International Journal of Law and Information Technology, Vol. 8 No. 2

International Consumer Purchases through the Internet: Jurisdictional Issues pursuant to European Law

MORTEN FOSS[1] AND LEE A. BYGRAVE[2]

Abstract

In this paper, an examination is made of the applicability and scope of the main European rules on jurisdiction with respect to disputes arising out of international consumer contracts entered into over the Internet. It is argued that these rules as they currently stand can be interpreted so as to meet the legitimate interests of both vendors and consumers in the context of electronic commerce. Nevertheless, a great deal of uncertainty is shown to surround the applicability and exact scope of these provisions in such a context. Finally, recent proposals to amend these provisions so as to take better account of the development of electronic commerce are examined and found wanting.

[1] Cand Jur (Oslo); Researcher at the Norwegian Research Centre for Computers and Law, University of Oslo.

[2] BA(Hons), LLB(Hons) (Australian National University); Dr Juris / LLD (Oslo); Senior Research Fellow at the Norwegian Research Centre for Computers and Law, University of Oslo; Barrister of the Supreme Court of New South Wales. This paper has been written as part of Phase 1 of the ECLIP project (Electronic Commerce Legal Issues Platform) funded by the EC Commission under the Esprit programme. General information on ECLIP is available at http://www.jura.uni-muenster.de/eclip. The conclusions reached in this paper, though, are entirely those of its authors and do not necessarily reflect the opinions of other contributors to ECLIP nor the views of the EC Commission.

1 Introduction

It is increasingly common for businesses to enter into contracts, via the Internet, for the sale and purchase of goods or services to consumers who are domiciled in countries other than those in which the businesses are based. Such contracts are international in the sense that the legal relationships between consumer/purchaser and business/vendor are connected – actually and/or potentially – to the legal systems of more than one country. Should a legal dispute arise in relation to this sort of contract, it will first be necessary to determine which country's court has jurisdiction to hear and determine the dispute. Thereafter, it will be necessary to work out which country's law should be applied to determine the substantive issues involved. Should the convicted party fail to honour its liabilities pursuant to the court judgement, it will also be necessary to determine the extent to which the terms of the judgement may be enforced across national borders.

The focus of this paper is on the threshold issue of court jurisdiction in relation to the settlement of disputes arising out of the above type of Internet-based consumer contract. The issue has recently attracted considerable debate on account of a proposal from the Commission of the European Communities to revise the rules on jurisdiction found in the Brussels Convention of 1968,[3] in order partly to reflect the development of electronic commerce (e-commerce).[4] As elaborated upon below, these rules make special provision for certain consumer contracts on account of the fact that consumers are typically weaker than the businesses with whom they contract. Debate has largely revolved around whether or not these special rules in favour of consumers, along with equivalent rules governing choice of law with respect to consumer contracts,[5] should be expressly extended into the online environment, with many businesses strongly critical of such an extension.[6] Unfortunately, the debate has threatened to swamp the crucial question of the degree to which the existing rules of the Brussels Convention, together with the rules found in other instruments of private international law, may be sensibly applied in the context of e-commerce. This paper is primarily an attempt to address aspects of the latter question.

---

[3] Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (Official Journal 1990 C 189, p. 2).

[4] See Proposal for a Council Regulation (EC) on jurisdiction and enforcement of judgements in civil and commercial matters (COM (1999) 348 final, 14.07.1999).

[5] See 1980 Rome Convention on the law applicable to contractual obligations (Official Journal 1980 L 266, p. 1), Art. 5.

[6] See especially the numerous submissions made by business groups to a public hearing on 'Electronic Commerce: Jurisdiction and Applicable Law', arranged by the EC Commission in Brussels, 4–5. November 1999. See also, *inter alia*, Pullen, 'Proposed amendments to the Brussels and Rome Conventions: European e-commerce industry threatened' (1999) *Commercial Communications*, August, pp. 11–17; and, to a lesser extent, Powell & Turner-Kerr, 'Putting the E- in Brussels and Rome' (2000) 16 *Computer Law & Security Report*, pp. 23–27.

The scope of analysis in the paper is delimited along the following lines:

1 only contracts for the purchase of goods or services by consumers are analysed;

2 it is assumed that the vendors of the goods or services are not, in the context of the contracts concerned, consumers themselves;

3 it is further assumed that the vendors are not, in the context of the contracts concerned, public authorities acting in exercise of their powers;

4 consideration is only given to contracts entered into by parties that are domiciled or established within the European Economic Area (EEA);

5 it is assumed that the vendor is based in an EEA State other than that in which the consumer is domiciled;

6 only contracts in which the contract has been concluded over the Internet are canvassed;

7 there is no discussion of choice-of-law issues (i.e. issues as to which country's law should be applied to resolve the dispute in question);

8 discussion of issues concerned with cross-national enforcement of judicial decisions is also omitted.

It follows from the above delimitation that the basic point of departure for discussion in the paper of jurisdictional issues is the legal systems of Western Europe. More specifically, attention is directed at the provisions of the Brussels Convention of 1968, together with those of the Lugano Convention of 1988.[7] The former Convention contains, *inter alia*, rules for the resolution of jurisdictional issues arising between Member States of the European Union (EU) with respect to civil and commercial matters – including the type of consumer contracts that are the focus of this paper – while the Lugano Convention addresses these issues also for Member States of the European Free Trade Association (EFTA).[8] The provisions of each Convention are identical with respect to consumer contracts. For the sake of brevity, reference in the following is made only to the provisions of the Brussels Convention.

The basic jurisdictional rule laid down in the Convention is that a defendant shall be sued in the State where he/she/it is domiciled (Art. 2(1)). The application of this rule – and of most of the rules treated below (Arts. 5(5), 13–15) – presupposes that the defendant is domiciled in a Contracting State to the Convention.[9] If the defendant is not so domiciled, the issue of jurisdiction is to be determined by domestic law (Art. 4).

[7] Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (Official Journal 1988 L 319, p. 9).

[8] The members of EFTA are currently Norway, Iceland, Switzerland and Liechtenstein.

[9] Note, however, the exception provided under Art. 13(2), dealt with in section 2.6 of this paper.

The Convention allows for some derogation from the rule in Art. 2(1). One important derogation is in order to give effect to what is commonly termed the principle of party autonomy; i.e. that parties are free to make a binding agreement as to which country's courts shall be competent to judge a dispute between them. If such agreement has been reached (and fulfils certain formal requirements), it shall be determinative of jurisdiction (Art. 17(1)).

