

# JURISDICTION RULES APPLICABLE TO CONTRACTS CONCLUDED BY ELECTRONIC MEANS

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## Abstract

*The purpose of this paper is to analyse the legislation, doctrinal opinions and relevant case law regarding the rules of jurisdiction applicable to the cases arising from contracts concluded by electronic means (e-contracts). Considering the elements of foreign origin that often affect this type of contracts, and the lack of a global agreement regarding international jurisdiction and recognition and enforcement of judgements, the objectives pursued by the author are:*

- identification of rules of jurisdiction applicable to the cases arising from e-contracts,
- identification of problems that could arise from law's interpretation,
- issuing of the *de lege ferenda* proposals.

*At European Union level, according to the provisions of Brussels I Regulation, as a general rule, actions against a person domiciled in a Member State shall be brought to the courts of that State.*

*According to the same Regulation, cases resulting from a contractual relationship may be decided by the courts of the place of performance of the contractual obligation. In lack of specific jurisdictional rules, the above rules apply to B2B e-contracts. In the case of B2C e-contracts, the consumer can bring proceedings either before the courts of the Member State of his domicile or before the courts of the Member State of the defendant's domicile. The consumer can only be sued in the Member State of his domicile. The rules protecting the consumer apply if the trader 'directs its activities' to the Member State in which the consumer is domiciled.*

*If the defendant is not domiciled in a Member State, the international jurisdiction is determined, in each Member State, according to its national rules of international private laws.*

**Key words:** *jurisdiction, choice of law forum, international private law, business to business contract, consumer to business contract*

## 1. Introduction

This paper analyses the jurisdiction rules applicable to e-contracts, where no express choice of forum is stipulated in the contract. Additionally, the paper identifies the limits within which parties can agree upon the jurisdiction applicable in case of a dispute. The paper focuses on the jurisdiction rules applicable to both business to business (B2B) and business to consumer (B2C) trade relations.

We can identify two categories of electronic commerce: on the one hand, we talk about trade in goods and services and, on the other hand, we talk about selling electronic materials (software, images, voice, text, etc.).

In the first case, the Internet is used as a medium for communication and sometimes as location of concluding the contract, while in the second case the Internet is also the place where the contract takes place. In other words, while in the first case the contract is concluded by electronic means, although the execution takes place outside the electronic environment, in the latter case the entire transaction, from the moment an offer is made and until the obligation in question is executed, is located on the same network.

The importance of the theme results from the difficulties to establish the "place" on Internet, in absence of an express choice of jurisdiction by the parties. The subject of the paper is important both from the perspective of scientific research and from a practical perspective, as the global

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Internet enabled markets have gradually expanded, amounting today to a significant share of total world's trade.

The research method starts from analyzing comparatively the legal provisions, relevant case law and doctrine in this field in Romania, EU, and USA. It further outlines the particularities of how the "*Bruxelles I Regulation*" could be applied in Romania, and describes the status of research in the field in in Romania. Based on this foundation, the paper provides analyses and conclusions of the author which are meant to cover the missing parts in the current Romanian doctrine.

## 2. Determining jurisdiction in absence of choice of jurisdiction clause - contractual relationships of type B2B

Jurisdiction in international private law is the ability conferred by law to the court of a State, in rapport with the courts from other States, to solve the civil law suit with an extraterritorial element<sup>2</sup>.

Traditional international private law takes into consideration the geographically factor when determining the jurisdiction. If one party wants to sue the other party would check where the defendant is domiciled or where it is its place of establishment.

### 2.a Romania – Member State of the European Union

At the European Union level, there is a constant process of regulation in order to harmonize the national provisions of Member States on the rules of jurisdiction and simplify the recognition and enforcement of judgments in civil and commercial matters.

In 1968, the Member States ratified the [Brussels Convention](#) regarding jurisdiction and enforcement of judgments in civil and commercial matters<sup>3</sup>.

Later, in 1988, the Member States together with the AELS States signed the Lugano<sup>4</sup> Convention, based on the Brussels Convention.

In 2000, Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and the enforcement of judgments in civil and commercial matters was adopted, and entered into force on the 1<sup>st</sup> of March 2002 (Brussels I Regulation)<sup>5</sup>. Brussels I Regulation is the matrix of European judicial cooperation in civil and commercial matters. It lays down uniform rules to settle conflicts of jurisdiction and facilitate the free circulation of judgments, court settlements and authentic instruments in the European Union<sup>6</sup>. It replaced the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by several conventions on the accession of new Member States to that Convention.

EU regulations are binding as adopted, without needing their implementation by Member States.

