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Determining Locus Solutionis in Contractual Disputes on the Internet

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Abstract International jurisdiction for contractual disputes on the EU level is regulated by the Brussels I bis Regulation. The respective instrument confers international jurisdiction to courts of the Member State in which the obligation in question is to be performed (Art. 7(1)(a)). The place of performance is concretised as the place of delivery and place of provision of services if the contract at issue is sale of goods or provision of services, respectively (Art. 7(1)(b)). It follows that the internet context becomes relevant when goods or services are to be delivered or provided online. The author will argue that those cases can either be characterised as provision of services or other contracts which, for the purpose of the Brussels I, fall into the ambit of general provision on establishing jurisdiction in matters relating to contracts (Art. 7(1)(a)). They cannot be qualified as sale of goods due to the nature of goods which may be acquired online and intellectual property issues necessarily involved. The aim of this paper is to propose a manner in which the provision at issue should operate in contractual disputes on the internet, having regard of principles the Court of Justice of the European Union established interpreting that jurisdictional rule.

Keywords: • Brussels I bis Regulation • contractual disputes • international jurisdiction • internet

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1 Introduction

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 (OJ L 351, 20.12.2012, pp. 1-32, hereinafter: the Brussels I bis Regulation) which entered into force in January 2015, thus replacing 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, 16.1.2001, pp. 1-23, hereinafter: the Brussels I Regulation) represents one of the most important legal sources of European procedural law containing rules on establishing international jurisdiction in civil and commercial matters. The focal point of this paper is the provision of Art. 7(1) of the Brussels I bis Regulation (formerly Art. 5(1) of the Brussels I Regulation and Art. 5(1) of Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ L 299, 31.12.1972, pp. 32-42) which confers international jurisdiction for contractual disputes to courts in the Member State in which the contract is to be performed. With the expansion of the Web 2.0, courts will be increasingly confronted with the challenging task of adapting this rule, based on the close territorial connection between the dispute and the territory of Member States, to internet disputes which defy the geographic borders. The analysis of internet disputes in this paper will be limited to matters relating to contracts that fall into the ambit of Art. 7(1) of the Brussels I bis Regulation, i.e. P2P and B2B contracts. After giving the insight into the interpretation of the Court of Justice of the European Union (hereinafter: the CJEU) concerning the respective provision, the author offers the solution for determining the place of performance online.

2 The Provision on Jurisdiction in Matters Relating to a Contract

According to subparagraph (a) of Art. 7(1) of the Brussels I bis Regulation, jurisdiction is conferred to courts for the place of performance of the obligation in question. Subparagraph (b) specifies the place of performance for two most common types of contracts, i.e. sale of goods and provision of services. In the case of the sale of goods contract, the place of performance is the place where the goods were delivered or should have been delivered, while the place where the services were provided or should have been provided is the relevant jurisdictional criterion for the provision of services contract. It stems from the subparagraph (c) that subparagraph (a) should be applied only when the contract at issue is not the one for the sale of goods or provisions of services.

2.1 The Scope of the Provision

The CJEU provided the autonomous interpretation of the term 'matters relating to a contract' for the purposes of the Brussels I.[1] It was first established that the respective term is 'not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another' (Judgment in *Handte v TMCS*, C-26/91, EU:C:1992:268, paragraph 15). This principle originates from the case in which the French court expressed its doubts whether it may, for the purposes of the Brussels I,

qualify the relationship between the manufacturer and the sub-buyer, who bought goods from the intermediate seller in the chain of contracts, as the contractual one. The negative definition of contract was later shifted into the one in the affirmative, according to which the existence of the contract 'presupposes the establishment of a legal obligation freely consented to by one person towards another and on which the claimant's action is based' (judgment in *Engler*, C-27/02, EU:C:2005:33, paragraph 51). This unusual shift of the negative definition into the one in the affirmative and consequential broadening the scope of the provision may be explained by the initial concern of the CJEU of construing the term too extensively and may be a direct consequence of the wording of the question referred for the preliminary ruling.

Even though the provisions of special jurisdiction are to be interpreted restrictively, being an exception form the general jurisdictional rule (see Bogdan, 2012: 43), the notion of the contract should not be understood too narrowly. It entails the relationship arising from the membership in the association, since the rights and obligations arising out of it are similar to ones which originate from the contract (judgment in *Peters v Zuid Nederlandse Aannemers vereniging*, C-34/82, EU:C:1983:87, paragraph 13). The jurisdiction should be determined in accordance with Art. 7(1) of the Brussels I bis Regulation even when one of the parties contests the existence of the contract. If it were not so, the efficiency of the provision would be called into question every time a party would challenge the existence of the contract (judgment in *Effer Spa v Kantner*, C-38/81, EU:C:1982:79, paragraph 7).

