

EURIM NETWORK GOVERNANCE WORKING PARTY

RESPONSE TO DTI CONSULTATION PAPER : EUROPEAN COMMISSION PROPOSALS FOR CHANGES TO ARTICLE 13 OF THE 1968 BRUSSELS CONVENTION

Introduction

We welcome this invitation to provide comments on the proposed amendments to the 1968 Brussels Convention. Although our response has been prepared by members of the relevant working party with expertise in this area, it does not claim to represent the views of EURIM as a whole since the consultation period did not allow time for it to be put forward for adoption by the membership as a EURIM position.

We welcome the concluding remarks made by the Portuguese Presidency following the Lisbon European Council on 23rd/24th March, in particular the identification of the need for predictability in regulation.

Reference is made in paragraph two of the Consultation Paper to the issue of Applicable Law and the Rome Convention. Whilst it is true to assert that “it does not automatically follow that if a country has jurisdiction over a case its law applies to the substance of the dispute”, it is also true to say that the clauses in the current Brussels and Rome Conventions which work to invoke a consumer’s country’s jurisdiction/law are very similar. There must therefore be a very strong inference that wording agreed for the Brussels Regulation will be transposed into the Rome Regulation next year. Whilst it might be true that some types of contract within Article 13 of the Brussels Convention are excluded from Article 5 of the Rome Convention, many others are covered by both. It would be somewhat confusing if for those types of contract covered by both Conventions, the application of the Articles produced the result of applicable jurisdiction going to one country but applicable law to another. We therefore believe that it is essential to consider any changes to the Brussels Convention with similar changes to the Rome Convention in mind.

We also believe that it is necessary to have in mind the relationship of the Brussels Regulation to the proposed Hague Convention which also covers jurisdiction in respect of cross-border cases.

In paragraph nine of the Consultation Document, the proposed revisions to Article 15 (Article 13 in the present Convention) are described as minor.

We disagree in one significant respect and that is that the second leg of the tests set out in Article 13 (of the present Convention) “the consumer took in that state the steps necessary for the conclusion of the contract” has been deleted.

We believe that this could now lead to some unexpected extensions of the right for consumers to use their own courts. We have in mind the position where a web site is “directed” at a Member State from which a consumer comes but that the consumer completes the contract whilst in the country of the web site operator, having gone there on, say, holiday. Previously in such circumstances, the consumer would not have had the ability to use their own courts but under the revised wording they will. If this interpretation is correct, suppliers who have web sites directed at Member States other than their own and who conduct face to face business in their own country will have to ask each and every customer which jurisdiction they come from if they are to enjoy “predictability”. This is clearly not realistic and therefore in reality the Regulation will impose a high level of unpredictability. This cannot be what was intended.

Whilst recognising that this consultation concerns the Brussels Regulation, we wonder if there is an opportunity to align the wordings of the Brussels and Rome Conventions/Regulations. Brussels refers to the consumers' "domicile" whereas Rome refers to "habitual residence". If

- a) there is no difference in fact between what each covers then the same wording should be used in each case to make this clear;
- b) there is a difference then it should be removed to improve predictability and certainty and reduce the possibility of different jurisdictions and applicable law applying to any particular dispute.

Answers to specific questions raised

[Q1: Should provisions be included to explain that a website is not necessarily directed at particular countries, or would it be better for the Regulation to be silent on the matter?]

Answer 1

Some clarity on what might constitute "directed at" is needed to generate a degree of predictability and also uniformity. Without some better guidance there is always the risk that individual courts in different countries could interpret the same facts differently and whilst such conflicting decisions might ultimately be resolved in the ECJ this would undoubtedly take time and considerable resources. Our recommendation is, therefore, that some guidance be given on the question of "directed at".

Perhaps the most straightforward way of achieving this is to allow companies to state to which Member States their Web site is directed.

The quid pro quo for allowing this would be that they must not then transact on the web with consumers from excluded Member States. This idea is expanded in the answer to question three below.

[Q.2: Should an activity be regarded as being "directed to" a state if the invitation to acquire goods or services was extended to, or could be construed as extending to, consumers in that state?]

Answer 2

The inclusion of the phrase "or could be construed as extending to" detracts from the usefulness of the definition. The openness of the phrase "or could be construed" is unlikely to provide the level of predictability customers and suppliers seek, being as open to interpretation as the phrase "directed at".