The Brussels I Regulation is directly applicable throughout the European Union except for Denmark. The European Union and Denmark signed an agreement on jurisdiction, recognition and enforcement of judgements in civil and commercial matters which ensures that the provisions of the Brussels Regulation are enforced in Denmark as of the 1st of July 2007<sup>7</sup>. The Lugano Convention of

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<sup>2</sup> Dan Lupaşcu, *Drept Privat Internațional* (Bucharest: Universul Juridic, 2008), 229

<sup>3</sup> Curia Europa, accessed February 20, 2011

<http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm>

<sup>4</sup> Curia Europa, accessed February 20, 2100

<http://curia.europa.eu/common/recdoc/convention/en/c-textes/lug-idx.htm>

<sup>5</sup> JO L 12, 16.1.2001, p.1.

<sup>6</sup> Commission of the European Communities, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee* (Brussels: 2009), accessed February 19, 2011,

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0174:FIN:EN:PDF>

<sup>7</sup> JO L 299, 16.11.2005, p. 62.

1988, which regulates the same field, is mandatory for the Member States, including Denmark, on the one hand, and Iceland, Norway and Switzerland, on the other side. This Convention shall be replaced in the near future with an agreement concluded by the European Union, Denmark and the states mentioned above<sup>8</sup>.

The Brussels I Regulation applies in civil and commercial matters irrespective of the level of the court.

The provisions of the Brussels I Regulation identify only the Member State in which the courts have jurisdiction. The specific court in its territory is to be subsequently determined by the national procedural law of that Member State.

In the absence of a choice of jurisdiction clause, Article 2 of the Brussels I Regulation states a *fundamental rule* according to which persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State: the courts of the defendant's domicile have international jurisdiction.

From this fundamental rule there are some exceptions: rules of special jurisdiction (alternative grounds of jurisdiction – Article 5; derived jurisdiction – Article 6; protective jurisdiction in matters relating to insurance contracts, consumer contracts and individual employment contracts – Articles 8-21), rules of exclusive jurisdiction (Article 22) and the rules on prorogation of jurisdiction (Article 23-24).<sup>9</sup>

In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law. If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State (*Article 59 of the Brussels I Regulation*).

But, in e-contracts, often happened that the trader is an association of persons, even if not legally established.

For defendants who are company or other legal person or association of natural or legal persons, courts determine the domicile of the defendant by applying the provisions on *Article 60 of the Brussels I Regulation*, which stipulates that a corporation or other legal person is domiciled at the place where it has is:

- (a) statutory seat, or
- (b) central administration, or
- (c) principal place of business.

In the United Kingdom and Ireland "statutory seat" means the registered office or, where there is no such office anywhere, *the place of incorporation* or, where there is no such place anywhere, the place under the law of which the *formation* took place.

To determine whether a *trust* is domiciled in the Member State whose courts are seised of the matter, the court shall apply its rules of private international law.

From this perspective, most of the jurisdiction rules of the Brussels I Regulation applies only when the defendant is domiciled in a Member State. If the defendant is not domiciled in a Member State, the Brussels I Regulation refers to national law (subsidiary jurisdiction), except for the cases where the courts of a Member State have exclusive jurisdiction in accordance with Articles 22 or 23 of the Brussels I Regulation or in the case of certain types of disputes on specific areas (e.g., Community trademarks).

<sup>8</sup> JO L 339, 21.12.2007, p. 1.

<sup>9</sup> Decebal Adrian Ghinoiu, *General rules of jurisdiction under the Brussels I Regulation* (Romania: Wolters Kluwer, 2009), Studii și Cercetări Juridice Europene, Volumul Conferinței Internaționale a Doctoranzilor în Drept organizată de Facultatea de Drept și Științe Administrative din cadrul Universității de Vest din Timișoara și Centrul European de Studii și Cercetări Juridice Timișoara 16-18 iulie 2009, 13

In *Group Josi Reinsurance Company SA v Universal General Insurance Company* (Case 412/98), the European Court of Justice ruled that the jurisdiction rules of the Convention are in principle applicable where the defendant has its domicile or seat in a Contracting State, even if the plaintiff is domiciled in a non-member country. It would be otherwise only in exceptional cases where an express provision of that convention provides that the application of the rule of jurisdiction which it sets out is dependent on the plaintiff's domicile being in a Contracting State.<sup>10</sup>

In *Andrew Owusu v N.B Jackson* (Case C-281/02), the European Court of Justice held that the designation of the court of a Contracting State as the court having jurisdiction on the ground of the defendant's domicile in that State, even in proceedings which are, at least in part, connected, because of their subject-matter or the claimant's domicile, with a non-Contracting State, is not such as to impose an obligation on that State so that the principle of the relative effect of treaties is not affected<sup>11</sup>.

