

Choice of forum and consumer protection

Evolution of choice of forum and consumer protection in (European) private international law: enough safeguards?

Prof Dr Pieter Kuypers, Radboud University Nijmegen

Curriculum vitae

- 1982 – 1988 : Utrecht University (The Netherlands), civil and European law
1987 : Faculté internationale de droit comparé, Strasbourg
1988 – 1989 : King's College, European competition law and military service
1989 - : lawfirm AKD (200 lawyers), Brussels (partner)
2008 : PhD Leiden University (The Netherlands) Choice of forum in private international law, comparative study under Dutch, Belgian, French and German laws
2013 : professor European public procurement law Radboud University Nijmegen (The Netherlands)

Overview

Definition choice of forum

Cases

Legal framework

Evolution legal framework

ECJ: Essential notions

Discussion

Conclusion

Evolution of choice of forum and consumer protection in (European) private international law

Overview

Example 1: *“All disputes arising out of this contract will be (exclusively or non exclusively – to the jurisdiction of the district court of Udine Italy.”*

Example 2: *“The district court of Udine will have sole jurisdiction.”*

Example 3: *“Parties submit their disputes to the jurisdiction of Italian courts.”*

Example 4: [from the written submission of a defendant] *“My client would not like to challenge the jurisdiction of this court in the present stage of the procedure, but reserves all its rights in this respect.”*

Overview

Definition choice of forum

Cases

Legal framework

Evolution legal framework

ECJ: Essential notions

Discussion

Conclusion

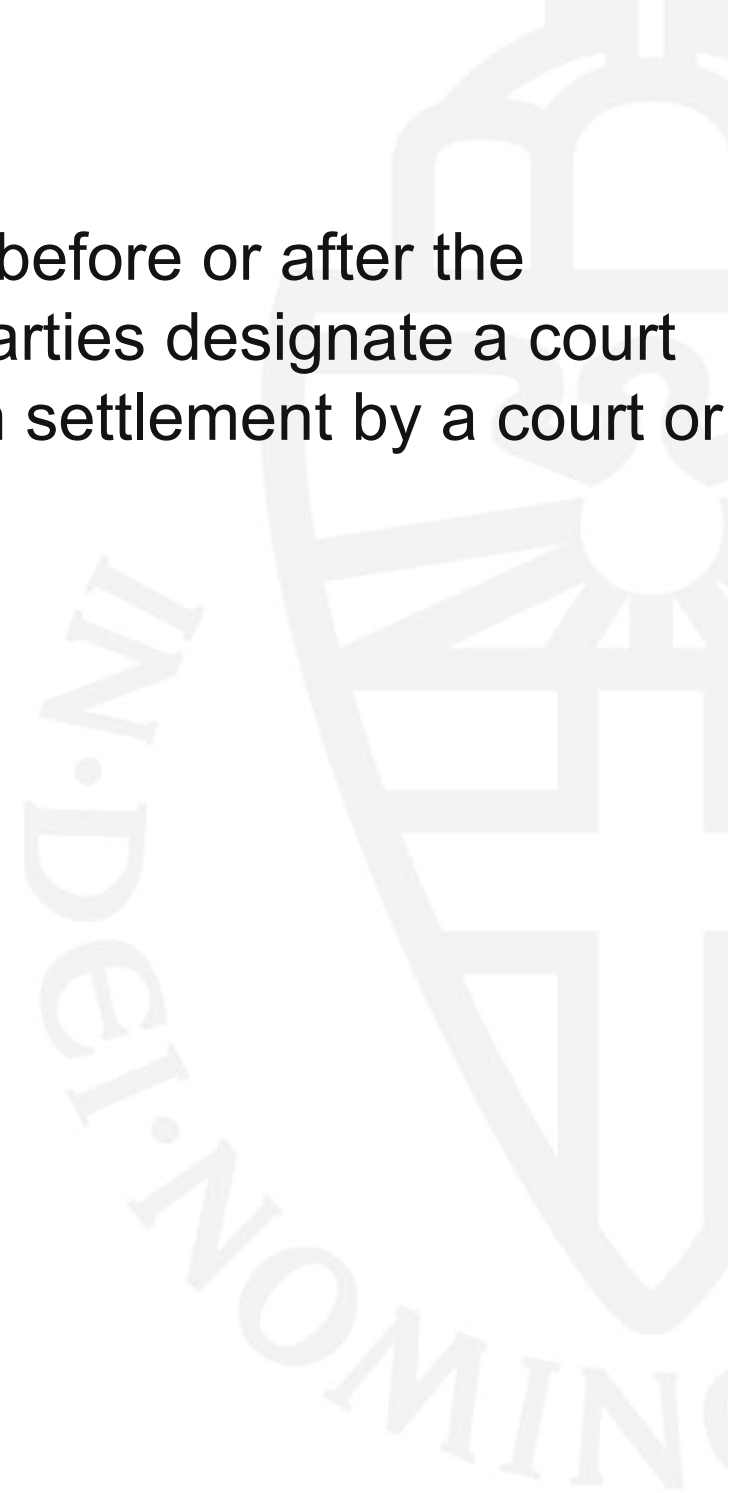
Evolution of choice of forum and consumer protection in (European) private international law

