INTERNATIONAL JURISDICTION FOR INTERNET DISPUTES ARISING OUT OF THE CONTRACTUAL OBLIGATIONS

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1. Introduction

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [OJ L 12, 16.01.2001, p. 1] (hereinafter: the Brussels I Regulation) is one of the most important procedural legal sources of the European private international law. The two sets of rules provided by the Brussels I Regulation are the ones regarding the international jurisdiction of the European Union Member States' courts and the ones prescribing the rules on recognition and enforcement of judgments among Member States.

The paper provides an analysis on readjusting jurisdictional rules and their interpretation by the Court of Justice of the European Union (hereinafter: CJEU) to internet disputes arising out of the contractual obligations. The provisions on special jurisdiction in matters relating to contracts, prorogation of jurisdiction and jurisdiction over consumer contracts are applicable in such cases. In particular, the Brussels I Regulation rules on special jurisdiction are based on a close connection between the dispute and the Member State whose courts are designated as competent. The problem arises in the course of adapting those traditional rules to internet disputes because they defy geographic limitations. The scrutiny of the aforementioned provisions will answer the question whether the need exists for introducing a provision tailored specifically for internet disputes arising out of the contractual obligations. The provision on general jurisdiction and jurisdiction by appearance, although applicable, will not be analysed since their application in internet disputes presents no particularities. The provisions will be analysed in the descending order that reflects the hierarchical order of application in contractual disputes: jurisdiction over consumer contracts, prorogation of jurisdiction and special jurisdiction in matters relating to contract, respectively [Van Calster, 2013].

At the end of 2012, amendments of the Brussels I Regulation were introduced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [OJ L 351, 20.12.2012, p. 1] (hereinafter: the Brussels I Recast). Those amendments will be considered inasmuch as they affect the rules discussed in this paper.

2. Jurisdiction over Consumer Disputes

Arts. 15 and 16 of the Brussels I Regulation determine the scope of application of the provisions on jurisdiction over consumer contracts and rules on jurisdiction for such contracts. The purpose of this section of the Brussels I Regulation is to protect the consumer as a weaker party [Nielsen, 2012]. If a consumer contract meets conditions provided in Art. 15 of the Brussels I Regulation, the jurisdiction has to be established exclusively on the basis of this section of the Brussels I Regulation. However, if one of the conditions is not fulfilled, the

provisions on general jurisdiction and special jurisdiction in matters relating to contracts apply.

Pursuant to Art. 16, the jurisdiction of the court depends upon the procedural role of the parties. If the consumer is the applicant, he or she can choose whether to commence the proceedings before the court of the Member State of his or her domicile or the court of the Member State in which the domicile of the trader is. On the other hand, if the consumer is the defendant, the only courts having jurisdiction are the ones in the Member State of the consumer's domicile. The only amendment introduced by the Brussels I Recast regarding consumer contracts is the one in Art. 18 of the Brussels I Recast which allows the consumer to sue the other contracting party before the courts of the consumer's domicile even if the other contracting party does not have a domicile, a branch, an agency or an establishment in the EU.

2.1. The Notion of the Consumer Contract

Art. 15 of the Brussels I Regulation defines the conditions which a contract has to meet in order to Art. 16 be applied. Two cumulative conditions should be fulfilled. First of all, the contract has to be concluded by a natural person, the consumer, for a purpose which can be regarded as being outside his or her trade or profession. Second, the contract has to either be the contract for the sale of goods on instalment credit terms, the contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods or other contract 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.

The CJEU has provided an autonomous interpretation of the concept of consumer contract in *Rudolf Gabriel* and *Petra Engler* [C-96/00 *Rudolf Gabriel*; C-27/02 *Petra Engler*] according to which the consumer must not be engaged in trade of profession and the contract must give rise to "reciprocal and interdependent obligations". A person entering a contract in order to pursue a trade or a profession in the future is not a consumer even if, at the time of conclusion of the contract, he or she is not engaged in a trade or a profession [C-89/91 *Shearson Lehmann Hutton*; C-269/95 *Benincasa*]. If the person concludes a contract intended for purposes which are partly within and partly outside his trade or profession, he or she may not rely on the rules of jurisdiction over consumer contracts "unless the trade or professional purpose is so limited as to be negligible" in the overall context of the contract [C-464/01 *Johann Gruber*].

2.2. Directed Activities

According to Art 15(1)(c) of the Brussels I Regulation, the consumer contract is any contract concluded between a consumer and 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. In the context of internet disputes, the part of this provision on directing the activities in the Member State of the consumer's domicile is, by far the most important one.

The Brussels I Regulation and the Statement on Articles 15 and 73 of the Council and the Commission are silent on which circumstances could form directing of activities [Bogdan, 2011]. Traditional means of advertising, such as television, radio and press make it easier to determine the trader's intent of addressing the advertising to consumers of a certain Member State. On the other hand, internet advertising creates difficulties in the course of establishing such intention.

