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REGULATION OF JURISDICTION AND CROSS-BORDER LIABILITY IN THE EU

The global nature of the Internet means that any business trading online is opening itself up to the possibility of trading with other businesses or customers based abroad. This is one of the enormous attractions of the Internet. However, the introduction of a foreign element to a business's activities exposes it to issues of conflict of laws. Regardless of the business's choice of law governing its activities and choice of court for handling any disputes, it may find that the laws of other countries apply or that the courts of other countries claim jurisdiction. So, it is important that any business engaged in e-commerce considers the implications of a global marketplace on its activities. This briefing note examines which courts have jurisdiction over a contract resulting from e-commerce and which law will be applied.

Introduction

The questions that arise in conflict of laws cases are of two main types:

1. Choice of court - Which country's courts have jurisdiction to determine the case?

2. Choice of law – Having established which courts have jurisdiction, which law should they apply to the subject matter of the dispute?

In the context of on-line business, the second question regarding the choice of law has now been supplemented by the E-Commerce Directive[1]. The question now arises as to which Member State's regulatory regime applies to certain aspects of on-line services. The applicable regulatory regime may originate from a Member State other than the Member State whose law governs the contract resulting from the on-line services or, indeed, the Member State in which the courts, having jurisdiction over disputes regarding that contract, are located.

[1] Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

Choice of Court

The Basic Rule under the Brussels Scheme

The question of jurisdiction between Member States of the European Union is determined by the Brussels Scheme. This is laid out in the 1968 Brussels Convention[2], the Lugano Convention of 1988[3] (which is in all material respects identical to the Brussels Convention but was signed by more European states than the Brussels Convention) and the Brussels Regulation of 2001[4].

The Brussels Regulation came into force on 1 March 2002, and replaced the Brussels Convention (but not the Lugano Convention). Whilst the Brussels/Lugano Conventions and the Brussels Regulation deal with all aspects of jurisdiction and the enforcement of judgments in civil and commercial matters (including, for example, non-contractual matters such as tort actions arising from defamation or breach of copyright), this briefing note focuses only on the aspects which affect e-commerce.

The Brussels Scheme establishes the basic proposition that parties are free to choose which courts will hear any disputes which arise under their contracts. In the absence of a choice of court, a defendant must be sued in his country of domicile (for a corporation, this means the place of its central management and control). Given that an online service provider may have occasion to sue its counterparties, it is therefore sensible to include a jurisdiction clause in its terms and conditions, to provide some certainty regarding the jurisdiction in which a dispute may be decided.

However, there are important exceptions to the basic principles of the Brussels Scheme in respect of contracts where one party is perceived to be in the weaker position. These include employment contracts, consumer contracts

[2] This was implemented in the UK by the Civil Jurisdiction and Judgments Act 1982 (as amended) (1982 Act).
[3] This was implemented in the UK by the Civil Jurisdiction and Judgments Act 1991, amending the 1982 Act.
[4] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

and insurance contracts. A "consumer" is defined as a person who concludes a contract for a purpose which can be regarded as being outside his trade or profession.

There are currently no international agreements on jurisdiction and enforcement of judgments to which the UK is a party. There is a draft Hague Convention on the enforcement of judgments in civil and commercial matters, but the final version is currently some way from being agreed by all the Member States of the Hague Conference (of which there are currently 62).

Consumer Contracts

Under the Brussels Regulation a consumer may sue a service provider in the courts of the consumer's own country (regardless of any express choice of court under the contract) where the service provider has pursued commercial or professional activities in the consumer's home Member State or has, by any means, directed such activities to that Member State and the contract falls within the scope of such activities. So, a consumer living in Germany, for example, could sue a UK online service provider in Germany, where the UK service provider has directed its commercial activities to Germany.