However, a multiplicity of other rules in the Convention take precedence over such an agreement. One set of rules (Arts. 13–15) concerns particular kinds of consumer contracts. Another set (Art. 5(5)) concerns disputes arising out of branch operations. Both sets lay down special rules on jurisdiction which also permit derogation from the rule in Art. 2(1). Articles 13–15 read as follows:

Article 13

In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called 'the consumer', jurisdiction shall be determined by this Section, without prejudice to the provisions of Articles 4 and 5(5), if it is:

1. a contract for the sale of goods on instalment credit terms, or

2. a contract for a loan repayable by instalments, or any other form of credit, made to finance the sale of goods, or

3. any other contract for the supply of goods or a contract for the supply of services, and
   (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.

Where a consumer enters into a contract with a party who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

This Section shall not apply to contracts of transport.

Article 14

A consumer may bring proceedings against the other party to a contract

either in the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled.

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

These provisions shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 15

The provisions of this Section 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 Contracting State, and which confers jurisdiction on the courts of that State, provided that such an agreement is not contrary to the law of that State'.

In summary, the effect of Arts. 13–15 is that, in relation to disputes connected to consumer contracts falling within the ambit of Art. 13, the vendor may only sue the consumer in the country where the latter is domiciled, while the consumer may always sue the vendor in the consumer's country of domicile. Further, these rules cannot be altered by agreement between the parties unless the agreement fulfils one or more of the conditions laid down in Art. 15.[10] Once the dispute has been settled by the court in question, a variety of rules in Title III of the Convention (see especially Arts. 26, 28 and 31) are applicable to ensure the efficacious recognition and enforcement of the court's judgement in the State where the defendant/vendor is situated.

As for Art. 5(5), this states that the defendant party to a dispute 'arising out of the operations of a branch, agency or other establishment' may be sued 'in the courts for the place in which the branch, agency or other establishment is situated'. It should be noted that Arts. 13–15 do not limit application of the rule in Art. 5(5).

The bulk of this paper is concerned with the application of Arts. 13 and

[10] It seems reasonable to construe Art. 15(2) as covering agreements that do not prevent consumers from bringing proceedings in the courts listed in Art. 14 (at the same time as the agreements also allow consumers to bring proceedings in other courts).

5(5) to consumer contracts as defined at the beginning of this section. Articles 14 and 15 are not examined further as they do not raise special problems with respect to Internet transactions.

When analysing the proper reach of Arts. 13 and 5(5) *de lege lata*, it is endeavoured to adopt the method and perspective typical of the European Court of Justice (ECJ). The ECJ has been accorded jurisdiction to rule on interpretation of the Brussels Convention.[11] The case law of the ECJ on this Convention also carries significant weight in interpretation of the Lugano Convention, though is not wholly determinative for construing the latter.[12]

In its case law on the Brussels Convention, the ECJ has taken the purposive, teleological approach to rule interpretation that characterizes its decision making generally.[13] The Court holds that the concepts employed in the Convention are to be interpreted, as a point of departure, autonomously of the meaning they are given in the domestic law of one or more of the Contracting States. They are to be construed 'by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems'.[14] In contrast, though, to its general approach to rule interpretation, the ECJ also tends to place significant weight on the intentions of the drafters of the Brussels Convention as evidenced in several published reports by *rapporteurs* of Convention drafting groups.[15]

---

[11] See Protocol on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgements in civil and commercial matters, signed at Luxembourg on 3.6.1971 (Official Journal 1990 C 189, p. 25).

[12] See further Second Protocol to the Lugano Convention; Jenard & Möller, *Report on the Convention on jurisdiction and the enforcement of civil and commercial matters done at Lugano on 16 September 1988* (Official Journal 1990 C 189, p. 57, 90, point 112 *et seq.*); Pålsson, *Luganokonvensjonen* (Stockholm/Oslo 1992), p. 30 *et seq.*

[13] See further Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgements* (Abingdon 1987), p. 1697 *et seq.* More generally, see Hartley, *The Foundations of European Community Law* (Oxford 1998, 4th ed.), p. 77 *et seq.*

[14] Case 29/76, *LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol* [1976] ECR, p. 1541, para. 3. See also, *inter alia*, Case 150/77, *Société Bertrand v. Paul Ott KG* [1978] ECR, p. 1431, paras. 14–16, 19; Case C-26/91, *Jakob Handte & Co. GmbH v. Traitements Mecano-Chimiques des Surfaces SA* [1992] ECR, p. I-3967, para. 10.

[15] See Jenard, *Report concerning the Convention on jurisdiction and the enforcement of judgements in civil and commercial matters* (Official Journal 1979 C 59, p. 1 – hereinafter termed the Jenard Report); Jenard, *Report on the 1971 Interpretation Protocol* (Official Journal 1979 C 59, p. 66); Schlosser, *Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgements in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice* (Official Journal 1979 C 59, p. 71 – hereinafter termed the Schlosser Report). With respect to the Lugano Convention, see Jenard & Möller, *Report on the Convention on jurisdiction and the enforcement of civil and commercial matters done at Lugano on 16 September 1988* (Official Journal 1990 C 189, p. 57 – hereinafter termed the Jenard/Möller Report). As shown further on in this paper, another report of relevance is Giuliano & Lagarde, *Report on the [Rome] Convention on the law applicable to contractual obligations* (Official Journal 1980 C 282, p. 1 – hereinafter termed the Giuliano/Lagarde Report).

2 Article 13

2.1 *The purpose of Article 13*

The purpose of Art. 13 (together with Arts. 14 and 15) is succinctly described by the ECJ as follows:

> the special system established by Article 13 et seq. of the Convention is inspired by the concern to protect the consumer as the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract, and the consumer must not therefore be discouraged from suing by being compelled to bring his action before the courts in the Contracting State in which the other party to the contract is domiciled.[16]

2.2 *The concept of consumer*

Like most other concepts in the Brussels Convention, the concept of 'consumer' in Arts. 13–15 is to be given an autonomous meaning.[17] It is also to be defined strictly, as it appears in provisions derogating from the basic rule on jurisdiction in Art. 2(1).[18] Concomitantly,

> the protective role fulfilled by these provisions [Arts. 13–15] implies that the application of the rules of special jurisdiction ... should not be extended to persons for whom that protection is not justified.[19]

It follows from Art. 13(1) that a consumer is a person who concludes a contract 'for a purpose which can be regarded as being outside his trade or profession'. According to the ECJ, determination of whether a person has the capacity of a consumer rests on an objective appraisal of the relationship between the person and the contract concerned:

> reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned.[20]

Focus is to be put on the *purpose* of the contract, not the actual use made of the products purchased. The ECJ holds that 'only contracts concluded for the purpose of satisfying an individual's own needs in terms of private

---

[16] Case C-89/91, *Shearson Lehmann Hutton Inc v. TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligung mbH* [1993] ECR, p. I-0139, para. 18.