In joined cases *Pammer* and *Alpenhof* [C-585/08 *Pammer* and C-144/09 *Alpenhof*] the CJEU clarified the concept of directing activities. In *Pammer*, Mr Pammer, whose domicile was in Austria, concluded a contract with a company established in Germany, Reederei Karl Schlüter. The contract concerned a voyage by freighter from Italy to Far East and was concluded using a website operated by the intermediary company. When Mr Pammer realized that the actual conditions on the vessel do not correspond to ones described on the website, he refused to embark and sought the reimbursement of the sum paid. The company reimbursed only a part of the sum and Mr Pammer initiated the proceedings before the Austrian court relying on Art. 15 of the Brussels I Regulation. The jurisdiction of the Austrian court depended on the fact whether Reederei Karl Schlüter directed its activities to Austria. In *Alpenhof*, the facts of the case were similar. The dispute arose between Mr Heller whose domicile was in Germany and Hotel Alpenhof, a company operating a hotel established in Austria. Mr Heller, found out about Hotel Alpenhof from a website and reserved a number of rooms. Since he was not satisfied with the hotel service, he left the hotel and refused to pay. Hotel Alpenhof sued Mr Heller before the Austrian court. Mr Heller objected to the jurisdiction of the Austrian court, stating that he, as a consumer, can be sued only before a German court where his domicile is. Once again, the jurisdiction of the Austrian court depended on the interpretation of directed activities.

The Austrian National Report on application of the Brussels I Regulation stated that a mere fact that the website is accessible was enough for the Austrian court to establish its jurisdiction pursuant to Art. 15 [Study JLS/C4/2005/03, National Report Austria]. Nevertheless, the Austrian Supreme Court decided to remove any doubt regarding the interpretation of the directed activities and referred a question for a preliminary ruling. In the Statement on Articles 15 and 73, the Council and the Commission of the European Union have clearly stated "that the mere fact that an internet site is accessible is not sufficient for Article 15 [of the Brussels I Regulation] to be applicable". However, if a contract was actually concluded at a distance, this can be a relevant factor leading to a justifiable conclusion that the website directs activities to a Member State of the consumer's domicile. Furthermore, it is pointed out that the language or the currency used on a website does not constitute a relevant factor. The CJEU decided in *Pammer* and *Alpenhof* that, in order to ascertain whether the activity was directed, it should be considered whether the website and the trader's overall activity lead to a conclusion that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of the consumer's domicile. In its answer, the CJEU listed the factors that could constitute directing of the activities. Those factors are: the international nature of the activity, mention of itineraries 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, 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 the one of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States [C-585/08 *Pammer* and C-144/09 *Alpenhof*]. It should be underlined that this list is not exhaustive. Furthermore, the

CJEU pointed out that the mere accessibility of the internet site in the Member State of the consumer's domicile, mention of the traders e-mail and other contacts details or use of a language or a currency which are usually used in the Member State of the trader's domicile are insufficient for the conclusion that the directing of activities exists.

Clearly, the CJEU approach is to determine if the trader had the intent of concluding a contract with the consumers in other Member States. Mention of the e-mail address, geographical address or a phone number without the international code does not mean the activities were directed, having in mind those information became mandatory in the course of offering services online according to Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce").

The proposal of the Netherlands Government in *Pammer* and *Alpenhof* was to take account of factors such as: distinction between the interactive website and a passive website, sending of an email to the consumer making him aware of the undertaking's website, charging of shipping costs or similar additional costs to consumers from certain Member States, the mention of a quality label used in a certain Member State, directions from certain Member States to the place of trader's business, and the mention of a customer service telephone number for consumers from another Member State. Besides this, according to the Netherlands Government, the domain name of the website should not be criteria of relevance. The Advocate General Trstenjak stated her disagreement with the latter, because, as she explained "the mention of the internet domain name of a Member State is a clear indication that the undertaking is directing his activities to the Member State with that domain name". Additionally, the use of a Member State's internet domain name does not mean the activity is not directed to other Member States. This could especially be relevant if the website has the domain name of a Member State different than one in which the trader is established. On the other hand, the use of a global domain, such as ".com", ".org", ".net" or ".eu" could be one of the indicators that the activity is directed to other Member States, but cannot itself lead to a conclusion that the activity is directed to all the Member States [Opinion of Advocate General Trstenjak in *Pammer* and *Alpenhof*; Study JLS/C4/2005/03, National Report Netherlands]. The CJEU has rejected the Netherlands Government proposal on making the distinction between the interactive and passive internet sites, as one of the relevant factors. The author agrees with this approach. The fact that the internet site is interactive does not mean that the trader envisaged doing business with the consumers in a particular Member State. Moreover, if an internet site is passive, it can direct activities to a certain Member State if it mentions, for example the shipping price or some of the elements enumerated in *Pammer* and *Alpenhof*.

The United Kingdom Government recommended another set of factors as indicators of directed activities: the use of websites which target advertising to nationals of other Member States, or a specific mention of nationals of other Member States, payment to search engines to display the trader's website as one of a number of links in particular countries, and directing consumers to relevant website based on their domicile through pan-European portals. Furthermore, the Advocate General pointed out the fact that the trader already concluded contracts with the consumers in a certain Member State could indicate the activity is directed to that Member State [Study JLS/C4/2005/03, National Report Germany]. If the trader sent emails to different Member States advertising its activity, he must expect to be sued in those Member States. Moreover, it should also be relevant if the trader has a website and directs activities in a Member State of the consumer's domicile using other media [Opinion of Advocate General Trstenjak in *Pammer* and *Alpenhof*].

The operative part of the *Pammer* and *Alpenhof* judgment, did not adopt all the factors put forward by the Advocate General Trstenjak, nor did it exclude them. The conclusion drawn

from this is that the national courts, in the process of determining whether the activity is directed to a certain Member State, can use the guidelines presented by the Advocate General, in addition to the ones adopted by the CJEU.