*As we mentioned above, the Brussels I Regulation establishes a number of special jurisdiction situations, some of them being relevant to e-contracts concluded B2B.*

*Thus, according to Article 5 of Brussels I Regulation, a person domiciled in a Member State may, in another Member State, be sued:*

(1) *In matters related to a contract* – in the courts for place of performance of the obligation in question (Article 5.1 a). In *SPRL Arcado v SA Haviland* (Case 9/87), European Court of justice has been retain in the grounds: “as the court held in its judgment of 22 march 1983 in case 34/82 ( martin peters bauunternehmung gmbh v zuid nederlandse aannemers vereniging (( 1983 )) ecr 987 ) the concept of "matters relating to a contract" serves as a criterion to define the scope of one of the rules of special jurisdiction available to the plaintiff . Having regard to the objective and the general scheme of the convention, it is important that, in order to ensure as far as possible the equality and uniformity of the rights and obligations arising out of the convention for the contracting states and the persons concerned, that concept should not be interpreted simply as referring to the national law of one or other of the states concerned. Consequently, the concept of "matters relating to a contract" is to be regarded as an independent concept which, for the purpose of the application of the convention, must be interpreted by reference principally to the system and objectives of the convention in order to ensure that it is fully effective .”<sup>12</sup>

Unless otherwise agreed, the place of performance shall be:

(a) In the case of a sale of goods, the place in a Member State where, according to the contract, the goods were or should have been delivered;

(b) In the case of services, the place in a Member State where, according to the contract, the services were provided or should have been provided. If subparagraph (b) is not applicable, then subparagraph (a) would be.

The practical application of these provisions in sale-purchase e-contracts or licensing of intangible products (e.g., software) concluded by electronic means may encounter several difficulties, in absence of a legal definition for goods and services.

(2) *With regard to a dispute arising out of the operations of a branch, agency or other establishment* – in the courts for the place in which the branch, agency or other establishment is situated (Article 5 point 5)

(3) A person domiciled in a Member State may also be sued (Article 6):

<sup>10</sup> Eur-lex Europa, Accessed February 19, 2011, [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=698J0412&lg=en](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=698J0412&lg=en)

<sup>11</sup> Eur-lex Europa, Accessed February 19, 2011, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002J0281:EN:HTML>

<sup>12</sup> Eur-lex, accessed February 19, 2011, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61987J0009:EN:HTML>

- where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

- as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

- on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;

- in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights *in rem* in immovable property, in the court of the Member State in which the property is situated.

In case of special jurisdictions, only the plaintiff can choose the special jurisdiction of the court. In the same sense ruled the Cour de Cassation in *Codevlanes v. Caruel Case*<sup>13</sup>.

## 2.b Romania - Outside the European Union

In international private relations, outside the European Union, Law no. 105/1992 on the regulation of private international law, as well as the international conventions still apply.

As a consequence of Romania's accession to the European Union, the national rules on international jurisdiction (Articles 148-157 of Law no. 105/1992) – containing “exorbitant” grounds of jurisdiction – will determine the international jurisdiction of the Romanian courts, on one hand, *ratione personae*, in cases where the defendant is not domiciled in a Member State – save in cases of exclusive jurisdiction and prorogation of jurisdiction provided for by the Brussels I Regulation -, and, on the other hand, *ratione materiae*, in cases involving matters which are not subject to uniform rules on jurisdiction provided for by the Brussels I Regulation or by other Community regulation enacted in the field of private international law<sup>14</sup>.

According to Law no. 105/1992, the Romanian courts are competent to solve the processes between a Romanian party and a foreign party, or only between foreign parties, be they natural or legal persons. The meaning of term “foreign”, will be established by Romanian national law (Urgent Governance Ordinance 194/2002).

The Law no. 105/1992 listed some situations in which the competence of the Romanian courts are exclusive, none of them being relevant to jurisdiction rules applicable to e-contract. In other reports with element of extraneity, the competence of Romanian courts are alternative, that means that a court from other country could be competent at the same time. Some examples of alternative competence of Romanian courts relevant to e-contracts are:

- The defendant or one of the defendants has his domicile, residence or goodwill in Romania. If the foreign defendant has no known address, the request will be submitted to courts from the plaintiff's domicile or residence in Romania;

- The headquarters of the defendant, a registered legal entity, is in Romania. To the purpose of this article, any foreign legal person is deemed as established in Romania if it has in Romania a branch, a subsidiary, an agency or a representative;

- The place where an obligation stemming from a contract has been formed or has to be executed, even in part, is in Romania;

- Lawsuits between foreigners as if they have expressly agreed, and legal relations concerning the rights they may have in connection with property or interests of the people from Romania;

<sup>13</sup> Curia Europa, accessed February 19, 2011, <http://curia.europa.eu/common/recdoc/convention/gemdoc2005/pdf/36-u-fr-05.pdf>

<sup>14</sup> Decebal Adrian Ghinoiu, *above 11*, 22

- Any other lawsuits stipulated by law.

Also, the Article 153 of Law no. 105/1992, established a *subsidiary competence* of the Romanian courts: if a foreign court declines its jurisdiction over an action brought to it by a Romanian citizen, then it can be brought to the court in Romania which shows the tightest relations with the process.

