

Publications

EU: Jurisdiction in cross-border e-commerce with consumers

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The ECJ had decided on 7 December 2010 two cases¹ concerning the jurisdiction in cross-border e-commerce with consumers and later decided on remaining details.

The facts of the cases decided in 2010

1. A German freight-ship owner has offered - via an internet platform operated by other Germans - passages in passenger cabins on its freight-ships. The Austrian Mr. Pammer booked a cabin from Trieste to the Far East but left the ship already in Trieste saying it did not provide the amenities which had been promised on the internet platform. The freight-ship owner only paid back a part of the travel price. So Mr. Pammer sued him in his local Austrian court for the rest.
2. An Austrian hotel named Alpenhof operated a website (probably www.alpenhof.info). One of the many Germans named Oliver Heller saw it and booked by e-mail a couple of rooms for himself and some friends for a week. Mr. Heller was not satisfied with the services provided by the hotel, turned down the hotel's offer to reduce the price and left without paying at all. So the owner of the Alpenhof sued Mr. Heller for payment in the local Austrian court. The question here was whether the court of Mr. Heller's habitual residence is exclusively competent

In both cases the actual contract was already made by electronic communication, there were not just reservations². But in a new case reported at the end the contract itself was made face-to-face. The language was clearly German in all cases.

The facts of the later cases

3. Ms. Mühlleitner from Austria wanted to buy a car for private purposes and searched at the

platform www.mobile.de. She chose a car offered by a dealer in Hamburg who gave the country code with the phone number. She called him by telephone. The car was not available anymore, so the dealer offered another car sending information by e-mail and confirmed this car was available also for buyers from abroad. Ms. Mühlleitner then travelled to Hamburg, made the contract there. At home she found the car to have defects and sued in an Austrian court³.

4. Mr. Emrek who lives near Saarbrücken in Germany close to the French border wanted to buy a second-hand car. A friend recommended him Mr. Sabranovic who has a second-hand car trade (also for import and export) just across the French border. Mr. Emrek drove there because of the recommendation, not because of Mr. Sabranovic's website where a French fix-line telephone number and a German mobile phone number were given, both with country codes. At home Mr. Emrek found the car to have defects and sued in a German court and for jurisdiction referred to Mr. Sabranovic's website⁴.

The legal issue

In the Pammer case (as well as in the Mühlleitner and Emrek cases) the question was whether the suing consumer could choose to sue at the court of his habitual residence instead of the defendant's residence under art. 16 para. 1 of the Brussels I regulation. In the Alpenhof case, however, the question was whether the owner could sue the consumer only at his habitual residence under art. 16 para. 2 of the Brussels I regulation.

In all these cases this depended on the question whether it was a consumer in the terms of art. 15 para. 1 of the Brussels I regulation. That was the case here if - in the terms of letter c - the businesses "directed" their invitations to offer (and other promoting activities) to consumers from other countries including the country where the consumer in question lives. The ECJ put it the way: whether the business showed their readiness to make such contracts by e-commerce⁵.

In all these cases the interest of the consumer to go court "at home" collided with the same interest of the business owner. This is particularly problematic where the consumer had willingly left his home market because mobile consumers from abroad may cause more difficulties for small and medium size businesses than the consumers from their own country.

So: What is the direction of an internet proposal?

After a detailed study of the legislative history⁶ - and by comparing with and (surprisingly) distinguishing from recital 24 of the Rome I regulation⁷ - the ECJ in the Pammer and Alpenhof cases came to the conclusion that the accessibility of the website from the consumer's home was insufficient for direction. The ECJ requires the expression of the willingness of the business to make contracts with consumers from other countries than his own⁸.

An apparent expression of this willingness is spending money on internet reference services (e.g. to be shown as one of the first three search results at Google) to ease the consumer's access to the

business' or its intermediary's website. So this alone is sufficient to conclude that the offer was directed to the country where the consumer lives⁹.

The following criteria are also suitable to conclude that the business activity was directed to the country of the consumer:

1. International character of the activity (so tourism more likely than shoe repair)
2. Travel indications from abroad
3. Different language, particularly for booking and confirmation, or different currency than the one used in the country of the business
4. Telephone numbers with country code
5. The use of another top level domain than the one of the business' country for the domain name
6. Mentioning an international clientele

This list is neither exhaustive¹⁰ nor would it be sufficient if just one of the criteria is met¹¹. It has been amended in the meantime:

7. Establishment of contact at a distance¹²
8. Reservation of goods or services at a distance¹³
9. A fortiori from 7 or 8, the conclusion of a consumer contract at a distance¹⁴
10. The directed instrument has caused the conclusion of the contract¹⁵

The ECJ has explicitly ruled that it does not make a difference whether the website is an active one (offering a contact form so that it becomes particularly easy for the consumer to send an e-mail to the business) or a passive (which just has photos and addresses etc, eventually only in the legal notice)

In the first two cases the ECJ did not yet have to decide whether there must be a link of causality between the website offer and the actual conclusion of the contract (as would, e.g. have been the case if Mr. Heller had found the Alpenhof through a printed advertisement, e.g., in a newspaper or a guide book and only his clever lawyer had found the Alpenhof's website, or as in the Emrek case where a personal recommendation brought the customer to the business). But in Mühlleitner and Emrek the ECJ decided that no such link of causality between website offer and conclusion of the contract was required¹⁶.