[Q3: Should a provision clarify that a business could limit its exposure to being sued in different countries by listing the Member States to which its activities are or are not directed?]

Answer 3

As a matter of principle, it ought to be possible for a business to seek to manage its risks (in terms of the cost of appearing in court overseas) by declaring with residents of which countries it is or is not prepared to do business. This would be even more acutely felt in terms of applicable law where certain functions or processes relating to the contract may be illegal in one Member State but not in another. Businesses should be able to protect themselves from entering into illegal or unenforceable

contracts by declining transactions with residents of Member States with whose legal requirements they do not comply.

We recommend that companies are enabled to protect themselves by declaring either inclusively or exclusively with consumers of which countries they are prepared to deal.

The company would need to demonstrate, on the balance of probabilities, that such a declaration had been made at or before the conclusion of the contract.

There is however a clear difficulty where after having stated that it is not directing its activities to one or more Member States the company nonetheless conducts business with a “resident” of one of these states.

In our view, the test should then be one of whether or not the business had taken reasonable steps to ascertain that the consumer did not in fact come from one of the countries listed as being excluded.

Or, alternatively, it might be sufficient for the company to show that it had made the statement of exclusion and it would then be for the consumer to show that even knowing that the consumer came from an excluded country, the company nonetheless went ahead and entered into the transaction.

The second option is included for completeness and is not one we would support.

[Q4: Should a provision state that consumers who fail to give correct information about their domicile could lose the protection of Article 15?]

Answer 4

If “predictability” is one of the aims of the revised Regulation, then it is essential that businesses are able to determine accurately what jurisdictions (and applicable laws) they may be exposing themselves to. In the circumstances, because of the generally anonymous nature of e-commerce, if businesses could not rely on customer statements then each and every contract entered into could be something of a lottery. Certainly predictability would not have been improved.

We would, therefore, welcome a provision that customers who fail to give correct information about their domicile should lose the protection of Article 15.

[Q5 invited comments on several options]

Answer 5

The deferral of adoption of the Brussels Regulation is to be welcomed only in so far as that time is used to clarify the issues and areas of uncertainty. Delay of itself is not beneficial as it merely prolongs the current existing state of affairs, which are not of themselves providing certainty.

We welcome developments in the field of ADRs. However, ADRs of themselves do not, address the issue of jurisdiction being an alternative to, rather than part of, the court process. No matter how good the ADR process some cases will go to court and in those instances predictability of venue is required.

This would be an even more important issue in respect of applicable law where all reputable suppliers would wish to comply with the underlying law regardless of the fact that the vast majority of disputes would be settled without resorting to the courts. As said previously, it is the precedential nature of the Brussels Regulation, as far as the future Rome Regulation goes, which is so important.

Giving customers a right to waive their protection by an explicit contractual agreement with the trader does have attractions in that it allows for the greatest degree of flexibility. In particular, it would allow businesses to use the issue of jurisdiction as part of their product offer. We would expect to see customers being able to choose between similar products offered by organisations based in different Member States but still subject to the customers' own jurisdiction. It should not be assumed that all corporates will seek to impose their own jurisdictions even if this is possible.

We do have a concern that some traders may seek to abuse this possibility. Therefore, any such contract clauses waiving the consumer's right would have to be made very clear to consumers.

Finally, in response to paragraph 12 of The Consultation document, as a matter of general principle we do not consider that e-commerce should be treated differently from any other kind of distance marketing, selling or delivery tool.

We are unsure which existing Community legislation is being referred to when concerns are expressed about confusion. Layering of provisions is not uncommon for instance:-

The proposed E-Commerce Directive specifically leaves the issue of jurisdiction to be decided using the Brussels Convention. It also avers to the possibility of the Treaty itself being used as the basis for overriding "mandatory requirements" of the consumers applicable law which the Rome Regulation would provide for. And reflects the complex nature of the issues being considered.

In paragraph 12 of the consultation document, the option for consumers to choose is said to be likely to be opposed by some Member States.

We wonder if some kind of compromise based on small value contracts might be possible.