2.3. Distance Contract

In *Mühlleitner*, the issue was not whether the activities were directed, but whether, in order for Art. 15(1)(c) of the Brussels I Regulation to be activated, the contract has to be concluded at a distance. The Austrian Court in *Mühlleitner* came to the conclusion that the condition of activities directed to the Member State of the consumer's domicile was fulfilled because of the international code on a website and the notice given to the consumer that the consumer's foreign citizenship is not the obstacle to the conclusion of the contract [C-190/11 *Mühlleitner*].

Daniela Mühlleitner, domiciled in Austria, accessed a German website, through which she became aware of a trader in Germany. The contract was not concluded over internet. Ms Mühlleitner went to the premises of the trader's seat in Germany and purchased the goods there. The trader refused to repair the defective goods so Ms Mühlleitner sued the trader in Austria. The trader contested her status of a consumer. The issue here was whether the contract has to be concluded at a distance in order to be covered by Art. 15(1)(c). The cause of the dilemma was the Statement on Art. 15 and 73 which mentions distance contracts. The CJEU's answer to that question was negative. The reason for this approach lies in the difference between the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [OJ C 27, 26.01.1998, pp. 1-28] (hereinafter: the Brussels Convention) and the Brussels I Regulation regarding consumer disputes. While the Brussels Convention provided that the consumer has to take the steps necessary for the conclusion of the contract in the Contracting State of his or her domicile, the Brussels I Regulation does not contain such condition. This condition was excluded from the provision to ensure higher protection for consumers, regardless of the Member State in which they acted while concluding a contract [See Debusseré, 2002].

2.4. Causal Link

The CJEU explained in *Emrek* [C-218/12 *Emrek*] that the application of Art. 15(1)(c) does not require the causal link between the directed activity and the conclusion of the contract. Mr Emrek, a German resident, purchased a used vehicle from Mr Sabranovic at his premises, in France, near German border. Mr Sabranovic had a website advertising his business, but Mr Emrek found out about him from an acquaintance. The Regional Court in Saarbrücken was of the opinion that the mention of the French international code and a German mobile telephone number demonstrate directing of the activity outside France, in particular to clients in the border area in Germany. Based on the factual circumstances presented in the judgment, the author finds this somewhat disputable, as the judgment in *Pammer* and *Alpenhof* requires a number of factors indicating the intent of the trader to pursue business in the consumer's Member State. In *Mühlleitner* such intent was not questionable having in mind the trader notified the consumer that her foreign citizenship would not create an obstacle to the conclusion of the contract.

The CJEU explained in *Emrek* that the necessity of the causal link between the directing of the activity and the conclusion of the contract would hinder the teleological interpretation of Art. 15(1)(c) and would present a problem in the context of acquiring evidence on the existence of the causal link, especially if the contract was not concluded at a distance using

the website. Nonetheless, the causal link could present strong evidence that the activity was actually directed to the Member State of the consumer's domicile. The judgment in *Emrek* therefore added another factor to the *Pammer* and *Alpenhof* non-exhaustive list of indicators of directed activities.

The approach of the CJEU in *Mühlleitner* and *Emrek* is justified considering neither the causal link, nor the condition that the contract is concluded at a distance are required in the case of a consumer contract which is the result of the trader's activity directed by television or press. If a trader advertises his activity in the Member State different than one in which his domicile is, he should reasonably expect to be sued there in the case of a dispute. Though it is correct that this interpretation protects also the consumers who are not entirely passive, it is not characteristic only of the internet consumer disputes. Clearly, the intention of the legislator was to extend the scope of consumer contracts in the Brussels I Regulation compared to the provision in the Brussels Convention. Otherwise, the Brussels Convention provision on consumer contracts according to which the consumer has to take the necessary steps for the conclusion of the contract in the Member State of his domicile, would be maintained. The author does not agree with the contention that occurred in theory, which criticizes the *Emrek* judgment because of its supposed unjustified protection of the consumers who enter another Member State with the sole purpose of concluding a contract and therefore should expect to be sued there [Rühl, 2013]. The CJEU pointed out in *Pammer* and *Alpenhof* that the Brussels Convention provision on consumer contracts was amended by the Brussels I Regulation with the purpose of strengthening the consumer protection because of the expansion of the internet communication which makes it difficult to determine the place where the consumer took the steps necessary for the conclusion of the contract.

The author does not agree with the assertion that the judgment in *Emrek* is contrary to the recital 25 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [OJ L 177, 04.07.2008, p. 6] (hereinafter: the Rome I Regulation) [Rühl, 2013]. Pursuant to recital 25, a consumer should be protected if the trader directs his activities by any means to the country of a consumer's domicile, and the contract is concluded as a result of such activities. Although the provisions in the Brussels I Regulation should be interpreted consistently with the provision of the Rome I Regulation and the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations [OJ L 199, 31.7.2007, p. 40.] (hereinafter: the Rome II Regulation), one should bear in mind the fact that the consumers are protected by the Brussels I Regulation because of their usually small claims and the fact that the cost of engaging in a cross-border proceedings would be higher than the value of the claim itself. On the other hand, in the course of determining the applicable law, the standard of the consumer protection does not have to be so high, because of the extensive harmonisation of the Member States substantive law in this field. Even if the non-Member State law is applicable, it still cannot deprive the consumer of the protection granted to him or her by the law of the country where his or her habitual residence is.