More on the criteria

Ad 2. On 13 May 2011 the website www.alpenhof.info offered a route planner by a link to Google Maps for guests coming by car. Apart from this it only mentioned the distances to the airports in

Salzburg, Austria, and Munich, Germany, named two low-cost carriers flying to Salzburg and had links to the railway time-tables of Austria, Germany, Italy and Switzerland. It appears Austrians should also beware of marking Munich on a map sketch.

Ad 3. Recital 24 of the Rome I regulation declares the use of language and currency as irrelevant factors for determining whether an electronic business activity is directed abroad to where the consumer lives. If that were the case the contract would fall under art. 6 para. 1 letter b on consumer contracts instead of the general attachment rules in art. 4 of the Rome I regulation. The wording of art. 6 para. 1 letter b was very explicitly intended to be parallel to art. 15 para. 1 letter c of the Brussels I regulation¹⁷. The ECJ, however, has reduced this to situations where the language and the currency of the business are used. The ECJ wants to deduce from a language or a currency foreign to the member state of the business that the offers are directed abroad. So it appears that, e.g., Romanians should beware of being so nice to use English or to calculate the price in Euro. This should be reconsidered in the case of language minorities¹⁸.

Ad 4. The ECJ remembered that certain indications are mandatory¹⁹, like geographical and e-mail address and phone number for fast efficient contact, even if the website is only directed to the national market of the business. But the use of the country code of the phone number is not mandatory and, therefore, an indication for the direction abroad.

Ad 5. The domain www.alpenhof.at is owned by an Alpenhof in Hintertux, Tyrol. Other Alpenhoeefe have combined their names with the name of the place, e.g. www.alpenhof-gerlos.at. But in fact it may be useful to demonstrate that the address under the national top-level domain was already taken when the business started its website.

Ad 6. On 13 May 2011 www.alpenhof.info had guest evaluations only in the German part and they did not show from where the commenting person was. But the wording of the judgement sounds as if the Alpenhof of the case had evaluations by former guests that were clearly from different countries²⁰.

Ad 9 and 10. These are only indicators that the business activities are directed from another country to the country where the consumer lives. However, it is not required that this actually results in the conclusion of the contract!

Perspectives

Hotels and other businesses offering their services through platforms will have no chance to sue consumers from other EU countries and those neighbouring countries that have ratified the new Lugano Convention elsewhere than in the consumers' domiciles.

If the businesses use their own websites they have a chance to avoid their “direction” abroad and, thereby, avoid to be sued abroad by consumers.

Mobile consumers may lose the advantages of the internet if they live in a country where the business owner finds proceedings to be less cost-efficient than in his home country and, therefore, the business owner refrains from doing business with consumers from certain countries.

Either the national hotel owners’ associations will establish networks of corresponding lawyers or look for an EEIG of law firms or the hotel owners on their own will make more use of the European Order for Payment²¹ or the European Small Claims Procedure

¹Cases nos. C-585/08 (Peter Pammer/Reederei Karl Schlüter GmbH & Co. KG) and C-144/09 (Hotel Alpenhof Ges.m.b.H/Oliver Heller; when I only refer to text nos. in the foot-notes below they are from this combined judgement

²Text no. 87

³Case no. C-190/11 (Daniela Mühlleitner/Ahmad and Wadat Yusufi)

⁴Case no. C-218/12 (Lokman Emrek/Vlado Sabranović)

⁵Text no. 76

⁶Text nos. 53 to 73

⁷No. 593/2008 on the law applicable to contractual obligations, referred to in text nos. 74 and 84 of the judgement

⁸Text nos. 75, 80 and 81

⁹Text no. 81

¹⁰Confirmed in the Emrek case no. C-218/12, text no. 27

¹¹Text no. 83

¹²Case no. C-190/11 (Mühlleitner/Yusufi), text no. 44

¹³ibidem

¹⁴ibidem

¹⁵Case no. C-218/12 (Emrek/Sabranović) text no. 44: this is only an indicator, not an essential requirement!

¹⁶However, the German Federal Court of Justice had decided otherwise in 2008: A German-speaking Greek lawyer was mentioned on various websites of legal protection insurances and the German embassy in Athens. In the case he had acted as agent with power-of attorney in an intended real estate sale on behalf of a Greek who had proposed to involve him as late as the time when the German interestees had already come to Greece to see the real estate. Somehow the Germans felt they had a contract for legal representation with this Greek lawyer. The German Federal Court of Justice, denied causality of the mentions on websites for the eventual conclusion of a contract for legal services and, therefore, denied consumer jurisdiction in Germany (order of 17 September 2008 - III ZR 71/08)

¹⁷Leible/Müller, Neue Juristische Wochenschrift 2011, 495 (497) point to the principle that no criterion may be ruled out from the beginning because the wording of art. 15 para. 1 of the Brussels I regulation is explicitly unrestricted

¹⁸See particularly the reference to the language of the business-owner at the end of text no. 91

¹⁹Text no. 77 and 78, e-commerce directive no. 2000/31/CE

²⁰Text no. 83 at the end

²¹Regulation no. 1896/2006

²²Regulation no. 861/2007

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