The key concept is that of a service provider "directing" his activities to a consumer in a Member State. Directing activities to a Member State could include advertising in that country, offering a choice of languages and giving delivery times or delivery costs for that country. In various discussions within the European Commission it has been suggested that the language of a website and the currency of payment may not be relevant factors. Since the concept of "directing" is largely a matter of degree, depending, amongst other things, on the nature of a website and how interactive it is, and also whether or not it specifically mentions its target consumer base, the safest option for any service provider is to specify which countries it is actually targeting for its consumer base, and which countries it is not.

The effect is that, unless a service provider implements a disclaimer on its website to exclude specified Member States, that service provider may potentially be sued by a consumer in every EU Member State to which it sells its products and to which it may be said to direct its activities. However, if the service provider, for example, restricts sales to the UK and makes this clear on its website, it is unlikely that a court outside the UK would assume jurisdiction in the event of a dispute.

Choice of Law

The Basic Rule under the Rome Convention

Once it has been established that a particular court has jurisdiction to hear disputes between the parties to a contract, that court can then decide which law governs the contract. The 1980 Rome Convention on the Law Applicable to Contractual Obligations[5] (the Rome Convention) between the EU Member States determines the governing law of contracts.

The Rome Convention is applied by the courts within the EU even where the parties are not resident or established in the EU. Notably, the Rome Convention is only concerned with contractual obligations; it does not govern non-contractual obligations such as liability for tort, in respect of which each country currently has its own rules.

The Rome Convention provides as a basic rule that "a contract shall be governed by the law chosen by the parties". Where the parties have not made a choice of law, the contract shall be governed by the law of the country with which it is "most closely connected" (which is usually the country where the performing party has his habitual residence or central management). An online service provider may be providing services to customers outside the country in which it is established. So the service provider should make it clear on its website which law is applicable and should clarify on the Webpage where customers click to make a purchase that the purchase is subject to the chosen law.

As with the Brussels Scheme, there is a significant derogation from the general rule under the Rome Convention in respect of consumers. A "consumer" has the same definition as under the Brussels Scheme.

Consumer Contracts

The basic rule for consumer contracts is that, although the parties may choose the applicable law, this choice must not have the result of depriving the consumer of the

[5] This was implemented in the UK by the Contracts (Applicable Law) Act 1990.

protection afforded to him by the mandatory rules of law in the consumer's country. The application of this rule may lead to a situation described as "dépeçage", that is, different parts of the same contract are ruled by the laws of two or even more countries.

The scope of this protective rule is limited to quite precise circumstances. There are three different types of circumstances, and they can be summarised as collectively having the effect of excluding protection for the "mobile consumer", that is, the consumer who travels to another country to make a purchase or receive a service. To determine whether or not a consumer contract is within the scope of this protective rule, it is necessary to determine whether an aspect such as advertising, the signing of a contract or the receipt of an order has taken place in the consumer's country. The concerns for service providers in respect of choice of law under the Rome Convention are largely the same as their concerns regarding choice of court under the Brussels Regulation: has the service provider's website or its other on-line activities been directed at consumers in all Member States, or only in some?

The consumer protection provisions of the Rome Convention relate only to "mandatory rules": the consumer is not given full rights to choose which law applies. Mandatory rules are laid down in the Distance Selling Directive, the E-Commerce Directive and by national law, such as the Unfair Contract Terms Act 1977. These mandatory rules cannot be limited or excluded by contractual provision. They will apply even if a contract states they do not.

In the absence of a choice of law under a consumer contract, the governing law is that of the country in which the consumer normally lives. This means that in cases where no law was chosen, online service providers are potentially subject to the national laws of the 15 different Member States.

Modernisation of the Rome Convention

The conditions imposed on the types of consumer contracts benefitting from the protective rule under the Rome Convention are identical to the conditions imposed on consumer contracts for the purposes of the protective rule under the Brussels/Lugano Conventions in respect of choice of court. All of these Conventions require the contract to be located in space by reference to an aspect such as advertising, the signing of the contract or the receipt of an order. However, the Commission now acknowledges that these criteria are no longer relevant to the development of distance selling techniques. Plus, this solution is no longer in harmony with the Brussels Regulation which, as noted above, has replaced the Brussels Convention. Under Article 15 of the Brussels Regulation consumer protection provisions apply where a company directs its business activities towards the Member State of the consumer's residence and a contract is concluded within the framework of these activities, whatever distance selling technique is used. The European Commission has issued a Green Paper regarding the Rome Convention under which it is considering, amongst other things, whether the criteria for identifying consumers eligible for the protective rules should be amended and also whether the meaning of "mandatory rules" should be specifically identified.