2.5. Contract Concluded within the Scope of Directed Activities

The last part of Art. 15(1)(c) provides that the contract has to be concluded within the scope of directed activities. Pursuant to the Statement on Art. 15 and 73, this rule applies to contracts concluded over the internet, as well. If by chance, Mr Pammer had seen a brochure advertising the travelling by freighter and, later on, had accessed the agency website and decided to travel by plane, the contract would not have necessarily been concluded within the scope of directed activity [Nielsen, 2012]. The contract would have been considered to be

concluded within the scope of directed activities, only if the agency website had contained some of the factors enumerated in *Pammer* and *Alpenhof*. Recital 24 of the Rome I Regulation supports this interpretation. According to the recital, the concept of directed activities should be interpreted harmoniously with the Brussels I Regulation. Pursuant to the same recital which refers to the Statement on Art. 15 and 73, "it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State, a contract must also be concluded within the framework of its activities" in order to Art. 15 (1)(c) be applicable.

3. Prorogation of Jurisdiction

Art. 23 of the Brussels I Regulation allows the parties to choose a competent forum for the existing or the future disputes between them. Prorogation of jurisdiction is not only reserved for contractual disputes, but is the most common in contractual relations. Besides Art. 23, special provisions on choice of court agreements are regulated by the sections of the Brussels I Regulation dedicated to insurance contracts, individual contracts of employment and, consumer contracts.

3.1. Interpretation of the Provision

Pursuant to Art. 23, the consequence of choosing the competent forum is derogation of jurisdiction of any other court that would have otherwise been competent according to the provisions of the Brussels I Regulation, unless the parties agree the jurisdiction of the chosen court is not exclusive [Magnus, 2012]. Parties can agree on a competent court that is not, in any way, connected to the dispute or parties themselves [C-159/97 *Transporti Castelleti Spedizioni*].

Apart from conditions that at least one of the parties has to have a domicile in the EU and the chosen court has to be the one of a Member State of the EU, the provision deals with the formal validity of the prorogation clause. The choice of court agreement has to be concluded: in writing, or evidenced in writing; in a form which accords with practices which the parties have established between themselves; or in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned. National courts must not subject the prorogation clause to any additional formal conditions [150/80 *Elefanten Schuh*]. The most important amendments introduced by the Brussels I Recast regarding prorogation of jurisdiction are excluding the condition that at least one of the parties has to have a domicile in the EU and introducing the provision according to which the substantial validity of the prorogation clause is governed by the law of the seised court.

In C2C contracts, parties often use standard form contracts, adhesion contracts or general conditions. The CJEU clarified in *Estasis Salotti* which conditions must be fulfilled for the prorogation clause written in the general conditions to be valid. In this case, the prorogation clause was included in the general conditions, written on the back of the contract concluded between the German and Italian undertaking. The provisions of the contract did not expressly mention general terms, they referred to previous offers made by German undertaking. Those offers contained an express reference to the general conditions. According to the CJEU, the mere fact that the prorogation clause is among general conditions, on the back of the contract does not guarantee that the contractual party agreed to the choice of court agreement. The prorogation clause will be valid only if the reference is express and can be checked by the

party exercising reasonable care, i.e. if the contract signed by both parties contains the express reference to those general conditions [24/76 *Estasis Salotti*].

In the case of a chain of contracts, prorogation clause in a contract between, for example the manufacturer and the buyer does not bind the subsequent buyer in the chain of contracts, unless it is established that he agreed to the prorogation clause under the condition provided in Art. 23 [C-543/10 *Refcomp*]. Such decision by the CJEU was in line with its previous judgment in *Coreck* according to which the prorogation clause in a bill of lading binds the third party if the third party succeeded to the rights and obligations of the party previously bound by the prorogation clause. If this is not the case, it must be ascertained whether the third party accepted that clause [C-387/98 *Coreck*].

3.2. Prorogation Clause in the Online Arena

Contracts concluded online do not usually contain a handwritten signature of the parties. Therefore, a clear indicator demonstrating the fact that the party was familiar with the prorogation clause is necessary. That condition would be fulfilled if, for example the email by which the contract was concluded contains a clear reference to the general conditions that could be stored on the hard drive of a PC or printed together with the body of the email. It is further pointed out that in order for a prorogation clause to be valid the signature does not have to be the electronic signature as defined by Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signature [OJ L 13, 19.01.2000, pp. 12–20] [Magnus, 2012].

The most important part of Art. 23 in the context of internet disputes is paragraph 2, according to which "any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'". The only condition of formal validity is the evidence on the existence of the prorogation clause. A durable record exists if the prorogation clause is stored on the server of the email service provider, hard drive of the PC, the usb-stick etc. The possibility of reproducing the prorogation clause in its original form is crucial [Magnus, 2012]. The durable record condition would be satisfied if the prorogation clause is agreed upon using the instant messaging software or chat rooms if they enable the storage of the conversation on the hard drive of the PC. On the other hand, a voice mail, a video-conference or a similar electronic communication are not suitable for choosing a competent court, as the prorogation clause is not in writing, even though it could be reproduced. [Tang, 2005]. The question is whether the requirement of reproducing the prorogation clause in its original form would be fulfilled if the prorogation clause that cannot be stored in other way is captured using the "print screen option".

