

Electronic Transactions: Jurisdictional Issues in the European Union

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Introduction

Electronic commerce is evolving and growing rapidly, and it has a huge potential to develop in future, because of the convenience of this new communication technique. First of all, now everybody could have an easy access to information about products available anywhere in the world. Second, people all over the world could conclude contracts in several minutes, without spending time and money for business trips.

What is so special about the Internet? Why do we have to discuss it separately? As some authors put forward, there is no 'there' in the Internet, everything happening on the Net is happening both everywhere and nowhere¹.

Traditional rules of private international law on jurisdiction are based on geographical connecting factors, such as domicile of the parties, which are sometimes not applicable in the Internet. Some other connecting factors, such as the place of contracting, the place of performance, the place where an establishment is situated, etc, are not so easy to be determined in the electronic world. At the same time, traditional rules of international law on jurisdiction cannot be set aside only because they seem not to be appropriate or relevant in this case².

The purpose of this paper is to discuss the application of traditional rules of international private law rules on jurisdiction in case a transaction is concluded or performed through the Internet and the development of EU legislation in this respect.

1. General principles of jurisdiction

Jurisdictional issues in the EU are governed by Brussels Convention of September 27, 1968 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (The Brussels Convention) combined with the Lugano Convention³. The Brussels Convention is now replaced by Regulation No. 44/2001 with the same name approved by the EU on 30th

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¹ Michael Bodgan, *Electronic Commerce: Problems of Jurisdiction and Applicable Law*, in Jens Fejo, Ruth Nielsen og Thomas Riis *Legal Aspects of Electronic Commerce* (2001), p.75

² Ursula Pahl, *Jurisdiction and applicable law on cross-border consumer contracts*, at <http://www.beuc.org/>

³ See Official Journal of the European Communities 1998 C 27/3 (the Brussels convention) and 1988 L 319/9 (the Lugano Convention). Brussels and Lugano Conventions have almost identical texts and were ratified by all EU Members (Lugano Contention was not ratified by Greece though). So we could say that the rules of the Brussels Convention are not only those rules contained in the original text, but also all modifications that took place combined with the rules of Lugano Convention.

November 2000 (Regan, 2000), entered into force on March 1, 2002⁴ (hereinafter the Regulation). This new Regulation introduced some rules of jurisdiction appropriate for electronic contracts. Rules of these documents only apply to disputes raised before judicial courts, exclusive of arbitration.

The rules of the documents apply when the defendant is domiciled in a contracting state regardless of his nationality (Article 2)⁵. In relation to electronic commerce, it is vendor of digital products

If the defendant is not domiciled in a Member State, then the relevant national jurisdictional rules will apply.

2. Special jurisdiction grounds

In some cases, the court other than that of the country where the defendant is domiciled can solve the dispute. This other court has so-called special jurisdiction on the issue. But in these cases the Plaintiff has still a right to choose whether he wants to sue the defendant in the court of his domicile or the other court. The grounds for special jurisdiction are numerous and rather complicated and I will consider those which are of interest when the dispute is raised out of electronic transaction.

2.1. The place of performance of the obligation in question

In accordance with Article 5.1 in case of breach of contractual obligations, the defendant may be sued before the court of the state where the obligation in question was performed. Article 5 of the Regulation governs the place of the performance of the obligation in question. In case the sale of goods, this will be the place where the goods were delivered or should have been delivered, in the case of the provision of services, the place where the services were provided or should have been provided under the contract. This solution *absorbed* earlier court practise on this matter⁶. In case of several contractual obligations, which must be performed in different countries, the « obligation in question» will be a «contractual obligation forming the basis of the legal proceeding»⁷, in case of several claims involving different obligations – the «principal» obligation⁸.

Determining the place of performance will create no Internet-related problems when the product advertised on the Internet was delivered to the customer by post. But if, for example, you could download the product from the Internet (for example, music, games or

⁴ See Official Journal of the European Communities 2001 L 12/1. Denmark does not participate in the adoption of this Regulation and is neither bound by it nor subject to its application. The Brussels Convention thus continues to apply between Denmark and other contracting states. As Lugano Convention will continue to apply in relations between Iceland and Norway, the new Regulation applies only between Finland and Sweden, as far as Nordic countries are concerned. So I will deal with all three documents in this paper.

⁵ As all three documents have almost the same structure, I will refer to a relevant article, meaning that it's the same in all three documents, unless there is a difference.

⁶ See ECJ in the case of *De Bloos v. Bouyer*, [1976] ECR 1497, see also ECJ in the case of *Tessili v. Dunlop*, [1976] ECR 1473.