2.2 The Interpretation of the Provision

The original text of the Brussels Convention did not contain the provision in subparagraph (b).[2] Regardless of the type of the contract, the jurisdiction was conferred to the court for the place of performance of the obligation in question. Since every contract has at least two obligations, the CJEU clarified in *De Bloos* which one is relevant for establishing jurisdiction. It is the one upon which the plaintiff's claim is founded (judgment in *De Bloos v Bouyer*, C-14/76, EU:C:1976:134, paragraph 11 and 13).[3] However, if the plaintiff contends that the dispute is based on two or more obligations of equal rank which must be performed in different Member States, the courts of each of those Member State are only competent with respect the obligation which was or should have been performed in that Member State. If the plaintiff wants to bring claims based on those obligations before the same court, he may do so before the court which is competent pursuant to provision on general jurisdiction based on defendant's domicile (judgment in *Leathertex*, C-420/97, EU:C:1999:483, paragraph 41 and 42). The defendant's domicile will again be the only available forum in the event that the obligation in question is the obligation not to do something, which cannot be geographically limited and is performed in multiple places. The CJEU has come to this conclusion in the case concerning the contract between two companies which agreed to act exclusively and not to commit themselves to other partners (judgment in *Besix*, C-256/00, EU:C:2002:99, paragraph 55).

Once it was resolved which obligation is the relevant one, the issue of determining the place of performance has arisen. In the landmark case *Tessili*, the Italian company

Tessili, which manufactured the women ski suits, sold them to the German company Dunlop. The ski suits were sent to Dunlop through the carrier engaged by Dunlop. The poor quality of the ski suits gave rise to the dispute, in which the issue appeared whether the obligation is performed in Italy where the suits were handed over to the carrier, or in Germany, where the buyer received the goods. The CJEU decided not to adopt the autonomous qualification it usually resorts to and decided that the place of performance of the obligation in question is to be determined in accordance with the applicable law (judgment in *Industrie tessili italiana v Dunlop AG*, C-12/76, EU:C:1976:133, paragraph 15). In other words, the court seised must, before even establishing if it has competence to discuss the case, determine the applicable law.[4] With the aim of simplifying this process for most common types of contracts, the subparagraph (b), or the *Tessili* provision as it is sometimes referred to, was introduced with the Brussels I Regulation. Subparagraph (b) is to be interpreted autonomously, without reference to *Tessili* or *De Bloos* (Mankowski, 2012: 159-160, paragraph 96).

The subparagraph (b) does not address the situation when the goods are to be delivered or the services are to be provided in several places. The solution was once again offered by the CJEU. If the delivery of goods must be performed in different places in the same Member State, it must first be established if there is a principal place of delivery based on economic criteria. If there is, the court for that place is competent to hear all the claims based on the contract. If there is no principal delivery, the plaintiff may institute the proceedings in the court for the place of delivery of its choice (judgment in *Color Drack*, C-386/05, EU:C:2007:262, paragraph 45). This principle was partly applied in the case in which the services were to be provided in several places in different Member States (judgment in *Rehder*, C-204/08, EU:C:2009:439, paragraphs 32-28). If the place of the main provision of services cannot be determined, the place where the provider of the services has carried out his activities in the most part should be relevant, provided that this is in line with the parties' intentions based on the provisions of the contract. For the purpose of the latter, the facts of the case may be taken into account, particularly the duration of time spent and the importance of the activities carried out. If the previous criteria fail, the domicile of the provider of the service should be considered as the place of the main provision of services (judgment in *Wood Floor Solutions Andreas Domberger*, C-19/09, EU:C:2010:137, paragraphs 40-42).

3 Determining the *Locus Solutionis* Online

In the context of the internet, the respective provision becomes cumbersome when the goods to be delivered are digital or services must be provided online. The mere fact that the contract was concluded online will not make difference, since the Brussels I does not accept the *locus contractus* as the relevant jurisdictional criterion.

3.1 Delivering Digital Goods

The term digital goods refers to goods that do not exist in material world, but the virtual one (Watkins, Denegri-Knott, Molesworth, 2016: 44), i.e. the non-rivalrous goods in the sense that consumption by one consumer does not prevent simultaneous consumption by other consumer (Murray, 2013: 11). Digital goods which may be

acquired online are electronic books, magazines, music, movies, photographs and software. What characterises acquiring those goods is the fact that they cannot be fully owned by the acquirer (Watkins, Denegri-Knott, Molesworth, 2016: 45) in the way the material goods may be. In the offline context, a person buying a DVD becomes the owner of the plastic carrier of the content, it does not automatically become the owner of the content itself, but merely has the permission to use it (Gliha, 2006: 807). When the digital goods are being acquired online, the digital content necessarily becomes separated from the carrier; hence the rights of the acquirer regarding the goods cannot be described as ownership. That is why acquiring the goods cannot be qualified as the sale of goods.[5] Even the Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods excludes from its scope of application goods like CDs and DVDs which serve as merely the carrier of the digital contents. On the other hand, goods like household appliances and toys in which the digital content has a subordinate function fall into the ambit of the Proposal (Brussels, 9.12.2015, COM(2015) 635 final, 2015/0288 (COD), Recital 13 and Art. 1(3)).