[17] Shearson Lehmann Hutton decision, *supra* n. 16, para. 13; Case C-269/95, *Francesco Benincasa v. Dentalkit Srl* [1997] ECR, p. I-3767, para. 12.

[18] Shearson Lehmann Hutton decision, *supra* n. 16, paras. 15–17; Benincasa decision, *supra* n. 17, paras. 13–14; Case C-99/96, *Hans-Herman Mietz v. Intership Yachting Sneek BV*, judgement of 27.4.1999 (unreported as yet), para. 27.

[19] Shearson Lehmann Hutton decision, *supra* n. 16, para. 19.

[20] Benincasa decision, *supra* n. 17, para. 16.

consumption' are embraced by Arts. 13–15.[21] Moreover, the concept of consumer does not encompass a person who has entered into a contract 'with a view to pursuing a trade or profession, not at the present time but in the future'.[22]

If part of the purpose of a contract lies within the purchaser's trade or profession while the other part of the purpose is to satisfy the private consumption needs of the purchaser, the contract is likely to fall within the protective scope of Arts. 13–15 only when the *main* purpose of the contract can objectively be found to lie outside the purchaser's trade or profession.[23]

2.3 *The vendor's good faith*

An important question is whether Arts. 13–15 may be applied when the vendor neither knows nor ought to have known that the other party with which he/she/it contracts is in fact a consumer. This question is especially important in an e-commerce context, where the ability of vendors to accurately determine the status of purchasers will frequently be made difficult by a lack of direct contact with purchasers.[24]

There is no direct answer to the question in the Brussels and Lugano Conventions or their *travaux préparatoires*. Arguably, this could indicate that the good faith of vendors is not protected. However, many, if not most, legal scholars appear to share the view that the application of Arts. 13–15 is most likely contingent upon the vendor being aware, actually or imputedly, of the purchaser's consumer status.[25] This view builds upon the following comments in the Giuliano/Lagarde Report concerning Art. 5 of the Rome Convention on the law applicable to contractual obligations:

---

[21] Id., para. 17. It may be queried whether these provisions also embrace contracts concluded in order to satisfy the private consumption needs of a family or domestic household. The ECJ has indicated that the concept of consumer in the 1985 Directive on door-to-door sales (Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises) extends to contracts concluded 'for family or personal requirements': Case C-361/89, *Pinto* [1991] ECR, p. I-1189, para. 16. Hertz sensibly submits that the above references to 'individual' in the Benincasa decision and to 'family or personal' in the Pinto decision 'should not be understood too restrictively': Hertz, *Jurisdiction in Contract and Tort under the Brussels Convention* (Copenhagen 1998), p. 195.

[22] Benincasa decision, *supra* n. 17, para. 19.

[23] Giuliano/Lagarde Report, *supra* n. 15, p. 23, para. 2. As noted in the Schlosser Report (*supra* n. 15, p. 118, para. 155), the concept of 'consumer' in Art. 13 of the Brussels Convention is taken from Art. 5 of an early draft of the Rome Convention on the law applicable to contractual obligations. That draft was later adopted without any amendments to the provisions in focus here.

[24] See also Torvund, 'Elektronisk handel via Internett', in Punsvik (ed.), *Elektronisk handel – rettslige aspekter* (Oslo/Stockholm 1998), p. 7. Further on such difficulties (albeit in the context of purchases carried out using the television as medium), see Benno, *Consumer Purchases through Telecommunications in Europe – Application of Private International Law to Cross-Border Contractual Disputes* (Oslo 1993), p. 81 *et seq.*

[25] See e.g. Hertz, *supra* n. 21, p. 195 and references cited therein; Philip, *EU-IP* (København 1994, 2nd ed.), p. 152; Kaye, *The New Private International Law of Contract of the European Community* (Aldershot 1993), p. 206; Rognlien, *Luganokonvensjonen: Internasjonale domsmyndighet i sivile saker* (Oslo 1993), p. 174 *et seq.*; Nielsen, *International privat- og procesret* (København 1997), p. 516; Pålsson, *Romkonventionen* (Stockholm 1998), p. 73; Bogdan, *Svensk Internationell privat- och prosessrätt* (Stockholm 1999), p. 243.

> Where the receiver of goods or services or credit in fact acted primarily outside his trade or profession but the other party did not know this and, taking all the circumstances into account should not reasonably have known it, the situation falls outside the scope of Article 5. Thus, if the receiver of goods or services holds himself out as a professional, e.g. by ordering goods which might well be used in his trade or profession on his professional paper, the good faith of the other party is protected and the case will not be governed by Article 5.[26]

As already noted, the commentary of the Giuliano/Lagarde Report concerning Art. 5 of the Rome Convention is regarded as relevant for construing the proper ambit of Arts. 13–15 of the Brussels Convention.[27] Thus, if a purchaser represents him-/herself as acting in the course of his/her business, it is most probable that the contract will be excluded from the protective scope of Arts. 13–15, especially if the (mis)representation is deliberate.[28] The same would seem to apply with regard to (mis)representation of a purchaser's country of domicile.[29] Less certain is who has the onus of proving that the vendor did not know or, in the circumstances, ought not to have known the purchaser's true status. Nevertheless, it seems relatively clear that when establishing what a vendor ought to know, account should be taken of the character of the goods or service purchased and the manner in which the buyer presents him-/herself.

2.4 *The scope of Articles 13(1)(1) and 13(1)(2)*

Articles 13(1)(1) and 13(1)(2) cover two types of contracts:

> contracts for the sale of goods on instalment credit terms; and
>
> contracts for loans repayable by instalments, or any other form of credit, made to finance the sale of goods.

