

Jurisdiction and the Internet: the EC Perspective

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This article examines issues of jurisdiction within Europe in relation to consumer contracts and doing business online.

The Conventions

The rules determining the issues of jurisdiction within Europe are governed by the Brussels and Lugano Conventions.

The Brussels Convention, signed in 1968, applies to all EU Members States and was implemented into English law by the Civil Jurisdiction and Judgments Act 1982. The Lugano Convention, signed in 1988, applies to those countries that are part of the European Free Trade Association (EFTA). The Lugano Convention was implemented in England by way of the Civil Jurisdiction and Judgments Act 1991. When considering the issues of jurisdiction and governing law, the 1982 Act is the applicable legislation in England, its objective being the avoidance of conflicts of jurisdiction and inconsistent decisions as between the English courts and the courts of other Convention territories.

Under Convention law, the question of jurisdiction depends on where the defendant is domiciled. In general, if the defendant is domiciled within the European Economic Community, Convention law will apply; if he is domiciled elsewhere, the law, common or otherwise, of the Member States will apply.

Brussels Convention

The general provision in relation to the jurisdiction of all civil and commercial matters is Article 2 of the Brussels Convention. This states that subject to provisions stipulating otherwise, 'persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State'. Therefore, unless otherwise provided, parties wishing to bring an action against another must issue proceedings in the country of the defendant's domicile.

If the defendant is domiciled in a country that is not party to the Brussels Convention then Article 4 states that the claimant may determine the question of jurisdiction according to the law of its own state.

To ascertain the domicile of an individual or a company, under English law one must consider sections 41-46 of the 1982 Act. In the case of individuals, someone is domiciled in the country where they are resident and to where the nature and circumstances of their residence indicates that they have substantial connection (section 41 (2)(a)).

With respect to business entities, domicile shall be where the corporation or association has its 'seat', this being the place where it was incorporated or formed or where its central management and control are exercised.

Articles 5,6 and 17 set out exceptions to the rule of Article 2 and allow a claimant to sue a defendant elsewhere than in the defendant's domiciled state. The exceptions applicable in the commercial and insurance context are:

- Article 5(1): where the claim relates to a matter of contract the defendant may be sued in the courts for the place of performance of the obligation in question;
- Article 5(3): in matters relating to tort, a defendant may be sued in the courts of the place where the harmful event occurred;
- Article 17: if the parties have agreed that a specific Contracting State shall have jurisdiction and this agreement is evidenced in writing then the court of that State shall have exclusive jurisdiction.

Consumer contracts

Express provisions are contained within the Brussels Convention to deal with the jurisdiction of consumer contracts. Section 4 (Articles 13-15 inclusive) provides that a consumer may choose to bring proceedings against the other contracting party in either the courts of the consumer's own domicile *or* in the courts of the other party's domicile. Conversely, the non-consumer party is not granted with the same freedom and may only bring an action against a consumer in the court where the consumer is domiciled.

These consumer rules will only be applicable in the circumstance where a contract for the supply of goods or services is concerned, provided that the conclusion of the contract was preceded in the consumer's state by a specific invitation addressed to him, or by advertising, and the consumer took steps in his own state to conclude the contract. Whether a website on the internet constitutes 'advertising' in this context is discussed below. These rules were incorporated to provide consumer protection and to balance out the unequal bargaining powers prevalent in consumer contracts.

Where issues of jurisdiction and governing law outside the EU are concerned, each EU state will rely on its own legislation and the rules of private international law.

Insurance contracts

For post-20 May 1993 contracts, Articles 7-12 of the Brussels Convention contain specific provisions that govern any dispute arising from an insurance contract, irrespective of whether the policyholder is a consumer or business entity.

Article 8 states that an insurance policyholder will have a choice of three forums in which to bring legal proceedings against an insurer:

- (1) in his own Contracting State;
- (2) in the state in which the insurer is domiciled; or
- (3) in the Contracting State in which the insurer has a branch or agency and the dispute has arisen out of that branch or agency.