⁷ See *De Bloos v. Bouyer* case

⁸ See ECJ in the case of *Ivenel v. Schwab*, [1982] ECR 1891, case # 133/81; see also ECJ in the case of *Shenaval v. Kreischer*, [1987] ECR 239, case 266/85.

books), by way of entering the code, which you received after the payment? Where would be the place of performance of the obligation, taking into consideration that you could download the product from anywhere in the world? Or is it going to be the place where the products were placed to the disposal of the customer by the seller?

Commission recommendations (Hague conference on Private international law, April 2000) provide that «it was best to separate contracts concluded electronically online, but performed offline either wholly or in part, from those which, although concluded online, are also performed entirely online». For the first, jurisdictional based on the place of the performance remain the same. For the second «neither place of conclusion, the place of performance nor the place of activity are relevant. However, the Commission did not put forward any alternative jurisdictional criterion for contracts between businesses»⁹.

There exist an opinion think that downloading could constitute sending of a product¹⁰. Author also presumes that a customer download the product from his own country, but I think that he can download it from anywhere in the EU, what's going to happen in this case? He could sue the producer in any country?

So this question is expected to be solved in the course of the EU Court of Justice practise.

2.2. The place of operation of the branch, agency, other establishments

Article 5(5) of all documents permits a dispute arising from the operations of a branch, agency or other establishments to be adjudicated by the courts for the place in which the branch, agency or other establishment is situated. To establish jurisdiction based on the location of the "branch, agency or other establishment" required, the branch must have been operated and subject to the control of the defendant¹¹ and the dispute must have arisen out of the operations of that branch, agency or other establishment¹².

Can an Internet site constitute an establishment that can serve as a basis for jurisdiction pursuant to Article 5(5)? There exist a point of view that an Internet site itself could constitute an establishment, it was a code of a particular country in the address of the website, which could create a legitimate expectation on the side of the customer that he is dealing with an establishment situated in a particular country¹³.

But Electronic Commerce Directive states that:

...the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located¹⁴.

Therefore it could be concluded that the location of a web server would not establish jurisdiction. The web server is a conduit of information, similar to a telephone or a fax

⁹ Catherine Kessedjian, *Electronic Data interchange, Internet and Electronic Commerce*, Hague Conference on Private International Law, Preliminary document #7 of April 2000, p. 19

¹⁰ Michael Bodgan, *Electronic Commerce: Problems of Jurisdiction and Applicable Law*, in Jens Fejo, Ruth Nielsen og Thomas Riis *Legal Aspects of Electronic Commerce* (2001), p.78

¹¹ *De Bloos v Buyer*, [1976] ECR 1497.

¹² *Somafer v Saar-Ferngas*, [1978] ECR 2183.

¹³ Michael Bodgan, *Electronic Commerce: Problems of Jurisdiction and Applicable Law*, in Jens Fejo, Ruth Nielsen og Thomas Riis *Legal Aspects of Electronic Commerce* (2001), p.79

¹⁴ *Electronic Commerce Directive*, 2000 OJ L178

machine and need information input from the owner or operator of the web site itself if it is to make that site available and useful. That information may well come from another web server or servers. Accordingly to try to find out the precise server(s) from which the web site derived from could be time consuming and costly.

Whether an electronic agent constitutes a "branch, agency or other establishment" also remains to be considered. In any event, such an agent would have to be situated in a Member State to the Regulation and any dispute would probably have to arise from that agent's acts or omissions. The European Court in its practise could solve this.

3. Jurisdiction over consumer contracts

Consumers have a special protection under the rules of the Conventions and the Regulation. When a contract is concluded between a professional and a consumer, consumer is regarded as a weaker party. Consumer is defined as a person who concludes a contract for a purpose exclusive his professional activities (Article 13.1 of the Conventions, Article 15.1 of the Regulation).

These specific rules apply to contracts for the sale of goods on instalment credit terms; for a loan with instalment credits, or for any other form of credit, made to finance the sale of goods, the list of contracts is open, so it could be any other contract (Article 15.1 of the Regulation, Article 13.1 of the Conventions). The consumer has a right to choose a competent court. It could be either:

- i) court of the defendant's domicile, or
- ii) court of his own domicile (if the contract was preceded by advertising there and consumer took in that country the steps necessary for the conclusion of the contract)(Article 13 of the Conventions, Article 16 of the Regulation).

But the consumer can use this special protection only in case when the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising in the state of his domicile; or the consumer took in that State the steps necessary for the conclusion of the contract (Article 13.3 (b) of the Convention).

In case of electronic transaction, it's very difficult to apply those rules. First, could we say that advertising took place in the consumers' country, when advertisement is placed on the Internet and thus is accessible for consumers all over the world? Then we could consider all advertising in Cyberspace the same. How, in this case, a professional could be protected from being sued in any Contracting State?