If, by agreement, the parties have submitted the dispute between them to a certain court of law, the chose court will be vested with competent jurisdiction, unless:

- The court is a foreign court and the dispute falls under the exclusive jurisdiction of a Romanian court;
- The court is a Romanian court and one of the parties makes evident that a foreign court shall have exclusive jurisdiction.

If multiple Romanian courts have jurisdiction under the provisions of Law No. 105/1992 and it cannot be determined which of them is entitled to solve the case, the action shall be directed according to the rules of material competence to the District 1 Court from Bucharest or the Municipal Court of Bucharest.

Competence of the Romanian courts established under Art. 148–152 of Law No. 105/1992 is not invalidated by the fact that the same case or a related case was submitted in front of a foreign court.

The Romanian seised court checks if it has jurisdiction to solve the case. If it finds that another Romanian court has jurisdiction, it decline its jurisdiction in favour of the Romanian court which have jurisdiction. If it finds that the case is of a foreign court jurisdiction, it rejects the claim on grounds of lack of jurisdiction of the Romanian courts.

## 2.c Comparative law - USA

In United States of America, there are two types of personal jurisdiction: general personal jurisdiction and special personal jurisdiction.

General jurisdiction is when contacts of a defendant with a state are continuous and systematic, enough that the defendant might reasonably anticipate defending any type of claim there. Under such circumstances, the court shall have jurisdiction in disputes including those involving acts taking place outside the state constituting the forum.

Special jurisdiction is when a forum has jurisdiction over a defendant whose contacts with the forum relate to the particular dispute in issue. The personal jurisdiction over a non-resident defendant by a forum state requires only that he have certain minimum contacts with it, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. The “minimum contacts” may be determine if: (1) the defendant must purposefully direct his activities or consummate some transaction with the forum state or a resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum and thereby invokes the benefits and protections of its laws; (2) the claim must be one arising out of or relating to the defendant’s forum-related activities; and (3) the exercise of jurisdiction must comport with “fair play and substantial justice”.<sup>15</sup>

A defendant meeting the above conditions may be subject to special personal jurisdiction even if he or she has never crossed the territory of that state. Even one single contact with the state is enough for qualifying for personal jurisdiction.

As far as e-contracts are concerned, jurisdiction is judged by means of analysing the connection between the website of the defendant (irrespective of whether the website, its holder or the business behind it is located in the US or not, and the forum state.

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<sup>15</sup> Denis T. Rice. “Jurisdiction and E-commerce disputes in the United States and Europe”. Paper presented by Committee on Cyberspace Law of the Business Law Section at the Annual Meeting of the California State Bar, Monterey, October 12, 2002

Faced with such cases, the courts have tried to adapt jurisprudence in cases of standard special personal jurisdiction to the activities on the Internet.

For example, the evolution of the case law in the United States of America started with the Inset Case<sup>16</sup>, when, although the defendant Instruction Set had no assets in Connecticut and was not physically transacting business there, the Connecticut court claimed jurisdiction only on the basis of the Instruction Set's use of a toll-free telephone number and the fact that there were at the time 10,000 Internet users in Connecticut, all of whom had the ability to access the website. Under the court's line of reasoning, any website would be subject to jurisdiction everywhere just by virtue of being on the Internet.<sup>17</sup>

Then, in 1996, a federal court delivered the first decision that include an overall analytical framework to test specific personal jurisdiction based on Internet activity. In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*<sup>18</sup>, the plaintiff Zippo Manufacturing, the Pennsylvania-based manufacturer of "Zippo" lighters sued the defendant Zippo Dot Com, a California-based newspaper and website editor, under the jurisdiction of the State of Pennsylvania for "Zippo" trademark infringement by registering domain names such as "zippo.com", "zippo net" and "zipponews.com".

Zippo Dot Com claimed a case of non-jurisdiction. However, the court decided that Zippo Dot Com has established contact with the state of Pennsylvania exclusively *via* the Internet.

The Zippo case has been the first to use criteria for establishing special personal jurisdiction for Internet-based activities. Such criteria have been divided into three categories depending on the type of activity pursued over the Internet.

The first category involves an defendant who "obviously pursues activity on the Internet", and contacts deliberately the state constituting forum by sending files. Under such circumstances, the court in the forum state has special personal jurisdiction over the cases involving such activities.

As opposed to the first category, the second category involves a passive website belonging to the defendant, namely, a website containing information accessible to visitors. Under such circumstances, the court has no special personal jurisdiction.

The third category lies somewhere in between the first two and needs special consideration.

When the website of the defendant is neither strongly interactive, nor totally passive, personal jurisdiction takes effect by "examining the level of interactivity and the nature of commercial information exchanged via the website".

The same criteria have been used by United States courts also in international cases although many courts requested "something extra"; for example, the fact that "the sales of the defendant were deliberately sent to the respective state" and have not been the result of isolated or fortuitous incidents.

