scope: When do Art. 17 ff. apply?

3. Situational scope of application

For all other types of contract: Art. 17(1)(c)

Two prerequisites:

1. a) Pursue commercial or professional activities or
b) direct commercial or professional activities
2. Contract falls within the scope of such activities

IV. Scope: When do Art. 17 ff. apply?

3. Situational scope of application

The term “direct”

Background: trader reaches out to the state of the consumer, thus displaying an intention to do business with consumers in that state (making it predictable to be sued in that state)

How do you prove such intention?

- Classical commerce: mailing of catalogues, sending out sales representatives, publishing media advertisements (cost and effort clearly demonstrate intention)
- E-commerce: website can be accessed EU-wide without any further cost for trader. EU-wide jurisdiction?

Joint declaration by Commission and Council (see Recital 24 Rome I): “In this context, the Council and the Commission stress that **the mere fact that an Internet site is accessible is not sufficient for Article [17] to be applicable**, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor.”

IV. Scope: When do Art. 17 ff. apply?

3. Situational scope of application

CJEU joined cases C-585/08 and C-144/09 – Pammer and Alpenhof:

1. Claimant Pammer (domiciled in Austria) had booked a cruise on a container ship with defendant Reederei Schlüter (seat in Germany) from Italy to the Far East. The description of the voyage on the internet had indicated certain amenities such as a pool, a fitness room and a certain cabin standard. As P discovered that the vessel was, in his view, lacking the indicated amenities, he refused to embark on the journey and claimed reimbursement of the sum paid for the voyage. As R reimbursed only 3,500 Euros, P initiated proceedings in Austria for the remaining 5,000 Euros.
 - If Art. 17(1)(c), P may sue at home (Art. 18(1)). If not, jurisdiction only in Germany (Art. 4) and maybe in Italy (Art. 7(1)).
2. Defendant Heller (domiciled in Germany) had found about Hotel Alpenhof (located in Austria) from its website and reserved a number of rooms for a period of one week. His reservation and the confirmation thereof were effected by email, the hotel's website referring to an address for that purpose. Mr Heller is stated to have found fault with the hotel's services and to have left without paying his bill despite Hotel Alpenhof's offer of a reduction. Hotel Alpenhof then brought an action before an Austrian court for payment of a sum of roughly 5,000 Euros. Mr. Heller submits that the Austrian court lacks jurisdiction because, as a consumer, he can only be sued in the courts of the Member State of his domicile (Germany).
 - If Art. 17(1)(c), H may only be sued in Germany (Art. 18(2)). If not, jurisdiction in Austria under Art. 7(1).

IV. Scope: When do Art. 17 ff. apply?

3. Situational scope of application

CJEU joined cases C-585/08 and C-144/09 – Pammer and Alpenhof:

- Core issue: “direct” activities over the internet
- On the one hand: Not sufficient that website can be accessed from everywhere. On the other hand: Not necessary that contract be concluded via the website.
- Non-exhaustive list of factors to find an intention to “direct” activities to a Member State:
 - express mention that goods or services are offered to that Member State
 - disbursement of expenditures on an internet referencing service
 - international nature of the activities at issue
 - mention of telephone numbers with international code
 - use of a top-level domain other than that of the Member State in which the trader is established
 - description of itineraries from one or more Member States to the place where the service is provided
 - mention of an international clientele
 - use of a different language or currency (despite joint declaration!)

IV. Scope: When do Art. 17 ff. apply?

3. Situational scope of application

CJEU case C-190/11 – Mühlleitner:

- Core issue: Is it necessary for the contract to be concluded at a distance?
- Joint declaration: “that a contract has actually been concluded at a distance, by whatever means”
- CJEU: Art. 17 ff. apply, if website contains sufficient indications that trader directed its activities to claimant’s state of domicile, even if the contract was not concluded at a distance
- Reason: wording and purpose of Art. 17

IV. Scope: When do Art. 17 ff. apply?

3. Situational scope of application

CJEU case C-218/12 – Emrek:

Claimant Mr Emrek, who is domiciled in Saarbrücken (Germany) was looking for a second-hand motor vehicle. Defendant Mr Sabranovic operates a business selling second-hand motor vehicles in Spicheren (France), a town close to the German border. At the material time, S had an internet site which contained the contact details for his business, including French telephone numbers and a German mobile telephone number, together with the respective international codes. Having learned from acquaintances, and not from the internet site, of S's business and the possibility to purchase a motor vehicle, E went to the business premises of that undertaking in Spicheren. He concluded a contract for the sale of a second-hand motor vehicle with S at his premises. E now sues S under the warranty before the court in Saarbrücken.

IV. Scope: When do Art. 17 ff. apply?

3. Situational scope of application

CJEU case C-218/12 – Emrek:

- Core issue: Does Art. 17(1)(c) require a causal link between the directing of activities and the conclusion of the contract?
- Answer: no causal link required. But if causal link proven, this will be a strong indication of the intention of directing activities to the State of the consumer.
- Reason: difficulty of proving a causal link; no Recital in Brussels Ia to the effect of Recital 25 Rome I