

Publications

EU: Jurisdiction in cross-border e-commerce with consumers (2nd up-date): your website may become a night-mare

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The ECJ had decided on 7 December 2010 two cases concerning the jurisdiction in cross-border e-commerce with consumers and later decided on some remaining details with surprising outcome for many businesses with websites or using platforms. And more is pending after the German Federal Court of Justice has requested a preliminary ruling on further details which might lead to a partial revision of the jurisprudence of the ECJ.

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.

In both cases the actual contract was already made by electronic communication, there were not just

reservations . But in the new cases reported below the contract itself was made face-to-face. The language was clearly German in all cases.

The facts of the later ECJ 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 had defects and sued in an Austrian court.
4. Mr. Emrek who lives near Saarbrücken in Germany (on the French border) wanted to buy a second-hand car. A friend recommended him Mr. Sabranović 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. Sabranović'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. Sabranović's website .

The facts of the new case from the German Federal Court of Justice

5. The plaintiffs are consumers from Northern Germany. They wanted to buy a holiday apartment in Spain in 2005. Under very clear e-commerce circumstances they made a contract with the defendant, a real-estate agent resident in Spain but speaking German, to find an apartment on Costa Blanca. In 2006 they made a contract with a building company for an apartment in a condominium still to be built. When the building company had financial difficulties to complete the condominium in 2008 the defendant offered his assistance to the plaintiffs to see the building completed and the plaintiffs registered as owners. The plaintiffs made further payments to the defendant who could not achieve what he was supposed to achieve. So the plaintiffs wanted their money back and sued in the regional court of their residence. Regional court and appeal court dismissed the claim for lack of jurisdiction. The Federal Court of Justice, however, thought the relationship between the two contracts could be close enough (and the consumers in need of protection) to extend the jurisdiction given for the first (fulfilled) contract to the second contract so closely related in its object (an apartment in Spain for the plaintiffs) .

The legal issue about jurisdiction

In the Pammer case (as well as in the later cases) the question was whether the suing consumer could chose 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 the consumer's 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 contract 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 this way: whether the businesses showed their readiness to make such contracts by e-commerce. In the case of the German Federal Court of Justice, however, the defendant had not offered the kind of services of the second contract on his website.

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 in search of the advantages of the common market because mobile consumers from abroad may cause more difficulties for small and medium size businesses than the consumers from their own country.

The legal issues of which law is applicable to these contracts will shortly be treated in a separate document.

So: What is the direction of an internet proposal?

After a detailed study of the legislative history - and by comparing with and (surprisingly) distinguishing from recital 24 of the Rome I regulation - 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 own.

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 lives.

The following criteria given in the Pammer and Alpenhof judgement 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 exhaustive nor would it be sufficient if just one of the criteria is met . The list has been amended in the meantime:

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

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 required . This opened the flood-gate and led the German Federal Court of Justice to ask whether this could apply to a later contract, too, where the final purpose was the still the same (the apartment) and which the parties would not have made without the first - entirely fulfilled - one.

The German Federal Court of Justice also pointed out that the ECJ had said in the Mühlleitner case that this special jurisdiction for consumers is exceptional and must, therefore, be construed narrowly but that, on the other hand, the purpose of this jurisdiction is consumer protection.

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 (on the law applicable to a contractual relationship) 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 regulation . 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 as to use English or to calculate the price in Euros. This should be reconsidered in the case of language minorities.

Ad 4. The ECJ remembered that certain indications are mandatory, 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. Mr. Sabranović in the Emrek case had given a German mobile phone number (apart from the French fix-line number with country code). In the case of the German Federal Court of Justice the Spanish real-estate agent had offered contact through a “back office” with fix-line number in Berlin.

Ad 5. The domain www.alpenhof.at is owned by an Alpenhof in Hintertux, Tyrol. Other Alpenhoefer 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 launched its first 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 countries

Ad 9 and 10. These are only indicators (but strong ones!) 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 if, 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 Payment or the European Small Claims Procedure.

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