The sending-to-a-forum-state condition is judged against the following criteria: the defendant sends electronically the result of his activity to a forum state, the defendant intends doing business or other interactions in the forum state, the defendant is involved in an activity creating a potential cause of action under the law in the forum state, with regard to a person in the forum state.

As evidence for sending-to-a-forum-state activity may be considered repeated business trips, telephone or fax communications, sale-purchase contracts signed with residents, contracts subject to the forum state's law, advertising in local newspapers, marketing strategies and business plans with regard to the forum state, etc.

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<sup>16</sup> Cyber law, accessed February 20, 2011

<http://cyber.law.harvard.edu/property00/jurisdiction/insetsum.html>

<sup>17</sup> Denis T. Rice, *above* 12, 27

<sup>18</sup> Find Law, accessed February 20, 2011, <http://caselaw.findlaw.com/us-9th-circuit/1136902.html>

### 3. Determining jurisdiction in absence of choice of jurisdiction clause - contractual relationships of type B2C

Consumers must have access to adequate redress if problems arise after buying goods and services on the Internet. Given the "virtualization" and "de-territorialisation" of electronic commerce (e-commerce), new complex questions arise as to which courts should apply to the transactions.

If consumers have to go to court in case of a problem they must have the right to take action before their own national courts. Depriving consumers of access to their own courts in practice is denying them their right to redress.

In most e-commerce transactions, consumers already bear a disproportionate risk because business requires pre-payment (for example by credit cards). The supplier will therefore rarely have any reason to want to sue the consumer<sup>19</sup>.

The recommendations for principles on jurisdiction on consumer cross-border contracts in ecommerce issued by Trans Atlantic Consumer Dialogue at February, 2000 was:

- The consumer is entitled to bring an action against business before a court in the consumer's home country;
- The consumer can only be pursued before a court in the consumer's home country;
- A choice of forum clause in a consumer contract is not enforceable;
- Execution of a judgement rendered in a foreign country
- Acknowledgement and effective enforcement of foreign judgements which have been rendered in the consumer's home country must be guaranteed;
- The costs and the time involved for cross-border execution must be reduce

#### 3.a. Romania – Member State of the European Union

Section 4 of the Brussels I Regulation regulates the legal regime of jurisdiction in relation to *contracts concluded with consumers*.

The concept of "consumer contract" is a contract concluded between a person, not acting in the course of business, but acquiring goods or services for his own private consumption, from a supplier acting in the course of a business.

Article 15 of the Regulation sets *the subject of the jurisdiction rules* in contracts concluded with consumers.

By comparing the provisions in Art. 13 of the Brussels Convention with those in Art. 15 of the Brussels I Regulation, results that the Brussels I Regulation maintains the legal regime applicable to consumer protection, introducing also some changes in the scope of application. Specifically, the Brussels I Regulation has retained the first two categories of contracts {(a) a contract for the sale of goods on instalment credit terms, or (b) a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods} and amended the third.

Thus, the third category of contracts involving a consumer and subject to the Brussels I Regulation is as follows:

"(c) in all other cases, the contract has been 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".

In the previous Convention, the third category of contracts, meant to fall under consumer protection regime, was as follows: " any other contract for the supply of goods or a contract for the supply of services, and

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<sup>19</sup> Transatlantic Consumer Dialogue, *Jurisdiction on cross-border consumer contracts*, 2000, Doc No. Ecom-15-00, accessed February 19, 2011 [http://tacd.org/index2.php?option=com\\_docman&task=doc\\_view&gid=140&Itemid=](http://tacd.org/index2.php?option=com_docman&task=doc_view&gid=140&Itemid=)



(a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and

(b) the consumer took in that State the steps necessary for the conclusion of the contract."

As results from a comparison of the two provisions, the concepts of "contract of sale of goods" and "service contract" have been replaced by the expression "in any other cases".

Hence, digital goods also fall clearly into this category.

Amending the third category of contracts subject to the Brussels I Regulation, in the sense that a person's activity should be directed to the Member State and not to the consumer, puts end to any doctrine talks concerning consumer qualifying as being active or passive in order to determine whether the legal regime of consumer protection applies or not.

One of the drawbacks of the Brussels I Regulation as well as the Convention is that the Community legislature has not provided a definition for the verb "to direct".

In the proposal for the Brussels I Regulation<sup>20</sup>, the Community legislature states that the notion of "directed to a Member State" was meant to clarify the fact that the provisions in subparagraph c at Article 15 apply to contracts concluded with consumers via interactive websites accessible in the state of the consumer's domicile.

Thus, two conditions become clear regarding the question whether a website redirects its activity to the Member State where the consumer is domiciled: (1) the website should be interactive, (2) the website should be accessible in the Member State.