If a contract is concluded by video-conference or exchange of the voice mail, a subsequent written confirmation has to exist, to which the other party has to give an explicit consent. The mere fact that the other party does not object to the prorogation clause does not mean the party gave his or her consent, either. In *Segoura,* the CJEU took the view that, if the contract was concluded orally, one party has to send a written confirmation to the other, to which the latter has to give the consent in written. The condition of formal validity would be satisfied if the confirmation and the consent were sent by an electronic means of communication which enables the durable storage, as was previously elaborated. On the other hand, if the consent is not sent in written or in appropriate electronic form, the prorogation clause would only be valid if it accorded to the practice previously established between the parties or usage in commerce of which parties were aware or should have been aware [25/76 *Segoura*].

If the prorogation clause is written in general conditions, there are several distinctive ways of agreeing to a prorogation clause on the internet: “click-wrap”, “browse-wrap”, and “web-wrap” [Riefa and Hörnle, 2009]. “Click-wrap” is online incorporation of general conditions by which one party agrees to general conditions of the other party, displayed in a pop-up window or a dialog box and gives the consent by clicking on “I agree” or “I accept” button. “Browse-wrap” represents general conditions which are accessible through a hypertext link. A party does not have to expressly give the consent, it can simply enter the website or proceed with the download. “Web-wrap” appears as a notice subjecting the further use of a website to the terms and conditions which are not apparent [Smith, 2007]. “Click-wrap” incorporation of general terms with a prorogation clause will be valid if it enables a durable storage, since the party exercising reasonable care can check the general conditions. On the other hand, “browse-wrap” and especially “web-wrap” are disputable, even if they offer the option of storing the content of the general conditions durably [See Mutabžija, 2013; Pistorius, 2004; Smlsalová 2007]. The issue with this kind of incorporation of the prorogation clause is whether it can be expected that a party exercising reasonable care should be aware of the existence of such prorogation clauses, provided it does not accord to the practice previously established between the parties or the usage established in international trade.

Finally, it should be mentioned that the section on consumer contracts in the Brussels I Regulation allows the parties to choose a competent court. In such cases, besides formal requirements in Art. 23 as a general rule on prorogation of jurisdiction, additional conditions in Art. 17 apply. Those special conditions will not be analysed, as they bare no relevance to the topic of this paper. Everything elaborated regarding the online prorogation clauses applies to prorogation clauses in online consumer contracts, as well [Nielsen, 2012].

4. Special Jurisdiction in Matters Relating to a Contract

If the conditions for the application of the provision on consumer contracts are not fulfilled and the contract does not contain the prorogation clause, Art. 5(1) of the Brussels I Regulation applies. Pursuant to Art. 5(1)(a) the court for the place of the obligation in question is competent to hear the dispute. Subparagraph (b) determines the place of obligation for two most common types of contracts – sale of goods and provision of services, the place of obligation being the place of the delivery and the place of provision of the service, respectively. If a contract falls outside either one of these two categories, according to the subparagraph (c), the subparagraph (a) applies.

4.1. Interpretation of the “Matters Relating to a Contract”

The CJEU has provided an autonomous interpretation of the term ”matters relating to a contract” as “covering a situation in which there is no obligation freely assumed by one party towards another” [C-26/91 *Handte*; C-27/02 *Engler*]. The notion of a contract should be interpreted independently of national legal systems. Even a membership in the association is to be considered as a matter relating to a contract for the purpose of the Brussels I Regulation, since the rights and obligations between a member and an association correspond to rights and obligations between the contracting parties [34/82 *Peters*].

The fact that one of the parties contests the existence of a contract does not preclude the application of Art. 5(1) of the Brussels I Regulation. The CJEU came to this conclusion in *Effer*. Mr Kantner was a patent agent commissioned by Hykra to investigate whether the cranes produced by Effer could be sold in Germany without infringing the existing patents. Since Hykra became insolvent, Mr Kantner decided to institute the proceedings against Effer

relying on the provision on jurisdiction in matters relating to contract. Expectedly, Effer objected that it is not contractually bound to Mr Kantner. The CJEU took the view that the application of the Brussels I Regulation provision on jurisdiction in matters relating to contracts cannot be called into question just because one of the parties claims the contract is non-existent. Otherwise, the legal effect of that provision would be disputable every time a party contests the existence of the contract [38/81 *Effer*].

After defining the scope of application of the provision on jurisdiction in contractual disputes, the interpretation of the subparagraph (a) of the Art. 5 has to be clarified. The CJEU has done so in *De Bloos*. At the time, subparagraph (a) was the only provision for contractual disputes in the Brussels Convention. The problem arose in the process of determining the relevant obligation when the contract included several obligations. The multiplicity of forums competent for disputes arising out of the same contract is unacceptable from the aspect of legal certainty and sound administration of justice. Therefore, the CJEU decided the relevant obligation is the one forming the basis of the legal proceedings, i.e. the one that corresponds to the contractual right relied upon by the plaintiff [14/76 *De Bloos*]. If the plaintiff claims more than one contractual obligation of equal rank has been breached, he or she has to institute the separate proceedings in relation to each obligation breached before the court for the place of performance of that obligation. The plaintiff can, however, bring his or her entire claim before the courts for the place where the defendant is domiciled [C-420/97 *Leathertex*]. Furthermore, the defendant's domicile is the only jurisdictional criterion available for the contractual obligation not to do something which is not geographically limited and is characterised by a multiplicity of places for its performance [C-256/00 *Besix*].