The main issue arising with respect to the application of these two provisions in the context of e-commerce concerns the meaning of the term

---

[26] Giuliano/Lagarde Report, *supra* n. 15, p. 23, para. 2.

[27] Schlosser Report, *supra* n. 15, p. 117 *et seq.*

[28] Indirect support for this conclusion may also be drawn from several decisions of the ECJ in which weight has been placed on the vendor's good faith when applying Art. 17 of the Brussels Convention: see Case 25/76, *Galeries Segoura SPRL v. Societe Rahim Bonakdarian* [1976] ECR, p. 1851; Case 71/83, *Tilly Russ and Ernest Russ v. NV Haven- & Vervoerbedrijf Nova and NV Goeminne Hout* [1984] ECR, p. 2417; and Case 221/84, *F. Berghoefer GmbH & Co. KG v. ASA SA* [1985] ECR, p. 2699. Also relevant is the decision in Case C-26/91, *Jakob Handte & Co. GmbH v. Traitements Mecano-chimiques des Surfaces SA* [1992] ECR, p. I-3967, especially para. 18 ('The objective of strengthening legal protection of persons established in the Community, which is one of the objectives which the Convention is designed to achieve, also requires that the jurisdictional rules which derogate from the general principle of the Convention should be interpreted in such a way as to enable a normally well-informed defendant reasonably to predict before which courts, other than those of the State in which he is domiciled, he may be sued').

[29] See again the case law referred to *supra* n. 28. See also Stone, 'Internet Consumer Contracts and European Private International Law' (2000) 9 *Information & Communications Technology Law*, p. 5, 9.

'goods'. In many instances, interpretation and application of the term 'goods' will not be difficult in an e-commerce context. For instance, an Internet-based contract for the sale and purchase of a boat will clearly remain a contract for the sale and purchase of a good.[30] However, more complex questions arise when products that have been traditionally delivered in the form of a physically tangible object (good) are instead delivered through the Internet in digital, non-tangible form. Such transactions are hereinafter termed as (online) delivery of *digitized products*. To spell out the obvious, a digitized product is a product that has been transformed from a physically tangible object to a purely digital combination of binary code.

Not all physically tangible objects – nor, concomitantly, all goods – can become digitized products, only those objects/goods that essentially have no other function than to serve as a physical medium for information.[31] Typical examples of objects/goods that can be digitized are books, videos, CDs, cassette tapes and computer programs. Common for such products is that intellectual property rights tend to attach to them. What is of concern in the following is the appropriate legal status of the digitized product itself, not the physical medium to which it was linked before digitization or to which it might later be linked.

2.4.1 The status of digitized products

The question of whether digitized products may constitute goods has not yet been addressed by the ECJ or, it would seem, by other major courts in Europe. Neither is it addressed in any of the *travaux préparatoires* to the Brussels, Lugano and Rome Conventions nor other major treaties dealing with the international sale of goods. Outside the field of taxation, there are few other legal or policy documents dealing with the question.

Complicating matters further is that the term 'goods' is not defined in the Brussels, Lugano and Rome Conventions or their *travaux préparatoires*. At the same time, though, one can plausibly interpret the lack of a definition as indicating that the notion of goods should be understood in its ordinary sense. Even so, the notion remains fairly vague. Nevertheless, a reasonably accurate approximation of the notion in its ordinary sense is to define goods as physically tangible objects (other than real estate) to which tradable, personal property rights attach. This is an approximate definition

[30] Much the same will apply with respect to the sale and purchase of many types of services. For example, online advice given by a lawyer to his/her client will undoubtedly constitute a service.

[31] It should also be noted that vendors who/which have earlier been engaged in the selling of goods may instead choose to offer services when they take their business online. One example is the online version of Encyclopaedia Britannica (see www.Britannica.com). Clearly, when distributed in the form of (paper) books, each copy of the encyclopaedia must be classified as a good. Yet when a customer requests information from the website of Britannica.com, the effectuation of the request would seem to be more appropriately classified as a service.

only; somewhat differing definitions may be adhered to across jurisdictions and under various laws.[32]

If one accepts such a definition of goods, it would seem at first sight that digitized products fall outside the ambit of the goods concept as they are not physically tangible objects. Yet this need not be decisive for resolving the issue at hand. There are examples of relatively intangible commodities that are regarded as goods for the purposes of certain legislation.[33]

Arguably, what is important is whether there exist other legal classifications under which it is more appropriate to place digitized products. One obvious alternative classification is 'services'. In the area of taxation, it is popular amongst legal policy documents to classify digitized products as services rather than goods.[34] The line taken in the area of taxation, however, should not be determinative for the question of concern here though it is certainly relevant.

A problem with the approach taken in the field of taxation is that it tends to classify *all* online deliveries of products as services. Such a line underplays the fact that online transactions in general, and the delivery of digitized products in particular, are far from uniform. Certainly, online transactions consisting essentially of services rendered to the customer, must be classified as delivery of services. An example here is the delivery of radio-broadcast over the Internet. However, when the products which are delivered would not be classified as services if they were to be delivered by other (offline) means, it is hard to see why they should be classified as services simply because they are delivered online. An example is computer games. When bought offline in an ordinary shop, such games are usually classified as goods. Why should an online purchase of such games in purely digitized format then be classified as a purchase of services, particularly when the digitized product is functionally the same as the product bought offline?

Another way of classifying digitized products and the contractual transactions to which they are linked is to focus on the intellectual property rights involved. Under this approach, one could argue that the sale and purchase of digitized products are essentially concerned with the limited transfer of certain intellectual property rights that attach to the products

---

[32] E.g. under Anglo-Australian law, the notion of goods may embrace money for the purposes of life insurance policies (see e.g. *Prudential Staff Union v. Hall* [1947] KB, p. 685), whereas it may not embrace money under, *inter alia*, consumer protection legislation (see e.g. Victoria's Hire-Purchase Act 1959, s.2(1)).

[33] See e.g. the Sixth Council Directive 77/388/EEC of 17.05.1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (Official Journal L 145, 13.06.1977, p. 1). Article 5(2) of the Directive classifies electrical power, gas and heating as goods.