The notion of "interactive" has no legal definition, but it can be agreed that a website posting information of commercial nature, although being passive - there is no possibility of concluding an online contract -, falls within the definition of "interactive".

As for the notion of "accessible" in the Member State of the consumer's domicile, in the statement no. 13 of the original proposal of the Commission is maintained that "electronic commerce in goods and services by a means accessible in another Member State constitutes an activity directed to that state". The European Parliament considered this criterion as being insufficient and proposed amending the statement no. 13 as follows:

"electronic commerce in goods or services by a means accessible in a Member State constitutes an activity directed to that State if the online trading site is an active site to the effect that that trader redirects deliberately and substantially its activity to the other State."

Moreover, Parliament proposed also amending Article 15 with the following paragraph:

"The notion of 'directing the activity' shall mean when a trader redirects substantially its activity to the other Member State or to some other countries including Member States. In determining whether a trader has redirected its activity in this way, the court shall consider all the circumstances, including the trader's attempts to limit its trading activity in its transactions with consumers domiciled in a particular Member State."

The Commission rejected the Parliament's amending proposal and ruled that:

"Parliament has proposed a new paragraph to define the notion of activities directed to one or more Member States, and took into account as a criterion any attempt by the operator to limit its business to transactions with consumers domiciled in certain Member States. The Commission cannot accept such a change that contradicts the principles of these provisions. The definition is based on the American perception of a commercial activity as a factor in determining competence, while the concept is almost alien to the approaches in the Regulation. Moreover, the existence of a dispute with a consumer requires the existence of a contract with the consumer. However, the existence of such a contract will be a clear indication that the seller of goods or services directed its

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<sup>20</sup> EC OJ 28 December 1999, C376 E/1

activity to the state in which the consumer is domiciled. Finally, the definition is not necessary since it generates market fragmentation within the European Community."<sup>21</sup>

This viewpoint was supported by the EU Council and reflected in the joint Statement of these institutions on Articles 15 and 73:

"The Council and the Commission point out in this connection that for Article 15(1)(c) to be applicable 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. This provision relates to a number of marketing methods, including contracts concluded at a distance through the Internet.

In this context, the Council and the Commission stress that the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor."<sup>22</sup>

Relative recently, Oberster Gerichtshof (Supreme Court, Austria) was referred to two cases involving the establishment of jurisdiction in disputes with consumers:

Case C-585/08

Mr Pammer, domiciled in Austria, intended to travel on board a cargo ship from Trieste (Italy) to the Far East. Therefore, he booked a trip with the German company Reederei Karl Schlüter through a German travel agency specializing in online sales of travel by cargo ship. Mr Pammer refused boarding on the grounds that, in his opinion, the conditions on board the cargo did not meet the description he had received from the agency and requested reimbursement of the price he had paid for the journey. As Reederei Karl Schlüter has reimbursed only a fraction of the price, Mr Pammer has notified the Austrian courts before which the German company has raised an objection of lack of jurisdiction citing the fact that the Company does not perform any professional or commercial activity in Austria.

Case C-144/09

Mr Heller, with residence in Germany, booked several rooms for a period of one week at Hotel Alpenhof, a hotel located in Austria. This reservation was made by email to the address indicated on the website of the hotel Mr Heller had consulted. Mr Heller impugned the services of the hotel and left it without paying the bill. The hotel has introduced, therefore, an Austrian court action to obtain payment for the invoice. Mr Heller has raised the objection of lack of jurisdiction, maintaining that, as a consumer residing in Germany, he cannot be sued but in the courts of Germany.

Oberster Gerichtshof (Supreme Court, Austria) addressed European Court of Justice two preliminary questions in order to determine whether the fact that a company based in a Member State offers online services presumes the fact that they "are directed" also to other Member States. Thus, if so, consumers who reside in these latter countries and have used such services could also benefit, in the event of a dispute with the trader, of the more favourable rules of jurisdiction stipulated in the Regulation.

In the judgments in Joined Cases C-585/08 and C-144/09<sup>23</sup>, European Court of Justice found that simply using a website by a trader in order to do business does not imply that its activity is

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<sup>21</sup> Commission of the European Communities. Amended proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (2000) 689 final, EC Official Journal 27 February 2001, C 62 E/243

<sup>22</sup> Europa, accessed February 19, 2011, [http://ec.europa.eu/civiljustice/homepage/homepage\\_ec\\_en\\_declaration.pdf](http://ec.europa.eu/civiljustice/homepage/homepage_ec_en_declaration.pdf)

<sup>23</sup> Eur-lex, accessed February 19, 2011, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0585:EN:NOT>

"directed to" other Member States, which would trigger the protective jurisdiction rules laid down by the Regulation. The Court considered that, for these rules to be applicable to all consumers in the other Member States, the trader must have demonstrated intent to enter into business relationships with them.