Regulatory Compliance

The particular court with jurisdiction to hear the dispute will, then, as a separate matter decide which country's regulatory requirements apply to information society services. "Information society services (ISS)" for these purposes means any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. This matter is determined by the E-Commerce Directive which came into force in the EU on 17 July 2000[6].

The basic rule is that ISS providers in the EU need only comply with the rules and regulations in their own country (their "country of origin"). So an ISS provider need only comply with one set of public law rules (that is, the rules of its own country) instead of the public law rules of all 15 EU Member States. However, the scope of the country of origin rules is quite narrow. Where the country of origin rule does not apply, the question of which country's regulatory regime will apply will continue to be governed by the Rome Convention.

[6] The Directive was implemented in the UK by means of the Electronic Commerce (EC Directive) Regulations 2002, the majority of which came into force on 21 August 2002. Each EU Member State had until 16 January 2002 to implement the Directive: most had not done so by that date but aimed to do so within 2002.

The Directive is not intended to prejudice the level of protection for public health and consumer interests in so far as this does not restrict the freedom to provide information society services. The areas of taxation and data protection are also outside the remit of the Directive. Furthermore, there are significant exceptions to the country of origin rules, and opportunities for Member States to derogate from these rules.

Under the E-Commerce Directive each Member State should ensure that ISS providers established in its territory (outbound services) comply with the national laws and regulations of that Member State which fall within the coordinated field, regardless of whether the ISS are provided in that Member State or another Member State. ISS delivered to a Member States by service providers established elsewhere in the EU (inbound providers) will be regulated by the enforcement authorities in the relevant Member State. Member States may not impose their laws falling with the coordinated field on inbound providers where the application of these laws would restrict the freedom of the service providers to deliver ISS from another Member State. These rules are known as the "country of origin" rules.

The place at which a service provider is established should be determined from European caselaw, according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider.

The coordinated field concerns requirements with which the service provider has to comply in respect of:

- the taking up of the activity of an ISS, such as requirements concerning qualifications, authorisation or notification;
- the pursuit of the activity of an ISS, such as requirements concerning the behaviour of the service provider, the quality or content of the service or the liability of the service provider.

So, the coordinated field covers only requirements relating to on-line activities such as on-line information, on-line advertising, on-line shopping and on-line contracting. It does not concern Member States' legal requirements relating to goods such as safety standards, labelling obligations or liability for goods, or Member States' requirements relating to the delivery or the transport of goods. Any services which are not provided by electronic means are also outside the scope of the coordinated field.

A number of areas of law are excluded from the scope of the country of origin approach. These broadly include:

- copyright, related rights and industrial property rights,
- the freedom of parties to choose the applicable law to a contract,
- formalities relating to the transfer of land,
- contractual obligations in consumer contracts,
- the permissibility of sending unsolicited commercial e-mails.

Furthermore, the Directive allows Member States to take measures to derogate from these rules in respect of a particular ISS if certain conditions are fulfilled. The UK Regulations allow UK enforcement authorities to derogate from the country of origin rules thereby allowing UK laws to be applied to an inbound provider where:

- the derogation is necessary on the grounds of public policy, public health, public security or consumer protection,
- there is a serious and grave risk of prejudice to these grounds, and
- the derogations taken are proportionate.

Generally, an enforcement authority may only take such measures after the home Member State has failed to remedy the situation following a request by the enforcement authority to do so (although this is not necessary in urgent cases), and the enforcement authority has notified the home Member State and the European Commission of its intention to act.