[34] See e.g. EC Commission, *E-Commerce and Indirect Taxation* (COM(98) 374, 17.06.1998), p. 5, Guideline 2; Organisation for Economic Cooperation and Development (OECD), *Electronic Commerce: A Discussion Paper on Taxation Issues*, 17.09.1998, available at http://www.oecd.org//daf/fa/e–com/discusse.pdf (last visited 4.4.2000), p. 20; Smith, *Internet Law and Regulation* (London 1998, 2nd ed.), p. 280.

and restrict product usage. This sort of approach has been taken by some scholars when analysing the legal character of the sale and purchase of computer programmes.[35] The approach is based on the assumption that the digitized product will normally constitute a copy (for the purposes of copyright law) as soon as it is (re)attached to a physical object/medium by the consumer.[36]

Purchases of *some* digitized products – or, perhaps more accurately, usage rights in relation to such products – can plausibly be viewed as essentially a limited transfer of intellectual property rights (e.g. where the purchaser is given a right to commercially exploit the product by copying it for resale, licensing or the like).[37] However, purchases of many other such products – indeed, probably the majority of them – are more difficult to view in this manner because the major aim of the purchases is not so much to make copies of the products in question (this being merely a means to an end) but to exploit the functionality of the products in other ways.[38] Another problem with the approach is that the legal assumptions upon which it is based might not be shared in all jurisdictions.[39] It is also noteworthy that the approach has not been explicitly endorsed by major international policy-makers in the field of e-commerce such as the EU, OECD or World Trade Organization (WTO).

To sum up so far, a differentiated, individualized approach should be taken when resolving the question at hand. Such an approach should attempt to analyse each product and product transaction in order to

[35] See e.g. Bing, *Merverdiavgift og EDB* (Oslo 1990), p. 54 *et seq.* (cf. pp. 28, 30).

[36] Note that a digitized product per se is often regarded as not constituting such a copy. See e.g. EC Commission, *Green Paper on Copyright and Related Rights in the Information Society* (COM(95) 382 final, 19.07.1995), p. 47 *et seq.*; Directive 96/9/EC of the European Parliament and of the Council of 11.03.1996 on the legal protection of databases (Official Journal L 77, 27.03.1996, p. 20 *et seq.*).

[37] In such a case, the purchase would tend to fall outside the scope of Arts. 13–15 of the Brussels Convention as the criteria for what constitutes a consumer transaction would not be met.

[38] Much the same line is taken in Thrap-Meyer, *Forbrukerkjøp og EDB* (Oslo 1989), p. 58 *et seq.* Compare also the situation in which one purchases a block of land, access to which is only possible via an easement over land owned by the neighbour. The purchase as a whole would usually still be characterized as a purchase of the block of land rather than as an acquisition of the easement.

[39] In Europe, while the copying of some digitized products for private use may fall within the exclusive rights of the copyright-holder (such that a consumer would need the consent of the latter in order to make such copies), this might not be the case for other digitized products. Compare e.g. Council Directive 91/250/EEC of 14.05.1991 on the legal protection of computer programmes (Official Journal L 122, 17.05.1991, p. 42) – which refrains from exempting from the exclusive rights of the copyright-holder the copying of computer programmes for private use – with the Amended proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society (COM(1999) 250 final, 21.05.1999) – which permits EU Member States to 'provide for limitations to the exclusive right of reproduction … in respect of reproductions on audio, visual or audio-visual digital recording media made by a natural person for private and strictly personal use and for non-commercial ends …' (Art. 5(2)(b)bis).

identify their principal features.[40] It should also be wary of making *a priori* assumptions. Hence, for instance, just because a product and transaction linked to it are difficult to classify as goods in the traditional sense of the term should not automatically mean that they can easily be classified as services. Concomitantly, just because the product being purchased and delivered online, functionally equates with or replaces a physically tangible object that is traditionally classified as a good, should not automatically mean that the digital product can or should also be classified as such. It needs to be kept in mind that some offline transactions qualifying as sale and purchase of goods can, when carried out online, end up resembling more closely the provision of services. For example, a consumer's purchase of an encyclopaedia in paper form is clearly a purchase of a good, whereas if the consumer enters into a contract with, say, Britannica.com Inc. for online access to the latter's database, he/she seems rather to be purchasing a service.[41]

At the same time, when subjecting the various types of digitized products and product transactions to closer analysis, it is by no means easy to subsume any of them under any one of the above-mentioned classifications. In view of this difficulty, one could argue that transactions involving digitized products cannot fall within the scope of Arts. 13(1)(1) and 13(1)(2), and that an appropriate amendment to extend these provisions must be effected before such transactions can be covered. Such a result is far from satisfactory given the length of time typically taken to amend treaties like the Brussels Convention and given the fact that the sale and purchase of digitized products are rapidly growing in popularity and economic significance. If a regulatory vacuum is to be avoided, one must attempt to determine which of the existing legal classifications is best suited to apply to digitized products.[42]

In doing so, account should firstly be taken of any existing consensus amongst policy-makers as to which classification is most appropriate. In the present context, however, no such consensus exists. The closest one comes to finding such consensus is in the area of taxation, but even in that field there has been criticism of the idea that digitized products should be seen

[40] This approach fits with the line taken by the ECJ in Case C-231/94, *Faaborg-Gelting Linien A/S v. Finanzamt Flensburg* [1996] ECR, p. I-2395, especially para. 12 ('In order to determine whether … [restaurant] transactions constitute supplies of goods or supplies of services, regard must be had to all the circumstances in which the transaction in question takes place in order to identify its characteristic features'). See also US Federal Treasury Department, *Selected Tax Policy Implications of Global Electronic Commerce* (Washington 1996), p. 26 (stating that, pursuant to US tax law, '[a]lthough many commercial transactions involve elements of both the provision of tangible property and the performance of services, these transactions are generally classified in accordance with their predominant characteristics').

[41] See *supra* n. 31.

[42] This would also seem to accord with the general approach of the EU and OECD as manifested in their respective policy documents on taxation issues concerned with e-commerce: see *supra* n. 34.

as services.[43] Given the lack of consensus, one is forced to move on to considering which classification is best in light of the purposes of Arts. 13(1)(1) and 13(1)(2) and the needs of the parties involved in selling/buying digitized products.