In this context, the Court seeks the clues that allow it to prove that the trader would intend to enter into business relationships with consumers domiciled in other Member States. Some of these signs are the unambiguous expressions of intent on the part of the trader to attract such consumers, for example, when the trader provides services or goods in several Member States designated by name, or when it pays for an online referencing service to the operator of a search engine to facilitate the access of consumers residing in these various Member States to its website.

However, other less obvious clues, possibly a combination thereof, are also likely to prove the existence of an activity "directed to" the Member State where the consumer is domiciled. This is especially the case with the international nature of the activity in question, such as certain tour operator activities, mention of international phone dialling prefixes, use of a top-level domain name, other than the Member State where the headquarters of the trader are located, for example: *.de*, or use of neutral top-level domain names such as: *.com* or *.eu*, description of routes starting from one or more Member States to the place of service, as well as mentioning an international clientele consisting of customers residing in different Member States, especially by presenting impressions of such clients. Also, if the website allows consumers to use a different language or currency other than those normally used in the Member State of the trader, such items may in turn serve as evidence for the latter's cross-border activity.

In contrast, there is no such evidence in mentioning the email or geographic address of the dealer on a website, as neither is the indication of its phone dialling coordinates without any international phone dialling prefixes, since such information shows no indication that the merchant directs its activity to one or many other Member States.

The Court concludes that, considering the evidence, the Austrian Court must determine whether the website and the global business and trade of the traders show that they intended to enter into business relationships with Austrian consumers ([Case C-585/08](#)) or German consumers ([Case C-144/09](#)) to the effect that they were willing to enter a contract with them.

The main rule of jurisdiction is stipulated at Paragraph (1) of Article 16 in Brussels I Regulation (Article 14 of Conventions) lays down the jurisdiction of courts in actions brought by consumers:

" Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled."

Instead, a consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.

As consumer has the possibility to bring proceedings in the courts of his domiciled, the problem of determination of the trader's domicile could be avoided.

Where the trader has an online presence and conducts business through a website by, for example, selling goods or providing services online, then the trader would be considered to be an information society services provider falling within the 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")<sup>24</sup>. The trader, as a service provider, is obliged under Article 5(1) of the Directive to provide easy, direct and permanent access to recipients of its services and competent authorities of, inter alia, its name and the geographic address at which it is established.

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<sup>24</sup> Eur-lex, accessed February 19, 2011, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:en:NOT>

Therefore, where the trader is an information society service provider in terms of the Electronic Commerce Directive, the aforementioned information that must be provided to its customers will assist such customers to identify at least one possible place where to sue, i.e. the country where it states that it is established.<sup>25</sup>

### 3.b. Romania - Outside the European Union

The Law no. 105/1992 on the regulation of private international law does not contain special consumer protection provisions.

### 3.c. The comparative law - USA

Traditionally, U.S. courts have sought to ensure a balance between consumer protection and encouraging small and medium enterprises development.

Generally, the United States, in the absence of a contractual clause designating the jurisdiction, the jurisdiction in disputes involving consumers is determined by analyzing special personal jurisdiction of traders in the countries where they direct or sell their goods and services. Some American courts have declared illegal contractual clauses designating the jurisdiction in contracts involving consumers, on grounds of their being unjust and unreasonable.

In general, American courts have held that consumer protection authorities are competent as far as jurisdiction is concerned to act against the traders outside the U.S. who prejudice American consumers.

## 4. Choice of forum.

Taking into consideration the difficulties in determination of the defendant's domicile or the place of performance in Internet international private law, it is recommended that the parties should have express exclusive jurisdiction clauses in agreements.

*At the European Union level*, the provisions of the Section 4 "Jurisdiction over consumer contracts" from Brussels I Regulation may be departed from only by an agreement:

1. which is entered into after the dispute has arisen; or
2. which allows the consumer to bring proceedings in courts other than those indicated in this Section; or
3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

The general conditions on the validity of choice of jurisdiction clauses are stipulated at Article 23 of Brussels I Regulation.

According to paragraph (1) of this Article, if the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

- (a) in writing or evidenced in writing; or
- (b) in a form which accords with practices which the parties have established between themselves; or
- (c) 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,

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<sup>25</sup> Universitet I Oslo, accessed February 19, 2011, [http://folk.uio.no/emilyw/documents/S01\\_p04\\_Weitzenboeck.pdf](http://folk.uio.no/emilyw/documents/S01_p04_Weitzenboeck.pdf)

and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

In accordance with Paragraph (2), any communication by electronic means which provides a durable record of the agreement shall be equivalent to writing.

Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settler, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

The validity of the agreement between the parties will be analysed according to national law. Recently, in *VB Penzugyi Lizing Zrt. v Ferenc Schneider Case*<sup>26</sup>, the European Court of Justice has confirmed this interpretation ruling:

“The national court must investigate of its own motion whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller or supplier and a consumer, which is the subject of a dispute before it, falls within the scope of Directive 93/13 and, if it does, assess of its own motion whether such a term is unfair.”