The judgment in *Tessili* is especially important for the interpretation of Art. 5(1) of the Brussels I Regulation. This case indicated the need of defining the place of performance for two most common types of contracts – sale of goods and provision of services. This case motivated the legislator to introduce the subparagraph (b) in Art. (5) so it is commonly referred to as the Tessili provision. A German company Dunlop purchased a consignment of women's ski suits from an Italian company Tessili. The dispute arose from the fact the buyers objected to the quality of ski suits to Dunlop. Consequently, Dunlop decided to sue Tessili. The ambiguity in the interpretation of the term "obligation in question" emerged from the fact that the ski suits were delivered through a carrier. The German company claimed the obligation was performed in Germany where it received the goods, while the Italian company contended the obligation was performed in Italy where the ski suits were handed over to the carrier. The CJEU stepped away from the autonomous interpretation and established that the place of performance of the obligation in question is to be determined by the private international law rules of the deciding court [12/76 *Tessili*]. Although such contention may be justified because the place of performance is a crucial part of every contract, the difficulty presents itself in the fact that the court has to determine the applicable law before even deciding if it has jurisdiction.

Since the subparagraph (b) of Art. 5(1) does not regulate the situation of delivering the goods in several places in a single Member State, the solution was, once again, provided by the CJEU. The competent court will be the court of the place of principal delivery which must be determined based on economic criteria. If the principal place of delivery cannot be established, plaintiff may sue the defendant in the court for the place of delivery of its choice [C-386/05 *Color Drack*]. Correspondingly, if the service is to be provided in several Member States, the competent court will be the one where the main provision of the service is to be carried out [C-204/08 *Rehder*]. If the place of the main provision of the service cannot be established, the place where the activity has been carried out in most part, based on provisions of the contract and factual aspects is to be determined. If the latter criterion fails as well, the

domicile of the service provider can be considered as the place of the main provision of the service [C-19/09 *Wood Floor Solutions*].

4.2. The Place of Performance Online

The mere fact that the contract was concluded online does not make any difference in the course of application of Art. 5(1). However, a distinction should be made between the electronic trading of tangible goods and services that have to be performed in physical environment and electronic trading of intangible goods and online provision of services [Mazzotta, 2001; Wang, 2008; Wang, 2014]. In the context of Art. 5(1), difficulties arise when the digitised, immaterial goods are being acquired online or services are being provided online. The digitised goods that are usually being acquired online are electronic books, electronic magazines, movies, music and software. Sometimes they are referred to as "nonrivalrous" goods because the content is separated from the traditional carrier, ie. "rivalrous" goods such as books, CDs, videocassetes etc [Murray, 2013].

4.2.1. Acquiring the Digitised Goods Online

The term "acquire" refers to the act of acquiring the permission of using a digitised good, and distinction should be made with respect to the sale of goods. Acquiring the digitised goods does not constitute the sale of goods because the acquirer does not become the owner of the goods, he is merely granted the permission to use them [Torremans, 2005].

For example, if a person A with a domicile in Member State B goes to a book store in a Member State C and buys a book there the majority of the price he pays for the book refers to the right of using a book, and much smaller amount is actually the price paid for the stapled paper [See Pistorius, 2001]. In electronic commerce, on the other hand the tangible aspect in the form of a book or a CD is not present, therefore, it cannot be characterised as a sale of goods contract. As Barlow pointed out "with the advent of digitisation, it is now possible to replace all previous information storage forms with complex and highly liquids patterns of ones and zeros" [Barlow, 1994].

The licence agreements are regulated differently in various Member States. Some Member States permit licensing of copyright, while in others specific contracts exist according to which the author grants the other contracting party the right to use his or her creation [Gliha, 2006; see Kunda, and Matanovac Vučković, 2010]. In either case, acquiring the digitised good is not a sale of goods contract. Consequently, the first indent of Art. 5(1) cannot be used. But can this contract be characterised as the provision of services? The CJEU had a chance to clarify the nature of such contract in *Falco Privatstiftung*. The applicants were Falco Privatstifung, a foundation established in Vienna managing the copyrights of the deceased Austrian singer and Mr Rabitsch, a former member of the singer's rock group, whose domicile is in Vienna. The defendant, Ms Weller-Lindhorst under a licence agreement marketed video recordings of the concert given by the singer and his rock group. The defendant contested the jurisdiction of the Austrian Court, so the court referred the preliminary question to the CJEU. The court wanted to resolve the doubt whether a contract under which the owner of an intellectual property right grants the other contracting party the right to use the intellectual property right can be considered as the contract for the provision of services for the purpose of the Brussels I Regulation. The CJEU answered negatively, explaining that "the party who provides the service carries out a particular activity in return for remuneration" and in this case "the owner of an intellectual property does not perform any service in granting a right to use that property and undertakes merely to permit the licensee to

exploit that right freely" [C-533/07 *Falco Privatstiftung*]. This leaves subparagraph (a) of Art 5(1) as the only option for establishing the competent court. This has been confirmed in the recently adopted Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [OJ L 304, 22.11.2011, p. 64]. Its recital 19 states that the contracts for the digital content which is not supplied on a tangible medium, should not be classified as a sales contract or a service contract.