Very few small value disputes are litigated because it is simply not cost effective for consumers. [Hence the need to develop ADRs.] If the right to their own courts has no practical value to consumers then to allow them to give it up has in practical terms deprived them of nothing. But on the other hand, it may encourage SMEs to contract cross borders if they could be sure of not having to appear in overseas courts. Which would be good for consumers who obtain more choice and employment opportunities.

[Q6: How far would the Commission's proposals:

- (i) improve consumer confidence in e-commerce and improve consumers' access to justice?*
- (ii) increase UK firms' costs and deter firms from engaging in e-commerce?]*

Answer 6

- i. We do not believe that the Commission's proposals would significantly improve present consumer confidence or access to justice for the following reasons:
 - we have seen no evidence that consumers actually consider the question of jurisdiction at all when entering into an e-commerce transaction
 - the vast majority of consumer complaints against suppliers are never litigated because the value at stake is insignificant when compared to the costs in terms of time and money of engaging in the legal process
 - from a practical point of view any judgement obtained in the consumer's home courts still has to be enforced against the supplier and this will, in the vast majority of cases, involve separate

proceedings in the supplier's jurisdiction which tends to nullify the original advantage obtained through the consumer commencing proceedings in their own court.

- ii. Undoubtedly the costs of defending one's self overseas are likely to be higher because of the probability of employing legal advisers in two countries.
- iii. Although the Brussels Convention/Regulation concerns jurisdiction, as we have already mentioned, one should not lose sight of the knock-on impact when the Rome Convention is turned into a Regulation. In both cases and more particularly in the case of the latter, companies would be faced with additional costs of having to obtain legal opinion in respect of the nature of proceedings in other Member States and more particularly in respect of the applicable law applying to those States. Further, in the case of applicable law, changes to product provision procedures or the products themselves might be required to achieve compliance with consumer country mandatory requirements. For large corporates this might not be too large a burden to bear, albeit that it might not be necessary, but in respect of smaller corporates, or those who do not actually envisage conducting a significant volume of cross-border trade, then this additional cost could act as a significant deterrent.

[Q7: If Recital 13 were removed and Article 15 kept, what would be the effect on:

- (i) consumers' confidence in e-commerce and access to justice?*
- (ii) UK firms' costs and their willingness to engage in e-commerce?]*

Answer 7

In formulating our answers to this question, we have presumed that what is implied by the removal of recital 13 is that e-commerce activity as a whole would not be subject to Article 15. We are not completely satisfied that this would be the case because it would still be possible for a court to find that advertising or other activity conducted through a website was still to be regarded as "by any means, directs such activities to that Member State":

- i. We are less than convinced that consumer confidence in e-commerce and access to justice would be significantly affected because we have yet to see any evidence which suggests that when contemplating making a purchase over the Net customers have any regard to the ease with which they could resort to court proceedings should the contract go awry. Furthermore, as we have pointed out above, the vast majority of contracts are for amounts which are too small to justify court action and in this context we regard the benefits of the Brussels Convention as being rather illusory.

It is our opinion that consumer confidence is far more likely to come through recognition of the brand value of the company with which they intend to contract whether that has been obtained through their own personal prior experience or through word-of-mouth recommendation.

- ii. If, as we mention above, there is less than clarity about the legal position in relation to the use of a website, then firms will still be faced with the same costs as we have mentioned previously. In such circumstances, they are likely to show a diminished willingness to engage in e-commerce.

[Q8: if "directs" were to be defined differently, what would be the effect on:

- (i) consumers' access to justice and confidence in e-commerce?*
- (ii) UK firms' costs and their willingness to engage in e-commerce?]*

Answer 8

- i. We have seen no evidence to suggest to us that consumers really are influenced by the issue of jurisdiction.
- ii. Insofar as a redefinition of “directs” would enable companies to accurately predict in which jurisdictions they might have to appear (and similarly with the Rome Convention/Regulation which laws they would have to comply with) then their potential costs would be reduced and that barrier to their willingness to engage in e-commerce having been removed they must be more likely to participate in the new economy.

[Q9: In the sector with which you are concerned what are the typical costs to firms of insuring against the risk of being sued for breach of contracts by consumers in other EU Member States?]

Answer 9

We have no information on typical costs of insuring against the risk of being sued for breach of contract by consumers in other Member States.

EURIM is the Parliament-Industry group concerned with the politics of the Information Society and e-economy.

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