Choice of forum: definition I

An agreement concluded or a legal act performed before or after the occurrence of a dispute or disputes, whereby the parties designate a court or courts for the settlement of disputes or agree on settlement by a court or courts (PhD Pieter Kuypers)

Express or tacit

Procedural agreement: hybrid nature



Choice of forum: definition II

- Article 3 Convention on Choice of courts agreements:

“ For the purposes of this Convention -

- a) *"exclusive choice of court agreement" means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts;*
- b) *(...)"*

- Express choice of forum
- Convention not entered into force

Overview

Definition Choice of forum

Cases

Legal framework

Evolution legal framework

ECJ: Essential notions

Discussion

Conclusion

Evolution of choice of forum and consumer protection in (European) private international law

Case I

A Danish national living in Aarhus, Mr. Jens Olafson, fell in love as a boy with fast German cars. It remained a dream, until he won a prize in a Dutch online lottery, he decides to buy a Porsche 911.

He discovers that Porsches are cheaper in Germany than in Denmark and searches on the web for a Porsche. He finally finds with a German trader a Porsche 911 with a discounted price of 40% compared to the catalogue price with the official dealers.

The car is finally delivered to him in Krakow by a subsidiary of the German trader, called German Cartrading Z.p.o.o.

The car turns out to be of bad quality (produces on Monday?) and the official network dealers refuse to repair the car.

In the contract with the German car trader there is an exclusive choice of forum for the court of the branch where the car is delivered to the purchaser in accordance with Article 5 sub 5 Regulation 44/2001/EG."

Where can Jens or the consumer organisation of which he is a member start a civil procedure?

Case II

The broker, Chinese National People's Bank (CNPB) is conquering Europe with its solid Shanghai stock exchange index tracker investment funds.

The wealthy UK businessman, former real estate broker, receives an advice from his private banker Helmut Neustein of Treuhand Vermögens Verwaltung AG in Liechtenstein, that the Chinese Taipei Wealth Fund (CTWF), one of the index trackers of CNPB, is an excellent opportunity with a fine record,

Mr Harrison, domiciled on the Isle of Man, decides to invest \$ 5 mio in CTWF certificates, listed in Shanghai.

The stock exchange collapses a week later and the CTWF certificates are downgraded to junk bond and lose more than half of their value.

He looks into the contract negotiated by Helmut on his behalf and he realises that there is a choice of jurisdiction for the arbitral court of the Shanghai stock exchange or the High Court in Peking.

Can Mr Harrison adhere to the London courts when he starts the procedure
1 September 2014?

Case III

Karl Messerschmidt, owner of a spirits and wine shop in Wolfsburg, is on holiday in Udine.

He visits Giovanni Pavese, a wine farmer with excellent white wines in the region. He decides that he will buy 96 bottles of wines, red and white, allegedly for his own consumption. He orders another 120 for his shop. To the disappointment of Giovanni he does not settle the invoice for 216 bottles (addressed to his shop) and Giovanni decides to start a procedure in the Landgericht in Wolfsburg against Mr Messerschmidt and his shop Messerschmidt Weinladen GmbH.

Karl Messerschmidt does not challenge jurisdiction, but the company emphasizes that there is a choice of jurisdiction for the district court in Trieste. The latter raises therefore the lack of jurisdiction of the court in Wolfsburg.

Has the court in Wolfsburg jurisdiction for both defendants, if he starts the procedure after 1 January 2015?

