



**Evolution of consumer's role in
international private law
(the case of cross border
contracts)**

Elisabetta Bergamini

University of Udine

Rules related to conflict of jurisdictions or of laws have been used to prevent the still remaining differences between national legislation from harming the consumer which has decided to buy goods in a cross-border context

Questions

- 1. Can the Brussels (1968) and Rome (1980) Conventions be considered successful?**
- 2. Will the evolution we have been (and still are) facing in this field ameliorate the situation?**

Brussels Convention and Regulation

Article 13 of the Convention required the presence of two conditions to be applied.

1. The first one was that the contract had to be preceded by a specific proposal or advertising made in the country where the consumer has his domicile.
2. The second one was that the conclusion of the contract had to have taken place in the country of the consumer's domicile

It is impossible to really protect the consumer (see national case law; Cour de Cassation 3rd July 2001)

Brussels Convention and Regulation

Notion of Consumer:

-restrictive interpretation by the Court of Justice:

case Dentalkit: a plaintiff who has concluded a contract with a view to pursuing a trade or profession, not at the present time but in the future, may not be regarded as a consumer.

case Gruber: a person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade or profession may not rely on the special rules of jurisdiction laid down in Articles 13 to 15 of the Convention, unless 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;

Under the Brussels Convention only the “passive” consumer was protected

Brussels Regulation (44/01)

Article 5(1)(a)

- 'A person domiciled in a Member State may, in another Member State, be sued:
- 1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question'.

Jurisdiction over consumer contracts

Article 15

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:

- (a) it is a contract for the sale of goods on instalment credit terms; or
- (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.

.....

- . This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Article 16

- 1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.
- 2. 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.'

Brussels Regulation(1215/2012)

- (new numbers: 17-18)
- Article 19
- The provisions of this Section may be departed from only by an agreement:
 - (1) which is entered into after the dispute has arisen;
 - (2) which allows the consumer to bring proceedings in courts other than those indicated in this Section; or
 - (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.

Brussels Convention and Regulation

elimination of these requirements from the texts of the new regulation 44/01 : positive results but.....

How can be the criteria of "targeted activities" be interpreted?

It seems insufficient the simple presence of an accessible website, requiring that the website invite to the conclusion of distance contracts and that a contract has been effectively entered into in this way

Interpretation problems were still open after reg. 44/01: see Commission report and Green Paper (2009) 174 - 175 on the lack of jurisdiction against third State defendant that could jeopardize the application of mandatory EU rules on consumer protection

The new regulation 1215/2012 does not extend jurisdiction also in case the defendant is not domiciled in the EU (the proposal did; Italian law does).

Case Pammer C-585/08

- *Case C-585/08*
- This dispute, between Mr Pammer, who resides in Austria, and Reederei Karl Schlüter, a company established in Germany, concerns a voyage by freighter from Trieste (Italy) to the Far East organised by that company which gave rise to a contract between it and Mr Pammer ('the voyage contract').
- Mr Pammer booked the voyage through Internationale Frachtschiffreisen Pfeiffer GmbH, a company whose seat is in Germany ('the intermediary company').
- The intermediary company, which operates in particular via the internet, described the voyage on its website, indicating that there was a fitness room, an outdoor swimming pool, a saloon and video and television access on the vessel.
- Mr Pammer refused to embark and sought reimbursement of the sum which he had paid for the voyage, on the ground that that description did not, in his view, correspond to the conditions on the vessel. Since Reederei Karl Schlüter reimbursed only a part of that sum, that is to say, roughly EUR 3 500, Mr Pammer claimed payment of the balance, roughly EUR 5 000, together with interest before an Austrian court of first instance, the Bezirksgericht (District Court) Krems an der Donau.
- Reederei Karl Schlüter contended that it did not pursue any professional or commercial activity in Austria and raised the plea that the court lacked jurisdiction.

Case Alpenhof C-144/09

- *Case C-144/09*
- Hotel Alpenhof, a company which operates the hotel bearing the same name located in Austria, is in dispute with a consumer, Mr Heller, who resides in Germany.
- After finding out about the hotel from its website, Mr Heller reserved a number of rooms for a period of a week around 1 January 2008. 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, the Bezirksgericht Sankt Johann im Pongau, for payment of a sum of roughly EUR 5 000.
- Mr Heller raised the plea that the court before which the action had been brought lacked jurisdiction. He submits that, as a consumer, he can be sued only in the courts of the Member State of his domicile, namely the German courts, pursuant to Article 15(1)(c) of Regulation No 44/2001.

“Directed activities”

- “The following matters, the list of which is not exhaustive, are capable of constituting evidence from which it may be concluded that the trader’s activity is directed to the Member State of the consumer’s domicile, namely the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader’s site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States. It is for the national courts to ascertain whether such evidence exists.
- On the other hand, the mere accessibility of the trader’s or the intermediary’s website in the Member State in which the consumer is domiciled is insufficient. The same is true of mention of an email address and of other contact details, or of use of a language or a currency which are the language and/or currency generally used in the Member State in which the trader is established.

Case Mühlleitner C-190/11

Article 15 does not presuppose that the contract between the consumer and the undertaking has been concluded at a distance.(website to direct activities and travel to the business location to sign the contract)

Neither the history of the provision, nor its purpose nor the decision of the ECJ in *Pammer* and *Alpenhof* required that the contract be concluded at a distance.