Regardless of whether the legislation of a certain Member State defines a contract under which the author grants the other contracting party the right to use the creation as a licence agreement or another type of agreement, the jurisdiction for such contracts is to be determined pursuant to subparagraph (a) of Art 5(1) of the Brussels I Regulation. This means that, in the absence of a contractual provision indicating the place of performance, the jurisdiction will depend upon the obligation on which the plaintiff relies upon his claim. If the obligation in question is the payment of royalties or other fees, as the case was in *Falco Privatstiftung*, the place of performance for the obligation of paying has to be determined by the law applicable to such obligation [12/76 *Tessili*]. German Government's proposal in *Falco Privatstiftung* was to change the CJEU's case law on Art. 5(1)(a) of the Brussels I Regulation under which the place of performance of the obligation at issue is to be determined on the basis of the rules of substantive law applicable to the contract or to the contested contractual obligation. German Government supported such proposition with the fact that the law applicable to contractual obligations was harmonised in the EU, and the case law establishing the interpretation in issue preceded that harmonisation [Opinion of the Advocate general in C-533/07 *Falco Privatstiftung*]. However, the CJEU did not accept the German Government's proposal.

Since the conflict of law rules of the Member States are harmonised by the Rome I Regulation, the place of obligation in question can be defined with more legal certainty than before. According to the Art. 4(2) of the Rome I Regulation, the law applicable to the obligation in question is the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. If the obligation in question is payment, then the place of performance of such obligation will be governed by the law of the habitual residence of the party required to effect the characteristic performance. This will not present a problem, since the place of payment is regulated by the civil code in most countries. The other main contractual obligation that can form the basis of the proceedings is the obligation to allow the use of an intellectual property right. Two types of obligations should be distinguished in this respect - the obligations that can be limited to a certain territory and the ones that cannot [Dratler, 2005]. For example, an obligation to allow the use of an e-book is the obligation that forces a contractual party not to interfere with the right of the other contractual party to use the e-book. It therefore represents the negative obligation that usually covers all the countries in the world and cannot be located on a certain geographical territory. If this is the case, jurisdiction can be determined solely on the basis of the provision on general jurisdiction, as the CJEU established in *Besix* [C-256/00 *Besix*]. On the other hand, if a company is a licensee of a software and is allowed to exploit it in a certain Member State, the obligation to allow the use of an intellectual property right is restricted to a certain territory. The place of performance is to be established in accordance with the provisions of the law of the habitual residence of the party required to effect the characteristic performance. With this line of reasoning the fact that the digitised goods are acquired by internet, becomes irrelevant, at least from the aspect of determining the competent court. The same applies to any other contractual obligation arising out of the contract.

Therefore, the distinction between the place of uploading and downloading proposed by some authors [Wang, 2010], is not relevant at all in the context of determining the place of the delivery of goods for the purposes of Art. 5(1)(b). The first indent of Art. 5(1)(b) cannot be

applied in order to determine the jurisdiction for contracts by which the digitised goods are being acquired.

4.2.2. The Provision of Online Services

The Polish national report on the application of the Brussels I Regulation has pointed out that Polish courts have some difficulties in determining the place of provision of the service when the service is provided online [JLS/C4/2005/03, National Report Poland]. Similarly, the Estonian national report indicated the problem exists in establishing which court has jurisdiction when advisory and financial services are being provided online [JLS/C4/2005/03 National Report Estonia]. The providers of online services are, for example, internet service providers, email providers, news providers, online stores, e-banking or e-finance websites etc. Such services can only be provided online. On the other hand, there are certain services that can be provided, both online and "offline", in the physical environment. For instance, the service of consulting can be performed in person, by telephone or using the email. If the latter types of services are being provided online, in the course of determining the competent court, the same principles should apply as if the service fell into the category of services that could only be provided online.

There are three possibilities for defining the place of the provision of a service when the service is provided online: the place of uploading, the place of downloading; and the closest connecting factor [Kohl, 2007; Wang, 2010].

4.2.2.1. The Place of Uploading

The place of uploading will usually correspond to the domicile of the provider of the service. However, the provider of services will often pursue his business, and therefore upload the content, from the place where he estimates his costs will be the lowest. In any case, the place of uploading favours the provider of service [Kohl, 2007; Wang, 2010]. Regarding this approach, it is important to recognize the risk of bringing a third party into the equation. Namely, the provider of the service does not place the content on a website himself, but engages a third party, a content provider, to do so. The content providers are physical or legal persons who place a real-time and downloadable content online [Smith, 2007]. If a content provider is the one placing the content online, choosing the place of uploading could mean conferring the jurisdiction to the court of the place which has no connecting factor with the dispute or the parties.

There is a possibility that the service is provided by placing the content online from several places. The possible partial solution to this situation could be found in already analysed decisions of the CJEU in *Rehder* and *Wood Floor Solutions* [C-204/08 *Rehder*; C-19/09 *Wood Floor Solutions*]. The mentioned case law solves the problem of providing the service in several Member State. The question remains how to resolve the problem of providing the service on several places within the same Member State. The author proposes the same solution to be adopted. That means if the service is to be provided in several places within the same Member States, the competent court will be the one where the main provision of the service is to be carried out. However, if this place cannot be established, the place where the activity has been carried out in most part, based on provisions of the contract and factual aspects, is to be determined. If the latter criterion fails as well, the domicile of the service provider can be considered as the place of the main provision of the service.