Overview

Definition Choice of forum

Cases

Legal framework

Evolution legal framework

ECJ: Essential notions

Discussion

Conclusion

Evolution of choice of forum and consumer protection in (European) private international law

Legal framework I: rule of three

Private international law

- Not international
- Relationship with international aspect
 - When is choice of forum international?
- Europeanisation
 - Less autonomy Member States
 - Important role party autonomy



Legal framework II: Rule of three

Three types of rules

- Conflicts of jurisdictions
- Conflicts of laws
- Enforcement and recognition of judgments

Mandatory, semi mandatory, voluntary



Legal framework III: Rule of three

Rules at three levels

- International
- EU
- National

EU accedes to treaties

EU: rules at three levels

- Treaties
- Regulations
- Directives



Legal framework IV: rule of three

Scope of application to be determined for every rule:

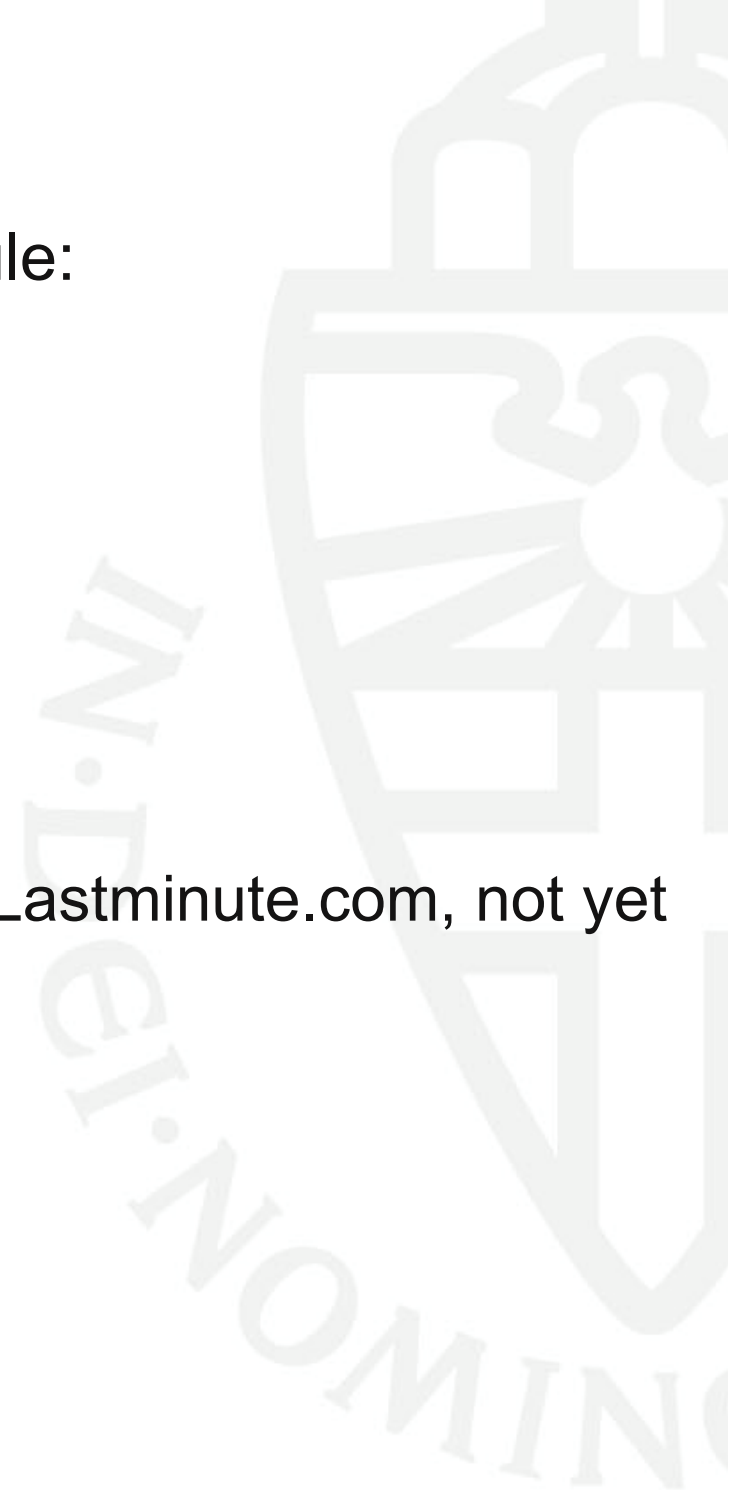
- Material: substance
- Formal: criteria set for application
- Ratione tempore