The CJEU recognised this particularity of the digital goods in *Falco Privatstiftung* (judgment in *Falco Privatstiftung*, C-533/07, EU:C:2009:257). The plaintiffs were Falco Privatstiftung, an Austrian foundation managing the copyright of the late Austrian singer Falco and Mr Thomas Rabitsch, domiciled in Austria, who is a former member of the singer's rock group. The defendant was Ms Weller-Lindhorst, domiciled in Germany who sold video and audio recordings of a concert performed by the singer and the rock group. She concluded a licensing agreement with the plaintiffs concerning video recordings pursuant to which she had the right to sell the recordings in Austria, Germany and Switzerland (Opinion of Advocate General Trstenjak delivered on 27 January 2009 in case *Falco Privatstiftung and Rabitsch*, C- 533/07, EU:C:2009:34, paragraph 12.). The national court wanted to establish whether the contract at issue may be considered as the provision of services for the purpose of establishing international jurisdiction. The CJEU answered that the jurisdiction should be determined in accordance with the subparagraph (a). The licensing agreement cannot be qualified as the contract for the provision of services, since the owner of the intellectual property right does not perform a service actively but solely obliges to permit the licensee to exploit the right. For the contract to be qualified as the one for the provision of services, it is necessary that a party actively provides a service in return for remuneration (judgment in *Falco Privatstiftung*, C-533/07, EU:C:2009:257, paragraph 29 and 31.).

Given that subparagraph (b) is inapplicable, international jurisdiction for acquiring goods online, should be established in accordance with subparagraph (a). Therefore, *Tessili* and *De Bloos* doctrines are applicable for establishing international jurisdiction. Whether the obligation at issue is payment or the delivery of goods, or perhaps another contractual obligation, the performance of the obligations should be established in accordance with the applicable law, unless the parties agreed on the place of performance of that obligation (see judgment in *MSG v Les Gravières Rhénanes*, C-106/95, EU:C:1997:70). Considering that the rules on applicable law for contracts are unified at the EU level, the applicable law will be established in accordance with Art. 4(2) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of

17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, pp. 6-16) pursuant to which the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. Since the provision establishes applicable law for the entire contract, all the obligations will most likely be governed by the same applicable law (see Cordero Moss, 1999: 387), unless the *dépeçage* is triggered. The characteristic performance is usually the non-pecuniary obligation, the obligation which represents the centre of gravity of the contract and performs the socio-economic function of the contract (Giuliano and Lagarde, Report on the Convention on the law applicable to contractual obligations Oj C 282, 31.10.1980, pp. 1-50; see also McParland, 2015: 424-427, paragraphs 10.341-10.353). In the case of supply of the digital goods, that obligation is performed by the supplier. Therefore, the place of performance of the obligation and international jurisdiction will be determined in accordance with the law of the supplier's habitual residence.

3.2 Providing Online Services

Services which are provided online may be divided into two categories: services that can only be provided online, which are provided by certain internet service providers, e-shopping, e-banking and e-finance internet sites and the ones which may be provided in both online and 'offline' environment, like different educational courses or consulting services. In any case, jurisdiction is conferred to courts for the place of provision of services and determining this place in the internet context presents difficulties. For instance Polish and Estonian national reports on the application of the Brussels I Regulation indicated that national courts came across obstacles when trying to localise the provision of non-physical services (Hess, Pfeiffer and Schlosser, Study JLS/C4/2005/03, Report on the Application of Regulation Brussels I in the Member States, Munich, Final Version, September 2007, p. 95).