When purchasing (on credit) digitized products from foreign vendors, consumers' need for protection pursuant to Arts. 13(1)(1) and 13(1)(2) is not significantly different from when they purchase (on credit) traditional goods. Moreover, the principle that like cases should be treated alike speaks in favour of classifying digitized products as goods pursuant to Arts. 13(1)(1) and 13(1)(2). Comparing the sale and purchase of digitized products with the sale and purchase of traditional goods, both sorts of transactions are essentially similar in terms of their functional and economic purposes. For example, when a consumer buys and receives a computer programme online, he/she is usually interested in attaining a tool for the processing of data in various ways, and the programme's basic function is to facilitate such processing. The medium by which the programme is delivered to the consumer is of relatively marginal consequence for the ability of the programme to meet the consumer's wants and expectations. Given this marginality, it would seem unreasonable to make the choice of medium for delivery determinative of whether or not the transaction falls under Art. 13(1)(1) or 13(1)(2). Indeed, most consumers would probably be unaware of, and hence surprised over, such a result.

At the same time, though, treating digitized products as goods might cause consternation for those vendors of such products who assume that the products cannot be goods due to their intangibility. However, this consternation cannot be accorded much weight given the basic purpose of Art. 13 (in conjunction with Arts. 14 and 15).

Further, if digitized products were deemed not to fall within the scope of the goods concept, one would risk a situation where a consumer of a digitized product would not be protected at all under Arts. 13–15 of the Brussels Convention, if the transaction failed to satisfy the criteria laid down in Art. 13(1)(3). The force of this last point, though, is weakened by the likelihood that the sale/purchase of a digitized product constitutes a 'contract for the supply of goods or ... the supply of services' (Art. 13(1)(3)).[44] Nevertheless, as returned to further on in this paper, Art. 13(1)(3) contains several criteria which are not found in Arts. 13(1)(1) and 13(1)(2) and which could be difficult to satisfy in many cases.

---

[43] See, *inter alia*, Opinion of the Economic and Social Committee on the EC Commission Communication on electronic commerce and indirect taxation (Official Journal C 407, 28.12.1998, p. 288 *et seq.*), point 3.2; Dunahoo, 'Electronic Commerce and Tax Neutrality: Current VAT Issues' (1999) *Internet Law and Policy Forum*, available at http://www.ilpf.org/confer/present99/dunahoopr.htm (last visited 4.4.2000), section E.

[44] See infra section 2.5.

2.4.2 Requirement of sale

It should be remembered that Arts. 13(1)(1) and 13(1)(2) only apply to cases involving the *sale* of goods. There is no intention to carry out in this paper a detailed analysis of the sales requirement as it does not raise problems unique for e-commerce. For present purposes, it suffices to say that while the exact scope of the concept of sale is not entirely clear,[45] there is little doubt that 'sale' denotes a transfer of property rights to the goods in question. Thus, if the delivery of a digitized product is to fall within the scope of the provisions, there must be a transfer of property rights to the product. With respect to some deliveries of digitized products, the rights transferred may not be sufficient to qualify as a transfer of property rights. This might be the case, for instance, with certain licensing schemes that place significant restrictions on a consumer's legal ability to dispose of the product(s) as he/she sees fit.

2.5 *The scope of Article 13(1)(3)*

In order to fall within the scope of Art. 13(1)(3), a contract must not only be of a certain type, it must also have arisen in a designated manner.[46] Regarding contract type, this is formulated as 'any other contract for the supply of goods or a contract for the supply of services'. Of primary importance for electronic commerce is determining what is meant by the expression 'supply of goods or ... services'. Resolution of this issue will depend on much the same considerations as are set out and discussed in section 2.4.1 above. In light of that discussion, there are solid grounds for concluding that the sale and purchase of digitized products may qualify as a 'supply of goods' pursuant to Art. 13(1)(3).

Even if the sale of digitized products may not qualify as a 'supply of goods', it is highly likely to qualify as a 'supply of services'. There can be little doubt that the expression 'supply of goods or ... services' is largely commensurate with the expression 'supply of goods or services' commonly used in EU law. Thus, in working out the meaning of the expression employed in Art. 13(1)(3), the ECJ is likely (implicitly, if not explicitly) to have recourse to its rulings on the scope of the expression 'supply of goods or services' in EU/EC treaty provisions. A basic premise of these rulings is that the expression is intended to cover all activities of a commercial nature.[47] The sale of digitized products is clearly a commercial activity.

Moreover, it is likely that the ECJ will be moved to conclude that such a sale may fall within the scope of Art. 13(1)(3) by the fact that an opposite conclusion (extending also to the scope of Arts. 13(1)(1) and 13(1)(2)) would leave consumers of digitized products without any protection

[45] See generally Hertz, *supra* n. 21, p. 197 *et seq.*

[46] Cf. Arts. 13(1)(1) and 13(1)(2) which only require that a contract be of a certain type.

[47] See further Hertz, *supra* n. 21, p. 200 and references cited therein.

pursuant to Arts. 13–15 of the Brussels Convention. The latter result would be difficult to justify in light of the basic purpose of these provisions as a whole.

As for the manner in which a contract arises, Art. 13(1)(3) lists two cumulative requirements:

> (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.

These requirements are intended to ensure that the special protection accorded by Arts. 13–15 applies only to consumer contracts that have an adequate connection with the consumer's place of domicile.[48] The basic assumptions upon which the rules build are that a consumer may only sue a vendor in the courts of his/her own State when (i) the vendor has directed his/her/its commercial activity towards the State of the consumer's domicile, (ii) the consumer resided in that State at the time when he/she entered into the contract, and, accordingly, (iii) there is a close connection between the contract and the State of the consumer's domicile, such that (iv) the consumer has a reasonable expectation of being able to sue in his/her local courts in the event of a dispute.[49]

In the following, the application of the two requirements in Art. 13(1)(3)(a)–(b) is discussed in the context of e-commerce.

2.5.1 What constitutes 'advertising' and 'specific invitation' under Article 13(1)(3)(a)?

The analysis here focuses on the extent to which vendors' utilization of websites and electronic mail (e-mail) as communication channels with consumers may fall within the scope of Art. 13(1)(3)(a). No specific consideration is given to other Internet communication channels, such as Internet Relay Chat or Newsgroups/Usenet, though the analysis will be of some relevance for these as well.

To begin with, can a vendor's communication of information about his/her/its operations and/or products via a website constitute 'advertising' for the purposes of Art. 13(1)(3)(a)? In answering this question, it should be noted that the concept of 'advertising' is not defined in the Brussels, Lugano and Rome Conventions or their *travaux préparatoires*.