17 October 2013 *Lokman Emrek* *./. Vlado Sabranovic.*

- Vlado Sabranovic, a resident of France, ran a used car business close to the German border. On his business website he listed several French telephone numbers and a German mobile phone number together with the respective international codes. Lokman Emrek, a resident of Saarbrücken in Germany, learnt about Mr. Sabranovic's business through friends. He, therefore, went to Mr. Sabranovic and bought a used car
- "The court's decision does injustice to the wording of Art. 15 (1) lit. c) and ignores the pertaining literature. In addition, it also ignores Recital 25 of the Rome I-Regulation. Recital 25 elaborates on Art. 6 of the Rome I-Regulation and, thus, the provision that was expressly modeled on Art. 15 (1) lit. c). It explains that consumers should be protected if the professional directs his activities towards the consumer's habitual residence *"and the contract is concluded as a result of such activities."* Recital 25, thus, makes clear that Art. 6 (1) of the Rome I-Regulation requires a causal connection between targeted activity and conclusion of the contract. Since Art. 6 of the Rome I-Regulation and Art. 15 of the Brussels I-Regulation have to be interpreted in a coherent and consistent fashion there is little doubt that Recital 25 should also inform the interpretation of Art. 15 (1) lit. c)."

C-327/10 February 2012, Lindner
Untraceable consumers under
Brussels **I**

A Czech bank brought proceedings in the Czech republic against Lindner, a German national who was part of a long-term mortgage loan contract, which includes the obligation to inform the other party to the contract of any change of address. Lindner had left his last known domicile in the Czech republic before the proceedings against him were brought. The Czech courts tried to track him down, to no avail.

The courts of the Member State in which the consumer had his last known domicile have jurisdiction as there is no evidence allowing them to conclude that the defendant is in fact domiciled outside the European Union

C-478/12, Case Maletic-lastminute.com (Nov. 2013)

- Brussels I Regulation applies to a consumer contract concluded with a professional based in the same jurisdiction as the consumer.
- Austrian consumers book a package holiday to Egypt on the website of lastminute.com. The trip is organized by TUI (Austria based company)
- The confirmation invoice mentions the name of a different hotel and in order to stay in the previously booked one they have to pay a surcharge

C-478/12, Case Maletic-lastminute.com

- The Austrian court retained jurisdiction over Lastminute on the ground of Article 15 of the Brussels Regulation, but declined it with respect to TUI ruling that the Regulation did not apply to a domestic dispute, and that another Austrian court had jurisdiction pursuant to Austrian civil procedure.
- For the ECJ: The concept of 'other party to the contract' laid down in Article 16(1) of Council Regulation (EC) No 44/2001 must be interpreted as meaning, in circumstances such as those at issue in the main proceedings, that it also covers the contracting partner of the operator with which the consumer concluded that contract and which has its registered office in the Member State in which the consumer is domiciled.

Rome Convention

Problems left unsolved in the formulation of the Rome Convention:

- What happens if there has been advertising in a different State and the consumer has known about it by chance
- Definition of the expression "all necessary steps to conclusion"
- How can the "mandatory rules of the law" be defined? Do they include only the basic protection rules? (the ones provided for by the EC directives on the topic) or do they include also the higher protection rules set in certain countries?
- Coordination of article 5 on consumer protection with article 7 on mandatory provisions

Rome Convention and Regulation

Not all Member States have had the same consideration and the same problems in referring to art.5: "German judgements appear to account for more than 90% of published decisions across Europe" ("Grand Canaria" cases)

Regulation 593/2008 (Rome regulation) - need to simplify yet enhance consumer protection

Grand Canaria cases

- The Gran Canaria Cases, decided in German courts, concerned the marketing strategies employed at German tourists.
- The sales contracts were written in German, for goods to be delivered in Germany, and the consumers were spoken to in German, but the transaction was to be governed by the laws of the Isle of Man. At the time, Spain had not yet implemented some consumer protection directives.
- The Bundesgerichtshof held that the choice-of-law clause in these contracts was valid because the contract concerned immovable property, not goods or services.
- The Gran Canaria Cases suggest that Rome I is not a perfect fit for all cases, since the consumers should have been the beneficiaries of their home state protections. Broader consumer contract rules would have allowed for their application in this instance.

Rome Regulation

Consumer contracts will be entirely regulated by the law of the place of the consumer's habitual residence (article 6).

Reasonable solution as traders who operate across borders are able to "spread the cost of learning about one or more legal systems over a large range of transactions."

The Rome proposal contained a "safeguard clause" to protect professionals in the case a consumer has lied about its habitual residence:

-in case of ignorance not due to negligence by the professional the special rule was not to be applied. The contract would fall under the scope of application of the regulation's general rules:

A- choice of law principle

B- application of the seller's or service provider's law in case no choice is made

No exception in the approved regulation.

Rome Regulation

- contracts relating to a right of user on a timeshare basis within the meaning of Directive 94/47/EC of 26 October 1994 will now fall under the special rules of article 5.
- Coordination with Brussels Regulation: “targeted” (directed) activities

Rome II regulation (864/2007)

Product liability (article 5):

A- habitual residence of person sustaining damage
(if the product was marketed in that country) or,
failing that

B- law of the country in which the product was
acquired (if marketed there) or failing that

C- law of the country in which the damage occurred

Final remarks

Brussels Regulation has been able to find a solution for most of the problems existent in the Convention: its practical application still requires close examination

Lack of real coordination between the three instruments and the material provisions (directives) on consumers contracts

Problem of the real level of protection. We cannot be sure that the law of the consumer's habitual residence is actually the most favourable for the consumer Is legal certainty enough to guarantee consumer protection, or is it only a first step to reach it?

- no option for the consumer to derogate to its provisions (unlike Brussels regulation)
- new steps still need to be taken in order to give the "active" consumer more power to receive an effective protection that is the protection he feels to be in the need of.