This situation produces undesirable consequences, in that a choice of court agreement can be considered valid in one state and invalid in another Member State. For example, in the grounds of the Case no. 2279/2007<sup>27</sup>, the Romanian Supreme Court qualified valid an “click-wrap” agreement (“I agree with the Rules RoTLD”).

According to Article 27 of Brussels I Regulation, where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

That means that one party to a choice of court agreements could seize the courts of a Member State in violation of the choice of court agreement, thereby obstructing proceedings before the chosen court insofar as the latter are brought subsequently to the first proceedings.

The European Court of Justice, in *Erich Gasser GmbH v Misat srl (Case C-116/02)*<sup>28</sup>, has confirmed that the *lis pendens* rules of the Brussels I Regulation requires the court second seized to suspend proceeding until the court first seized has established or declined jurisdiction.

In *Gregory Paul Turner v Felix Fareed Ismail Grovit (Case C-159/02)*<sup>29</sup>, the European Court of Justice further confirmed that procedural devices which exist under national law and which may strengthen the effect of choice of court agreements (such as anti-suit injunctions) are incompatible with the Brussels I Regulation if they unduly interfere with the determination by the courts of other Member States of their jurisdiction under the Regulation.

The Commission has proposed to sign the Convention on choice of court agreements that was concluded on 30 June 2005 under the auspices of the Hague Conference on Private International

<sup>26</sup> Curia Europa, accessed February 20, 2011, [http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=en&num=79898890C19080137&doc=T&ouvert=T&seance=ARRET&where=\(\)](http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=en&num=79898890C19080137&doc=T&ouvert=T&seance=ARRET&where=())

<sup>27</sup> Legi-internet, accessed February 20, 2011, <http://www.legi-internet.ro/index.php?id=287>

<sup>28</sup> Curia Europa, accessed February 19, 2011 [http://curia.europa.eu/common/recdoc/convention/gemdoc2004/pdf/Z\\_en\\_01.pdf](http://curia.europa.eu/common/recdoc/convention/gemdoc2004/pdf/Z_en_01.pdf)

<sup>29</sup> Eur-lex, accessed at February 19, 2011 <http://eur-lex.europa.eu/Notice.do?val=287586:cs&lang=ga&list=287586:cs,&pos=1&page=1&nbl=1&pgs=10&hwords=&checktexte=checkbox&visu=>

Law. The Convention will apply in all cases where at least one of the parties resides in a Contracting State other than an EU Member State, whereas the Regulation applies where at least one party is domiciled in a Member State. As a result, a coherent application of the rules of the Convention and those of the Regulation should be ensured.

*In international rapports outside European Community*, the choice of forum clauses will be analysed in Romania in base of Law. no. 105/1992. This clause is known in Romanian doctrine<sup>30</sup> as a “convention of jurisdiction prorogation”, which could be valid unless: the proceedings are in exclusive jurisdiction of Romanian courts, but parties chose an foreign court; or, the parties chose a Romanian court, but one of the party invoke the exclusive jurisdiction of a foreign court.

*In USA*, the clause of a choice of forum is generally uncontroversial and enforced, if the parties to the contract are presumed to have equal bargaining power and, therefore, an equal ability to accept or reject such clauses.

The e-contracts frequently provide choice of forum clause. The problems that could arise are the validity of the conclusion of an contract by electronic means.

For example, a “click-wrap” choice of forum could be valid if the user has a reasonable opportunity to access the terms and conditions a review them before being bound, the terms and conditions should be sufficiently conspicuous and readable, there is a clear and unambiguous manifestation of assent to the terms and conditions.

## 5. Conclusions

In the absence of a valid “choice of forum” clause, the jurisdiction rules that apply to international proceedings arising from e-contracts depend on the type of transaction concluded, and on the domicile of the defendant.

After Romania's accession to the European Union, as a general rule, actions against a person domiciled in a Member State shall be brought to the courts of that State. According to the special jurisdiction regulated by Brussels I Regulation, cases resulting from a e-contracts may be decided by the courts of the place of performance of the contractual obligation, *except for the business to consumer (B2C) e-contracts*. In the case of B2C e-contracts, the consumer can bring proceedings either before the courts of the Member State of his domicile or before the courts of the Member State of the defendant's domicile. The consumer can only be sued in the Member State of his domicile. The rules protecting the consumer apply if the trader “*directs its activities*” to the Member State in which the consumer is domiciled.

If the defendant is not domiciled in a Member State, the international jurisdiction is determined, in each Member State, according to their national rules of international private laws (Law no. 105/1992, in Romania).

The *choice of forum clause* determines the court of jurisdiction chosen by parties, but the court seised by the plaintiff must determine the validity of the *choice of forum clause* according to the internal law.

The online disputes resolution clauses are not treated by the present paper, being open for future research.

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