The insurer, on the other hand, is not granted the same rights as the policyholder. Pursuant to Article 11, an insurer may only sue a defendant in his domicile Contracting State irrespective of whether he is the policyholder, insured or beneficiary under the policy.

The strict rules on the jurisdiction of insurance contracts may only be departed from in very limited circumstances. Article 12 provides that these rules may be departed from where there is a jurisdiction agreement:

- (1) entered into and agreed by both parties *after* a dispute has arisen;
- (2) which allows the policyholder or insured or beneficiary to bring proceedings in courts other than those indicated in this section;
- (3) entered into between the policyholder and insurer who are domiciled in the same state and which confers jurisdiction on that state even if the harmful event occurred abroad; or
- (4) concluded with a policyholder who is not domiciled in Contracting State except insofar as the insurance is compulsory or relates to immovable property in a Contracting State.

Article 12(1) is of significance for it emphasizes the fact that any express jurisdiction clause within the contract of insurance referring all disputes to the exclusive jurisdiction of a country's courts will *not* be binding irrespective of Article 17 mentioned above because it was entered into *before* the contract was concluded. Accordingly, the rules on insurance contracts override any jurisdiction clause in the policy that fetters the policyholder's rights under the Convention to bring his claim in his own domicile.

Governing law

Once the issue of jurisdiction has been determined, the next issue to be addressed is that of which law the relevant courts shall apply. This will be determined according to the conflict of law rules of the country that has jurisdiction over the dispute. Within the EU, a harmonization of each Member State's conflict of law rules has been achieved by way of the Rome Convention on the Law Applicable to Contractual Obligations 1980 ('Rome Convention'), the 2nd and 3rd Directive on Long Term Insurance and the 2nd and 3rd Non-life Directive, all of which may be applicable in determining the governing law of an insurance contract.

The first question to ask is 'Is the insured risk located within or outside the EU?' If located within the EU, the type of risk insured must then be considered:

- Life assurance or long-term insurance: to find the governing law of the insurance contract entered into on or after 20 May 1993, the Insurance Companies Act 1982, Pt II, Sched 3 (implementing the 2nd and 3rd Directives on Long-Term Insurance) provides the required mechanism. The relevant provisions of the Insurance Companies Act state that the law applicable to the contract of insurance is the law of the Member State of the commitment. This means that if the policyholder is an individual, 'the commitment' is considered to be located in the Member State where the individual has his habitual residence. If the policyholder is not an individual, the 'commitment' is considered to be located in the Member State where the policyholder's establishment to which the contract relates is situated. Having determined the Member State of the 'commitment' in accordance with this test, if the laws of that Member State allow the parties to choose the law of another country and they have done so, then that law shall be the governing law of the contract. For contracts concluded prior to 20 May 1993, the national law of the country where the risk is located shall apply.
- General business insurance (buildings insurance, vehicle insurance or insurance of four months or less duration): for contracts entered into on or after 1 July 1990, governing law will be determined in accordance with the Insurance Companies Act 1982, Pt I, Sched 3A (implementing the 2nd and 3rd Non-life Directive). Pursuant to this statute, the governing law of general business insurance contracts is determined by the terms of the contract or the circumstances of the case. In the absence of express or implied choice, the contract is governed by the law of the country with which it is most closely connected, this being the Member State where the risk is situated. Risk is situated where the policyholder is resident and where it has its relevant establishment. Accordingly, there is a presumption as to proper law in general business insurance contracts as to the location of the policyholder. For contracts concluded prior to 1 July 1990, the national law of the country where the risk is located shall apply.
- Any other type of insurance business: for contracts entered into prior to 1 April 1991, the governing law will be determined by the common law conflicts rules of the country where the risk is located. For contracts concluded after 1 April 1991, the Contract Applicable Law Act 1990 (incorporating the Rome Convention) shall apply.

The Rome Convention provides that a contract shall be governed by the law chosen by the parties.