International aspect

- ECJ 14 November 2013, case C-478/12, Maletic/Lastminute.com, not yet reported

Scope rules

Priority of rules at higher level



Overview

Choice of forum

Cases

Legal framework

Evolution legal framework

ECJ: Essential notions

Discussion

Conclusion

Evolution of choice of forum and consumer protection in (European) private international law

Brussels Convention I

Article 13 Brussels Convention

In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called 'the consumer', jurisdiction shall be determined by this Section, without prejudice to the provisions of Articles 4 and 5(5), if it

is:

- a contract for the sale of goods on instalment credit terms; or*
- a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or*

- any other contract for the supply of goods or a contract for the supply of services, and*

(a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and

(b) the consumer took in that State the steps necessary for the conclusion of the contract.

Where a consumer enters into a contract with a party who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

This Section shall not apply to contracts of transport."

Brussels Convention II

Articles 14 and 15 Brussels Convention

Article 14

A consumer may bring proceedings against the other party to a contract either in the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled.

Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Contracting State in which the consumer is domiciled.

These provisions shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.”

Article 15

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

which is entered into after the dispute has arisen; or

which allows the consumer to bring proceedings in courts other than those indicated in this Section; or

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 Contracting State, and which confers jurisdiction on the courts of that State, provided that such an agreement is not contrary to the law of that State.”

Brussels Convention III

Article 17

1. If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction.

2.

Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to the provisions of Articles 12 or 15, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16.”

Article 18

Apart from jurisdiction derived from other provisions of this Treaty, 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 16.”

Brussels Regulation 44/2001/EG I

Article 15 Brussels Regulation

. 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.

Where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

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.”

Brussels Regulation 44/2001/EG II

Articles 16 and 17

Article 16

. 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.

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.

This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.”

Article 17

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

which is entered into after the dispute has arisen; or

which allows the consumer to bring proceedings in courts other than those indicated in this section; or

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 Regulation 44/2001/EG III

Article 23

If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

..)

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.”

Article 24

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.”

Evolution Articles 17 - 23

General: ECJ 14 November 2013, case C-478/12, Maletic/Lastminute.com, not yet reported

- Case law Brussels Convention remains valid for Regulation

Article 13.3: *any other contract for the supply of goods or a contract for the supply of services, and*

) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and

) the consumer took in that State the steps necessary for the conclusion of the contract.

Article 15 sub (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 23: also electronic means (second paragraph)

Hague Convention on choice of forum agreements

Article 2 lid 1 sub a

1) This Convention shall not apply to exclusive choice of court agreements -

a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party;”

Not relevant for consumer contracts, but can be used for reference.

Article 26 par 6: Article 23 Brussels Regulation will be set aside, if one party has domicile in contracting state, not being EU.

Documentation: hcch.net (Hague Convention)

Comparison Regulation 44/2001/EG and Hague Convention

Exclusivity

Only contracts

“Primarily”



Article 17

. 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 6 and point 5 of Article 7, if:

a) it is a contract for the sale of goods on instalment credit terms;

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.

Where a consumer enters into a contract with a party who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

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.”

Revised Brussels Convention 1215/2012/EU II

Articles 18 and 19

Article 18

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, regardless of the domicile of the other party, 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.

3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.”

Article 19

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

a) which is entered into after the dispute has arisen;

b) which allows the consumer to bring proceedings in courts other than those indicated in this Section; or

c) 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.”

Revised Brussels Convention 1215/2012/EU III

Articles 25 and 26

Article 25

1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. 3. The courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved.

Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24.

Article 26

1. 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 24.

In matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant, the court shall, before assuming jurisdiction under paragraph 1, ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance.”

Article 31 par. 4

1. Paragraphs 2 and 3 shall not apply to matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the claimant and the agreement is not valid under a provision contained within those Sections.“