---

[48] Schlosser Report, *supra* n. 15, p. 118, para. 158. The report also states (id.) that this intention is in line with the intention behind the equivalent provisions dealing with consumer contracts under Art. 5(2) of the Rome Convention.

[49] See especially Giuliano/Lagarde Report, *supra* n. 15, p. 24–25, para. 5.

Nevertheless, it is fairly safe to assume that the concept embraces some or other form of communication of information about a vendor's operations and/or products for the purpose of increasing product sales. It is possible that the term 'advertising' in Art. 13(1)(3)(a) should be construed as requiring that the promotional information be spread to a certain size of population in the State of the consumer's domicile. Exactly how large the degree of spread should be is difficult to determine in the abstract but there arguably needs to be more than just a communication to one person if the reference to 'specific invitation' in Art. 13(1)(3)(a) is not to be rendered superfluous.

Some writers claim that advertising on a vendor's website cannot fall within the scope of Art. 13(1)(3)(a) because the website itself is analogous to the shop of the vendor.[50] It is argued that a shop is the place where a vendor receives purchase orders and conducts sales; a shop as such does not constitute advertising. Certainly, a website can resemble a conventional shop. However, it is questionable whether a shop or aspects of it cannot ever constitute advertising. Surely at least some shopfronts with their signs are forms of communication designed to attract customers.

In any case, advertising can undoubtedly occur through the transfer of web*pages* from a vendor's website to a consumer – assuming, of course, that the webpages contain information promoting the vendor's operations and/or products. This is so even if the transfer takes place only upon the consumer's request.[51] The latter fact should not prevent the transfer from being classified as advertising under Art. 13.[52] There are many situations in which consumers must take active steps in order to receive information about a vendor's product(s) and yet where the information transfer would still seem to be generally viewed as advertising.[53] Further, Art. 13 does not operate with any express requirement that the advertising be sent to the consumer without the latter first requesting transfer of the information.

The fact that promotional information is sent online in digital form should also be immaterial to the issue of whether there is advertising for the purposes of Art. 13(1)(3)(a). Equally immaterial is the fact that the transfer of the webpage occurs *automatically* in response to the consumer's request: the technology facilitating the transfer operates on behalf of the

[50] See e.g. Schu, 'The Applicable Law to Consumer Contracts made over the Internet: Consumer Protection through Private International Law?' (1997) 5 *International Journal of Law and Information Technology*, p. 192, 213; Hultmark, *Elektronisk handel och avtalsrätt* (Stockholm 1998), p. 83.

[51] The request is communicated via the consumer's browser programme to the server where the website is located. See further Gralla, *How the Internet Works* (Indianapolis 1998), p. 142 *et seq.*

[52] Cf. Hultmark, *supra* n. 50, p. 83.

[53] Take, for instance, magazine advertisements (excluding those on the cover pages): a person will not see these unless he/she purchases or borrows the magazine and flicks through the pages. To take another example, if a person attending a trade fair approaches the stand of a vendor and asks for a brochure promoting the vendor's products, it is improbable that the handing over of the brochure would not generally be regarded as advertising.

vendor and with the vendor's imputed knowledge, even in cases when the vendor merely leases space on the server supporting the website.

To sum up, the transfer of webpages containing promotional information to consumers at the request of the latter can qualify as advertising pursuant to Art. 13(1)(3)(a). Naturally, the same conclusion applies when the webpages are transferred independently of a request by the consumer (i.e. through use of so-called 'push technology').[54] As for the communication of promotional information via e-mail, there can be little doubt that this also constitutes advertising pursuant to Art. 13(1)(3)(a).

Even if a vendor's communication of information about his/her/its operations and/or products via webpages or e-mail may constitute advertising for the purposes of Art. 13(1)(3)(a), it is necessary to assess whether such communication may also be classified as a 'specific invitation addressed to [the consumer]'. This is because the latter criterion does not operate with a requirement that the communication of the information attain a certain degree of diffusion amongst a populace – as opposed to the advertising criterion, which probably does. In the context of the Internet, it could be difficult to prove that such a requirement has been met. Hence, application of Art. 13(1)(3) may be made easier if it can be shown that the vendor's communication of promotional information constitutes a 'specific invitation' to the consumer.

The only existing authoritative guidance (besides the academic literature) for construing the expression 'specific invitation addressed to [the consumer]' is to be found in the Giuliano/Lagarde Report.[55] Although the guidance is meagre, it does indicate that the expression is intended to cover such activities as mail orders and door-step selling. It also indicates that the expression is intended only to cover communications that are addressed to specific persons, though there appears to be no necessity for the persons to be named. Moreover, the expression does not seem to require that the vendor operates with a predefined, limited set of persons to whom he/she/it wishes to send the promotional information. Thus, situations in which the vendor sends the information at the request of a consumer could probably fall within the ambit of the expression.[56]

A website as such is unlikely to qualify as a 'specific invitation addressed to [the consumer]'. However, the opposite result will probably obtain if a consumer (via his/her browser programme) contacts the server where the vendor's website is located and requests a transfer of webpages (containing promotional information) from the site, and the request is met. The same result will probably obtain even when the webpages do not make use of

[54] Further on push technology, see Gralla, *supra* n. 51, p. 188.

[55] Giuliano/Lagarde Report, *supra* n. 15, p. 24.

[56] See also Hertz, *supra* n. 21, p. 205 (especially n. 54); Stone, *supra* n. 29, p. 7; and the decision of 24.04.1993 by the District Court of Amsterdam in *Kuipers v. Van Kesteren* (1994) NIPR, p. 160 (also set out in Kaye (ed.), *European Case Law on the Judgements Convention* (Chichester 1998), p. 728 *et seq.*).

automated profiling tools that ensure a customized offer, but simply contain relatively generalized invitations to purchase: the webpages would still be being sent to a specific set of persons (namely, those persons behind the IP address to which the webpages are transferred).[57]

As for invitations sent to a consumer via e-mail, these are highly likely to qualify as specific invitations addressed to the consumer. The fact that the invitation is sent to an electronic address as opposed to an ordinary street address should be immaterial here. So should the possibility that the name in the electronic address is actually a pseudonym for the addressee.