However, such an agreement will only be binding if it does not prejudice the mandatory rules of the country chosen, eg consumer protection rules in the Unfair Terms in Consumer Contracts Regulations. Where there is no choice of law, the contract will be governed by the 'proper law' of the contract, this being where the court considers the

contract has its closest connection. The court has considered the interpretation of ‘proper law’ on numerous occasions. A contract of insurance has its most real and closest connection where the party who is to effect the performance characteristic of the contract is located, this being where the insurer providing the insurance is situated (*GAN v Tai Ping* [1999] Lloyd’s Rep IR 229).

Conclusion

Jurisdiction of general contracts

- A defendant may only be sued in the Contracting State in which he is domiciled in which he is domiciled (Article 2 Brussels Convention).
- An express jurisdiction clause agreed between both parties and evidenced in writing will be binding (Article 17 Brussels Convention).
- If the defendant is not resident within an EU state then the jurisdiction of the courts of each Contracting State shall be determined in accordance with that State’s laws.

Jurisdiction of consumer contracts

- The consumer may choose where to bring proceedings against, say, a supplier of goods: either in his own Contracting State or the Contracting State of the supplier.
- The supplier may only bring proceedings where the consumer is domiciled.
- An express jurisdiction clause within the consumer contract will not be binding against the consumer.
- An agreement on jurisdiction will be binding if it is entered into after the dispute has arisen, allows the consumer to bring proceedings in a court other than those indicated in this section, or confers jurisdiction on a State in which both the consumer and supplier are domiciled provided that such an agreement is not contrary to the law of that State.

Jurisdiction of insurance contracts

- An insurer may only sue a policyholder in the Contracting State of the defendant’s domicile.
- The policyholder may sue the insurer either in the insurer’s domicile Contracting State, in his own Contracting State or in the Contracting State where the insurer has a branch and the dispute has arisen from that branch.
- If the defendant is not resident within an EU state, then the jurisdiction of the courts of each Contracting State shall be determined in accordance with that State’s laws.

- An express jurisdiction clause within the contract of insurance will not be binding against the policyholder.
- These rules will only be derogated from in limited circumstances as detailed above and stated in Articles 11 and 12a of the Brussels Convention.
- If the claimant is not resident within a Contracting State, then he will still be subject to the rules of the Brussels Convention with respect to jurisdiction (see below).

In the matter of *Group Josi Reinsurance Co SA v Universal General Insurance Company Case C-412/98*, the European Court held that the Brussels and Lugano Conventions rules apply to a contracting party that is not domiciled within an EU Member State. This decision has wide-reaching effect and overturns the previous notion that only EU companies and individuals are subject to these European Conventions. The Court held that the Conventions are based on the principle that the defendant's domicile determines which country shall have jurisdiction over a dispute and that therefore the claimant's domicile is not relevant for the purpose of applying the rules of jurisdiction. The Brussels Convention is, in principle, applicable where the defendant has its domicile in a Contracting State even if the claimant is domiciled in a non-Member State.

The internet – sale of insurance products

An internet provider wishing to sell products over the internet must not only be aware of the jurisdiction and governing law issues arising out of a contract, but also the mechanism required to create a legally binding contract over the internet. For a contract to be binding (under English law), there must be offer, acceptance and consideration. An insurance provider should ensure that a website created to sell insurance products does not constitute a contractual offer of a product – then if the internet user accepts the product, the insurer is bound, regardless of whether, in fact, he did not wish to contract with that person over the internet. There are several new and proposed pieces of European legislation dealing with these issues which are to be considered prior to their incorporation into each EU state's national law.

Proposed Electronic Commerce Directive

The Directive aims to establish a legal framework for electric commerce in the EU and will apply to all 'information services' (which include the sale of goods and services) that are provided online for money. The Directive has been adopted by the European Council and member countries must incorporate its provisions into their national law by 17 January 2002. This Directive states that for a legally binding contract to be concluded on the internet, offer, acceptance and acknowledgment of acceptance are required. The contract is deemed to be formed when the acknowledgment of acceptance is received, regardless of whether it is read by the recipient.