Evolution Revision Brussels Regulation

Article 18: extension to defendants outside EU

Article 25: no domicile required

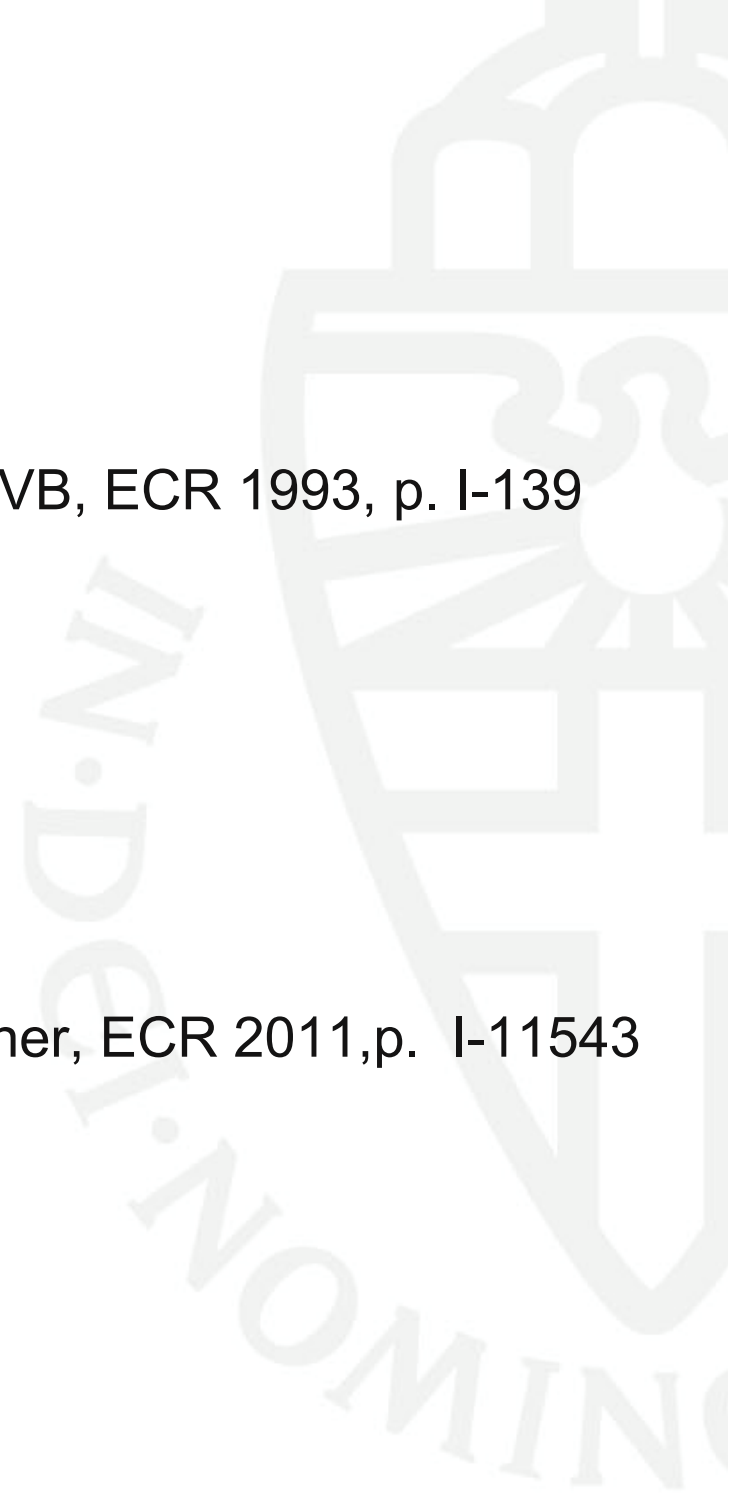
- ECJ 19 January 1993, case C-89/91, Shearson Hutton/TVB, ECR 1993, p. I-139