Consumer Contracts

As stated above, the country of origin rules do not apply to "contractual obligations concerning consumer contracts". The UK Government has interpreted these obligations as including the question of which law applies to the substance of a dispute, including contractual obligations/rights, essential information that has a determining influence on the decision to contract which must be provided in accordance with the requirements of

the consumer's Member State, and requirements that bear on the terms of the contract (such as rules on implied terms, certain cancellation rights and the circumstances in which an agreement is unenforceable).

This means that in respect of consumer contracts the regulatory requirements are treated in the same way as all other aspects of the law governing the contract under the protective rules set out in the Rome Convention. In other words, a consumer cannot be deprived of the protection afforded to him by the mandatory rules relating to contractual obligations of the law of the Member State in which he has his habitual residence.

Relationship between E-Commerce Directive and Brussels and Rome Conventions

Neither the terms of the Brussels Regulation nor the Rome Convention conflict with the terms of the E-Commerce Directive. As pointed out earlier, the E-Commerce Directive purely focuses on which Member State's regulatory regime applies to the activities of an ISS provider established in the EU. It does not address the issue of jurisdiction or choice of law, and it specifically excludes private international law from its ambit.

Alternative Dispute Resolution

There are significant difficulties associated with seeking redress from disputes over on-line transactions. The costs and the delays involved in litigation, particularly for consumers, can be prohibitive and soon eclipse the value of the disputed product or service. The problems are compounded when the dispute is cross-border. The costs are higher, the delays are longer, and the relevance and effectiveness of the courts for resolving such disputes are not obvious, especially when the value of the disputed product is low as is often the case for consumer transactions. Uncertainty over the legal framework may not only inhibit consumers from purchasing products or services over the Internet, but also discourage companies from entering into the electronic market place.

The Lisbon European Council has called for the establishment of ADR at Community level to promote consumer confidence in e-commerce within the EU. The E-Commerce Directive specifically provides that "Member States shall encourage bodies responsible for the out of court settlement of . . . consumer disputes". The pivotal role of ADR in an on-line environment has also been recognised internationally (for example, by the OECD and the Global Business Dialogue). There are encouraging market driven ADR initiatives (for example, those being developed by Eurochambers, Webtrader, ECODIR, Cybercourt, e-Mediator and ODR.NL).

The Commission has also launched a number of initiatives. These include the EEJ-NET (European Extra Judicial Network) which establishes a network of ADR schemes which have notified to the Commission as complying with core principles to guarantee their fairness and effectiveness. The EEJ-Net will provide a communication and support structure made up of national contact points (or 'Clearing Houses') established by each Member State. If a consumer has a dispute with a business, he can contact his Clearing House for advice and support to assist him in filing a complaint with a notified body where that business is located. In a cross-border dispute the Clearing House in the consumer's country will contact the Clearing House in the service provider's country, which will in turn contact the relevant notified body in that country.

For financial services, FIN-NET (Financial Services Complaints Network) has recently been launched providing a specific redress network for disputes involving financial services. It links together the schemes that are responsible for ADR for financial services at national level to form a Community-wide network. Unlike other commercial areas, there are structures already in place in every Member State. So FIN-NET builds on an established tradition of providing out-of-court solutions using the knowledge and experience at national level.

Next Steps

Any service provider engaging in e-commerce should consider the following:

- Include a clear statement in the website of where the business is located and which law is applicable. On the web page where the customer clicks to make a purchase, it should be clarified that the purchase is subject to the chosen law.
- Establish whether the service provider needs to comply with the rules and regulations of any other country, either by virtue of any mandatory consumer protection rules which apply to consumer contracts or by virtue of the country of origin rules.
- Include a clear statement in the website of which courts have jurisdiction over any disputes.
- Where online trading with consumers is being conducted, courts of the consumer's home country will have jurisdiction. So, specify on the website the countries to which the service provider is directing its activities, or restrict certain countries from its ambit.
- Include a clear statement in the website of which dispute resolution procedures are in place to deal with complaints.

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