Distance Selling Directive

This Directive aims to provide consumers with considerable protection when concluding contracts over the internet. Suppliers of products, and companies in general, consider its provisions to be overly prescriptive and paternalistic especially when applied to ‘sophisticated’ consumers. This Directive does not apply to financial services (see below). It has been adopted by the European Council and is to come into force in the UK late this year.

Proposed Directive on Distance Selling of Financial Services

This Directive will apply to any contract concerning financial services concluded between a consumer and an individual by specified means, including those contracts made over the internet. This Directive will contain substantial protective measures for the consumer, such as a general right to withdraw from the contract without penalty for a period of between 14 and 30 days (depending on the product) after the contract was made and the requirement for a comprehensive set of information to be sent to the consumer prior to conclusion of the contract. This Directive should be considered prior to its enactment into European law in order to realize a smooth transition at a later date as once the Directive becomes law, contracting out of the consumer protection provisions will be prohibited.

Advice to internet vehicles selling insurance

An insurance provider may be in breach of the national law of several countries worldwide by simply offering its insurance products for sale over the internet. The nature of e-commerce makes businesses open for business without limitation and a supplier may be infringing the laws of several countries at any given moment. A website exposes a European domiciled supplier to a potential risk of being sued in any country in the world where its products are sold or indeed where its website can be accessed.

There are several important factors to consider when selling insurance products over the internet.

Advertising.

The use of comparative advertising such as ‘our life insurance is the cheapest in the world’ is not advisable as in certain jurisdictions, such as England, this will require the site provider to monitor every other life insurance product in the world to ensure that the statement remains true to avoid claims for misrepresentation. This is evidently impractical. To use this type of consumer advertising will undoubtedly result in the insurance provider being at risk of breaching consumer protection regulations throughout the world.

Express jurisdiction and governing law clause

There is no guarantee that an exclusive jurisdiction or governing law clause will be binding on insurance purchasers worldwide. A jurisdiction clause in a consumer contract would not be binding when the Contracting parties were domiciled within Europe (due to Article 12 of the Brussels Convention) unless the circumstances fall within the exclusion of Article 11. An express arbitration clause may, on the other hand, be valid if agreed between the parties, as Article 1(4) of the Convention states that the rules of the Brussels Convention do *not* apply to any insurance dispute which the parties have agreed to refer to arbitration.

The insurer's website may accordingly be designed so that an exclusive arbitration clause is incorporated within the contract when the contracting parties are situated within the EU and an exclusive jurisdiction clause is incorporated when the policyholder is situated outside the EU.

In both circumstances, it is essential that each clause is brought to the attention of the consumer and requires him to accept it, ie click on the specific dialogue box as this would indicate a conscious intentional agreement to the terms.

Express disclaimer

An insurer could warn users from specified countries not to go beyond the home page by way of a disclaimer (which, for example, under French law would have to be in French to be enforceable, as would the express terms of the contract), thus providing itself some protection from litigation. This may exonerate the insurer from future liability if the disclaimer is set on the website's entry page and requires the visitor to acknowledge and accept it by clicking on an accept box. It is essential that the disclaimer is sufficiently drawn to the attention of the user otherwise it may be held to be ineffective under consumer protection regulations.

Denial of access

The insurer should consider denying website access to consumers based in specified countries of the world where the insurer is not certain that it has complied with all local laws. Although this is to impose a limit on the geographical scope of internet trade, failure to do so will increase the risk of litigation considerably. The mechanics of preventing access from a specified country have not been implemented successfully to date. Even if the facilities to prevent access are available, a consumer could probably still find his way onto a website via search engines based in another country.

Despite taking all protective measures possible, there is still considerable uncertainty as to whether a disclaimer, choice of law or jurisdiction clause will be legally binding and therefore offer a supplier any security. Until e-commerce laws are harmonized globally, any internet supplier should be conscious of the risk areas inherent in online trading.