Providing services online may be localised in several places, like the place of uploading, the place of downloading, service provider's establishment, the service recipient's establishment, the place where the servers are situated.[6] The place of uploading and the place of downloading may be completely random and fortuitous places easily manipulated by both parties. For instance, in the Polish national report on the application of the Brussels I Regulation, it was suggested that the place of downloading should not be relevant, since the recipient may pass through several Member States while downloading the content (European Civil Procedure: Study JLS/C4/2005/03 – Evaluation of Application of Regulation 44/2001, National Report – Poland, Warsaw, July, 2006, pp. 32-33). The servers may be situated in the country that has no connection with the parties or the dispute. From the perspective of the legal certainty requirement,[7] the parties domicile may seem as the most appropriate choice.
The answer to the presented issue may be found in the CJEU's case law. In *Car Trim*, one of the cases on the interpretation of the place of the delivery of goods, the CJEU clarified that the place of delivery is deemed to be the place where the physical transfer of goods took place, by which the purchaser obtained the power of disposal of the goods, since the main purpose of the sale of goods contract is the transfer of those goods from the seller to the purchaser. This issue has arisen since the goods were

transferred to the carrier before they reached the purchaser (judgment in *Car Trim*, C-381/08, EU:C:2010:90, paragraphs 60-61.). The same principle was later followed in drafting the text of the Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, Brussels, 9.12.2015, COM(2015) 634 final, 2015/0287 (COD)). According to Art. 5(2), the supply will take place when the digital content is supplied to the consumer or to the third party chosen by the consumer, whichever happens earlier. The same criterion should be followed for establishing the place of provision of online services for the purposes of the subparagraph (b) of the Brussels I bis Regulation. If the service is being downloaded from several places, the CJEU's principles established in cases of provision of services in offline environment should be applied, according to which the place of the main provision of services is relevant. In the absence of the latter, it must be determined where activities are carried out in the most part. If this fails as well, the domicile of the provider of the service may be considered as the place of the main provision of services. There is also the possibility of replacing the place of downloading as the place of receiving the service with the domicile of the recipient of the service. That way, the *Cart Trim* principle would be party followed and the jurisdiction would be based on the criterion which is more in line with the principle of legal certainty.[8]

4 Conclusion

The operation of the Brussels I bis jurisdictional rule for matters relating to contracts, regulated in Art 7(1) requires certain adaptation to internet disputes when digital goods are being delivered online or services are being provided online. In this respect, it must be noted that those contracts will either be qualified as other contracts in the sense of paragraph (a) or provision of services from the subparagraph (b). They should not be characterised as the sale of goods contracts since the ownership over digital goods is not transferred to its acquirer. The acquirer is merely permitted to use the goods. While the provided analysis proves that the relevant provisions can be adequately adapted to the internet environment, the unfortunate consequence of differing the contracts that fall within the subparagraph (a) from those which are governed by the subparagraph (b) is the fact that the jurisdiction will be determined in substantially different ways. In the case of acquiring the digital goods online, operative parts of early CJEU cases, *Tessili* and *De Bloos*, are applicable meaning that the deciding court will have to establish whether it has jurisdiction in accordance with the law applicable to the obligation in question. On the other hand, determining the international jurisdiction for provision of online services should follow autonomous determination of the place of performance established in *Car Trim*.

Notes

[1] The term Brussels I is used for reference to the entire jurisdictional system established with the Brussels Convention, the Brussels I Regulation, the Brussels I bis Regulation.

[2] Art. 5(1) of the original text of the Brussels Convention, merely stated that in matters relating to contracts the competent courts were courts for the place of performance of the obligation in question. The provision was amended with the Convention of 26 May 1989 on the accession of

the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic (89/535/EEC) by adding to the existing text the rule that for individual contracts of employment, the place of performance of the obligation in question is deemed to be in the place where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the business which engaged the employee was or is situated.

[3] Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (78/884/EEC), amended certain language versions of Art 5(1) clarifying that the relevant obligation is the one which forms the basis of the claim.

[4] See for instance case *Definitely Maybe (Touring) Ltd. v Marek Lieberberg Konzertagentur G.m.b.H.* [2001] 2 Lloyd's Rep. 455. The plaintiff was the English company which provided the services of the band Oasis to organisers of the concerts, while the defendant was the German company that organised two festivals in Germany. Since one of the Gallagher brothers did not perform at the festival, the festival organisers refused to pay the entire amount of the agreed price. As a consequence, the plaintiff instituted the proceedings in England. English court had to first establish the applicable law for the contract so it could decide on its competence. Under German law, a place of performance the obligation to pay is the debtor's domicile, in this case Germany, while the English law provides that the place of performance of payment is a place where money is to be received.

[5] For the similar solution, see author's previous article Vrbljanac, 2015: 741. There are also differing opinions, see for instance Wang, 2010: 52-57.

[6] For different propositions, see Hörnle, 2009: 126 and Wang, 2010: 52-57.

[7] On legal certainty as one of the cornerstones of the Brussels I system, see recital 16 of the Brussels I bis Regulation and judgment in *Owusu*, C-281/02, EU:C:2005:120, paragraph 38.

[8] This approach has already been suggested by the author, see Vrbljanac, 2015: 747.

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