Article 26: duty of informed consent

Article 31 par. 4: lis pendens

No solution for consumers without domicile

- ECJ 17 November 2011, case C-327/00, Hypotecni/Lindner, ECR 2011, p. I-11543



Directive 93/13/EEC I

Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

Article 3 par. 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.”*

Article 3 par 3: *“The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.”*

Annex 1: *“(q) 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.”*

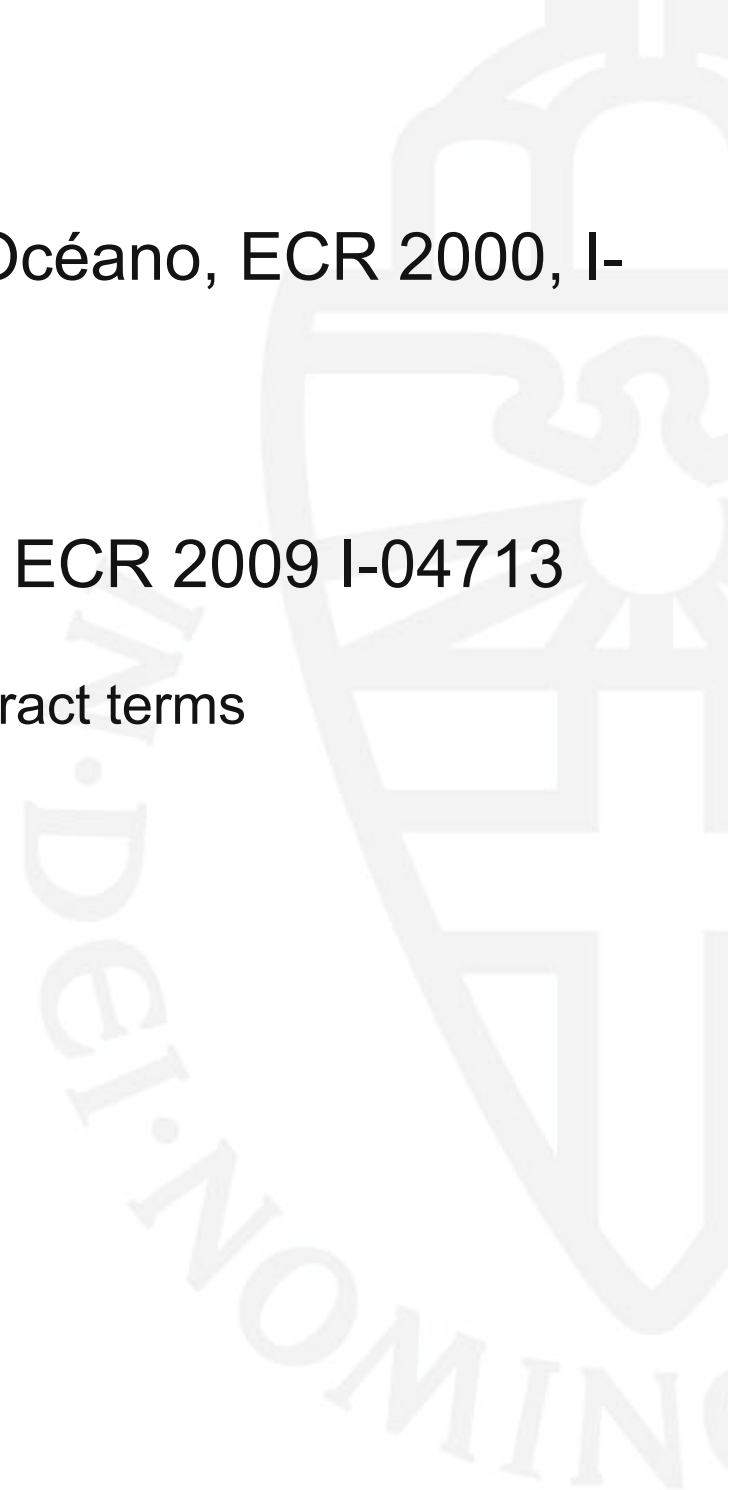
Directive 93/13/EEG II

ECJ 27 June 2000, cases C-240/98 to C-244/98, Océano, ECR 2000, I-04941

- Evaluation own motion

ECJ 4 June 2009, case C-243/08, Pannon/Györfy, ECR 2009 I-04713

- No need to contest beforehand
- Consumer might oppose to non application of unfair contract terms
- Challenge no later than defence to the substance



Overview

Choice of forum

Cases

Legal framework

Evolution legal framework

ECJ: Essential notions

Discussion

Conclusion

Evolution of choice of forum and consumer protection in (European) private international law

ECJ: Essential notions I

Autonomous interpretation

- ECJ 21 June 1978, case 150/77, Bertrand/Ott, ECR 1978, p. 1431

Aim: protection of the ultimate consumer

- ECJ 19 January 1993, case C-89/91, Shearson Lehmann/TVB, ECR 1993, p. I-139
- ECJ 5 December 2013, case C-508/12, Vapenik/Thurner, not yet reported

Consumer contract: sweepstakes

- ECJ 11 July 2002, case C-96/00, Gabriel, ECR 2002, I-6367
- ECJ 20 January 2005, case C-27/02, Engler, ECR 2005, I-481
- Case C-180/06, Ilsinger, ECR 2009, I-03961