4.2.2.2. The Place of Downloading

The place of downloading is the place where the recipient of the service obtains the service by downloading it from the website [Kohl, 2007; Wang, 2010]. The shortcoming of this approach is the fact that it opens the door to forum shopping, since the recipient of the service can obtain the service in another Member State with the sole purpose of having the possibility to sue before the forum which is the most convenient to him. It is also possible that the recipient of the service can obtain the service during a shorter stay in another Member State without being aware of the impact it has on his procedural position. In a case of a service that is being received at several places, everything previously said in the context of uploading applies.

4.2.2.3. The Closest Connecting Factor

Finally, the place of the provision of the service can be localized in a place with the closest connecting factor with the provider of the service or the recipient of the service. For the sake of legal certainty, this place should be linked with the domicile of the provider of the service or the recipient of the service [Wang, 2010].

4.2.2.4. The Solution

The authors of the Polish national report on the application of the Brussels I Regulation suggested the place of the uploading as the place of provision of the service via internet. They pointed out that the place of downloading is not the appropriate criterion because it is possible to pass through several Member States with a laptop while receiving the service [Study JLS/C4/2005/03, National Report Poland]. The author, however is of opinion that the place of downloading is the more appropriate criterion for establishing jurisdiction. In *Car Trim,* the CJEU took the view that for the purposes of Art. 5(1) the place of delivery is the place where "physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction" [C-381/08 *Car Trim*]. In this case, one of the questions referred to preliminary ruling was whether the place of delivery is the place where the goods were handed over to the first carrier or the place where the purchaser obtained the goods. The CJEU decided that the place of delivery should be determined on the basis of the contractual provisions. If the contract does not indicate the place of delivery, the place where the goods were handed over to the purchaser is the relevant one. The CJEU explained the aim of the sale of goods contract is fulfilled when the purchaser acquires the goods and the contractual obligation is not performed until he does. By analogy, such reasoning can be extended to the contracts for the provision of services. The place of uploading is focused on the course and not the aim of the contract and would be contrary to the established case law. Furthermore, accepting the place of uploading is not reasonable if one has in mind the possibility of engaging a content provider to upload the content instead of the provider of a service. In another words, the place of delivery of goods, as well as the place of provision of services for the purpose of Art. 5(1)(b) should be determined relying solely on the facts of a case, and not based on the rule governing the place of delivery of goods or provision of service [Mankowski, 2012].

It is obvious the CJEU has placed a greater importance to the place where the purpose of the contract was achieved. From this perspective, the place of downloading the content corresponds to the adopted approach. Another possibility is to link the place of performance of the obligation with the domicile of the recipient of the service. That way, the solution from

the *Car Trim* would be followed, at least partially, and the possibility of forum shopping would be reduced.

5. Conclusion

The provision on jurisdiction over consumer contracts was amended by the Brussels I Regulation with the aim of strengthening the protection of the consumers. The previous condition according to which the consumer has to take the steps necessary for the conclusion of the contract in the Member State of his domicile was excluded and replaced by the requirement that the activity of the trader has to be directed to the Member State of the consumer's domicile. The other significant reason for amending the provision is the expansion of electronic trading. Recent case law of the CJEU interpreting provision on jurisdiction over consumer contracts in the Brussels I Regulation has provided national courts of the Member States with clear and comprehensive guidelines on how to apply the concept of directed activities to internet advertising. As a result, the protective mechanism of the provision operates adequately in internet disputes, as well as in the disputes not involving the internet. The European legislator recognized the issues electronic trading could raise in the context of the prorogation of jurisdiction. For this reason, the provision on the conditions for a formal validity of a prorogation clause concluded by an electronic means of communication, was introduced in the Brussels I Regulation. Electronic means are equivalent to writing as long as they provide a durable record of the prorogation clause in its original form.

Unlike the previous articles, the Brussels I Regulation provision on the special jurisdiction in matters relating to contract was not amended for the purposes of electronic trading. For this reason its application in internet disputes could present a more challenging task. The criteria for determining the jurisdiction adopted in this provision makes the fact that the contract is concluded online, irrelevant. However, the fact that the goods to be delivered are digitised or the fact that the service is to be provided online are important for the application of Art. 5(1). In this respect the proper characterisation of the contract is of great relevance, as well as the distinction between the tangible goods and services that have to be provided in a physical environment and digitised goods and services that are provided online. Acquiring the digitised goods does not involve the transfer of such goods since they are the object of the intellectual property law. Therefore, a permission to use those goods should not be mistaken for the sale of goods contract. Such reasoning leads to the conclusion that acquiring the digitised goods falls into the category of subparagraph (a) of Art. 5(1) for the purposes of determining the competent court. The application of the said provision should operate according to the established practice of the CJEU. The jurisdiction for provision of online services contract is determined by second indent of Art. (5)(1)(b). Among several possible solutions, the place of downloading, where the recipient receives the service, is proposed as a relevant one, as it accords to the existing case law of the CJEU.

The analysis of the provisions applicable in contractual disputes indicates that the existing rules along with their proper interpretation operate rather effectively even in the disputes involving the internet. The introduction of the rules tailored specifically to the internet disputes is not only unnecessary, but would artificially create a disparity between the contractual disputes with an internet element and the ones without it.

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