In the new Regulation there is new concept of activities pursued in or *directed towards* a Member State (Article 15.1 (c). In a proposal for this regulation (Brussels, 14.07.1999 COM (1999) 348 final, 99/0154 (CNS), it said that this would apply in case of consumer contracts concluded via the Internet site (active web-site) accessible in his country of domicile. In case the site only advertising products (passive web-site) with no possibility to conclude a contract through the Internet, will give no grounds for special jurisdiction. You have to have the ability to conclude a contract through the site accessible in your country, and then you could use a special protection. It actually raised anxieties in business world, because it gives

the customer an opportunity to sue the company in every Member State¹⁵, where you can conclude a contract. This problem could be solved by means of placing a list of countries which consumers could conclude a contract through the Internet. But this might not a very 'clean' method from the competition law point of view. There also proposed in a business world to take into consideration such facts as the use of the certain language, currency, etc. The use of the certain language may be a sign of orientation towards the relevant market. But this is not a fact that the court would consider such proposals.

ICC fears that proposed EU legislation would discourage companies, and particularly small and medium-sized enterprises, from embarking on B2C ventures and also place severe limitations on e-business in developing countries. The ICC statement said: «Many companies today simply are not willing to subject themselves to the costs of investigation and compliance with a myriad of rules in each country, or the risk of sanctions, unenforceable contracts, and adverse publicity in hundreds of countries, states and provinces».¹⁶

There could be also situation where a Web site is neither passive nor active, for example, when it allows only a limited exchange of information, such as request for an order or for a consumer to add his name in a mailing list. So only European Court of Justice may decide in this case how to interpret a term «directing such activities...»¹⁷.

About the requirement that the consumer must have taken steps for the conclusion of the contract in his home country. How could we, if a contract was concluded through the Internet, find where the consumer took the relevant steps as he could access the site all over the world?

The new Regulation's rules removed this requirement. So consumer can take advantage of special protection in case when contract was concluded in a state other than the consumer's domicile¹⁸. In the Internet transactions there is no use of «active» and «passive» consumer concept any more.

4. Prorogation of jurisdiction

The court, which has a jurisdiction to solve the dispute, can be selected by common agreement between the Parties (Article 17 of the Conventions, Article 23 of the Regulation). Court should be located in a Contracting State. The jurisdiction could be different from that under Convention, except for the rules on exclusive jurisdiction (Article 15) and those, which are applicable to consumer contracts (Article 15). This rule is a solution to avoid all difficulties described above arising at the interpretation of jurisdictional rules of the Convention from one side, but there is its own problem here on the other side.

¹⁵ Proposal for a Council regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, Brussels, 14.07.199 COM (1999) 348 final 99/0154 (CNS)

¹⁶ *Proposed European e-commerce law would stifle business*, at <http://www.iccwbo.org/>

¹⁷ Lorna Gillies, *Jurisdiction for Consumer Contracts European Union: Modified Rules of Jurisdiction for Electronic Consumer Contracts*, in *The computer law & Security report*, Vol.17(Issue 6), 2001, p. 397 at <http://www.sciencedirect.com/>

¹⁸ Proposal for a Council regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, Brussels, 14.07.199 COM (1999) 348 final 99/0154 (CNS)

The choice of the court must be made «in writing» or it should be a verbal agreement with verbal confirmation. There was no decision of the EC Court of Justice whether an exchange of electronic messages fulfils this requirement. In Article 9 (of the Directive on electronic commerce it's also provided that Member states shall ensure that their legal system allows contracts to be concluded by electronic means. And that Member states shall ensure that the legal requirements applicable to the contractual process can't create any obstacles for the use of electronic contracts or affect their validity. So the legislation of the EU members should develop in direction of accepting that electronic contracts and its condition (we are interested in agreement about jurisdiction) are equivalent to writing contracts, which would solve this problem for countries where the Regulation doesn't apply, because Article 23 of the Regulation provides that any communication by electronic means which provides a durable record of the agreement shall be equivalent to «writing». Means that clauses in contracts concluded by electronic means are valid and enforceable.

Conclusion

It is very difficult to apply traditional rules of international private law on jurisdiction in case a transaction is concluded or performed through the Internet. The EU legislation is now developing to satisfy the needs of this field, some specific rules have been adopted. But there are still a number of issues to be approached. In particular, interpretation of international private law terms when they are to be applied in connection with electronic transactions. Business world has very serious anxieties about very wide interpretation of such terms. The EU Court of Justice has not had a chance yet to clarify these issues. Some more time is needed to adjust contemporary legislation to requirements of nowadays businesses in the light of new communicational techniques development.