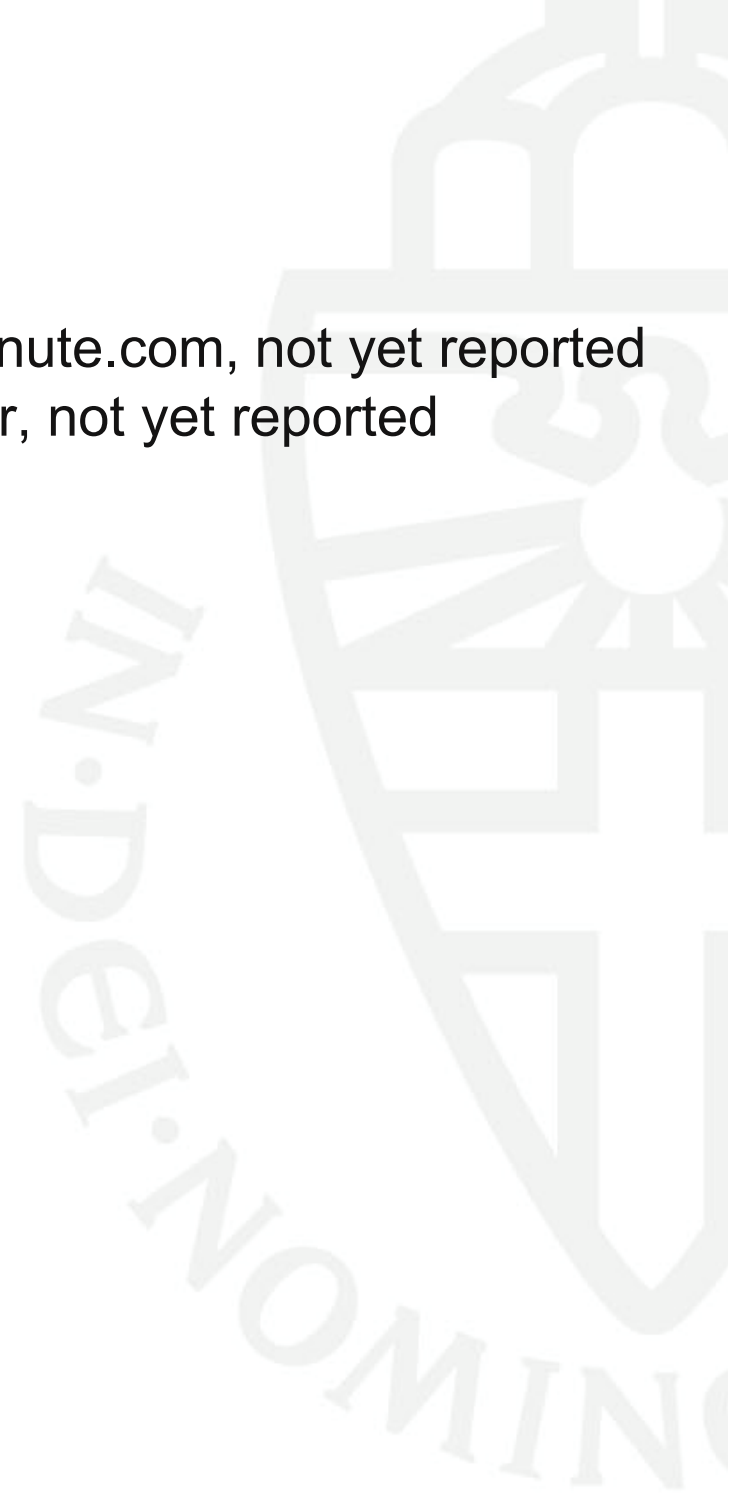
Consumer: restrictive interpretation

- ECJ 3 July 1997, case C-296/95, Benincasa/Dentalkit, ECR 1997, p. I-3788
- ECJ 20 January 2005, case C-464/01, Gruber/Bay Wa, ECR 2005, p. I-439

ECJ: essential notions II

The other party to a contract

- ECJ 14 November 2013, case C-478/12, Maletic/Lastminute.com, not yet reported
- ECJ 5 December 2013, case C-508/12, Vapenik/Thurner, not yet reported



Overview

Choice of forum

Cases

Legal framework

Evolution legal framework

ECJ: Essential notions

Discussion

Conclusion

Evolution of choice of forum and consumer protection in (European) private international law

Discussion

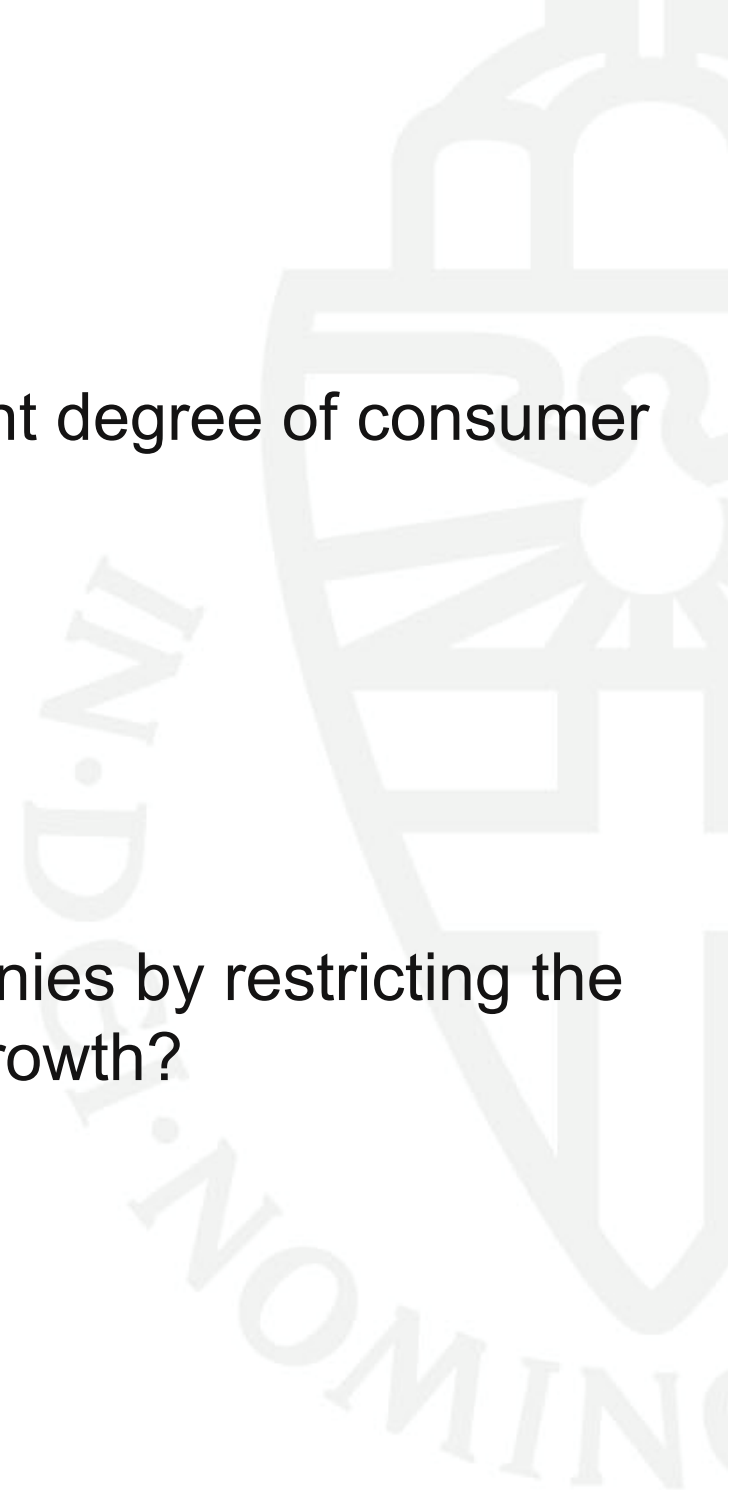
Answers to questions in the three cases

Revised Brussels Regulation is attaining a sufficient degree of consumer protection against choice of forum?

Is collective action covered?

Consumers without domicile?

Should the EU not enlighten the burden for companies by restricting the protection of consumers to accelerate economic growth?



Overview

Choice of forum

Cases

Legal framework

Evolution legal framework

ECJ: Essential notions

Discussion

Conclusion

Evolution of choice of forum and consumer protection in (European) private international law

Conclusion

Choice of forum is procedural agreement and a hybrid ground for jurisdiction

Express and tacit choice of forum

In the EU there has been a strong development in favour of protection of the consumer against choice of forum, partly achieved by Directive 93/13/EEC.

Consumer can rely on the jurisdiction of the court of his domicile, apart from a few exceptions, even if a choice of forum exists.

Choice of forum and consumer protection

Thank you for your attention

Any questions?

Prof. Dr. Pieter Kuypers, Radboud University Nijmegen

Contact: p.kuypers@jur.ru.nl or +00 31 88 253 50 83

Mobile +32 496 122 194