2.5.2 How to construe 'in the State of the consumer's domicile' in Article 13(1)(3)(a)?

For Art. 13(1)(3)(a) to apply, it is not enough that the activity concerned qualifies as advertising or a specific invitation; the activity must also occur in the State where the consumer is domiciled. According to the Giuliano/Lagarde Report,

> the trader . . . [needs to have] taken steps to market his goods or services in the country where the consumer resides. [. . .] The trader must have done certain acts such as advertising in the press, or on radio or television, or in the cinemas or by catalogues aimed specifically at that country.[58]

Some uncertainty exists as to whether this requirement in Art. 13(1)(3)(a) means simply that marketing must *occur in* the State of the consumer's domicile or whether it also means that the marketing must be *directed to or at* that State. On its face, Art. 13(1)(3)(a) seems to operate with the former requirement only. However, the above-cited commentary in the Giuliano/Lagarde Report (together with the Report's commentary cited below) suggests that the latter requirement is also relevant, though it fails to clarify whether meeting this requirement is a sufficient alternative to meeting the former requirement. For the purposes of the following discussion, it is assumed that both requirements have to be met, though the validity of this assumption *de lege lata* is uncertain.

Accordingly, the safest approach is to undertake a two-step assessment of the marketing concerned, asking (i) to where is the marketing directed?, and (ii) where does the marketing occur? It should be recognized that the answer to the first question will aid in answering the latter question, though it will not be fully determinative.

---

[57] The situation is analogous to a case in which a consumer rings up the vendor's shop and asks that a standard offer be faxed to him/her. If the vendor accedes, he/she/it would most likely be regarded as making a specific invitation addressed to the consumer.

[58] Giuliano/Lagarde Report, *supra* n. 15, pp. 23–24.

Further to the first question, some uncertainty exists as to whether the vendor's subjective intentions about which State his/her/its marketing activity is directed towards, shall be decisive when determining whether marketing by the vendor is directed at a certain State. While some statements in the Giuliano/Lagarde Report can be construed in support of treating the vendor's subjective intentions as decisive – at least when the statements are considered in isolation – the stronger argument is in favour of considering as decisive the vendor's imputed intentions based on an objective assessment of all of the facts of the marketing activity concerned – an argument that also fits with the thrust of the Giuliano/Lagarde Report.

The requirement that the vendor's marketing activity must occur in, and/or be directed to, the State of the consumer's domicile is elaborated upon in the Giuliano/Lagarde Report as follows:

> If, for example, a German makes a contract in response to an advertisement published by a French company in a German publication, the contract is covered by the special rule. If, on the other hand, the German replies to an advertisement in American publications, even if they are sold in Germany, the rule does not apply unless the advertisement appeared in special editions of the publication intended for European countries. In the latter case the seller will have made a special advertisement intended for the country of the purchaser.[59]

These statements indicate that whether the promotional information *can* be accessed in a certain State is not decisive for determining the application of Art. 13(1)(3)(a); neither is the fact that a vendor could reasonably *expect* the information to be accessed there. Rather, what is decisive is whether the promotional information is intended, objectively speaking, to be accessed in that State. In working out this intention, regard may be had to (at least) the nature of the medium by which the promotional information is transmitted.

It could be strongly argued that the open, expansive nature of the Internet as a whole permits the inference to be drawn that a vendor using the net as a marketing medium intends (objectively speaking) to direct the marketing at most, if not all, countries of the world. Concomitantly, it could be strongly argued that the marketing is directed at all States from which there is the possibility of accessing the vendor's website – at least if the website is interactive (i.e. allows for exchange of information between

[59] *Id.*, p. 24.

the site and the site visitor, including online placement of purchase orders).[60]

Alternatively, one could run an argument that would potentially restrict jurisdiction to the courts of a more limited set of States, based on the approach taken in some of the case law of the European Court of Justice and US courts. Regarding the ECJ, its decision in the Shevill case is particularly pertinent here.[61] The case involved the Court applying Art. 5(3) of the Brussels Convention in a situation where a newspaper containing a libellous article was distributed to several European States. Rather than ruling that jurisdiction to hear an action for libel could be conferred on the courts of all States where it was possible to purchase the newspaper in question, the Court held that jurisdiction was limited to the courts of those States where also the victim of the libel was known.[62]

As for US case law, there is now a fairly extensive number of decisions on jurisdictional issues occasioned by Internet usage.[63] Almost all of the cases are intranational in scope. Many of them arise in the context of alleged trademark infringements; very few concern consumer contracts. The basic line emerging from this case law is that (personal) jurisdiction shall be determined, to a large extent, on the basis of an assessment of the character and degree of contact – both through and outside the Internet – between the defendant and the State in which the plaintiff is resident. A central factor taken into account in this regard is the degree of interactivity of the defendant's website; i.e. to what extent can a visitor to the website

[60] Such a line is taken in, *inter alia*, Stone, *supra* n. 29, p. 8 ('by placing promotional material, along with an electronic facility for placing orders, on open access on a website which can be accessed from any country in which there is a connection to the internet, the supplier issues an invitation or advertising at every place from which an internet user electronically requests the relevant material or facility'). Hertz (*supra* n. 21, p. 206) and Nielsen (*supra* n. 25, p. 518) take the same line though without addressing a need for website interactivity. Nielsen's opinion pertains not to Art. 13(1)(3)(a) but to the equivalent provisions in Art. 5(2) of the Rome Convention.

[61] Case C-68/93, *Fiona Shevill and Others v. Presse Alliance SA* [1995] ECR, p. I-0415.

[62] *Id.*, para. 29: 'In the case of an international libel through the press, the injury caused by a defamatory publication to the honour, reputation and good name of a natural or legal person occurs in the place where the publication is distributed, *when the victim is known in those places*' (emphasis added). It is noteworthy that some attempts have been made to argue that the Court's approach in Shevill should be applied to cases involving copyright infringement over the Internet: see e.g. Fuglesang & Krog, *Internett og jurisdiksjon – jurisdiksjon etter Luganokonvensjonen artikkel 5 nr. 3 ved ulovlig eksemplarfremstilling og tilgjengeliggjøring for almenheten gjennom Internett* (Oslo 1999), especially p. 60 *et seq.*

[63] See e.g. *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp., p. 1119 (W.D. Pa. 1997); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d, p. 414 (9th Cir. 1997); *Compuserve, Inc. v. Patterson*, 89 F.3d, p. 1257 (6th Cir. 1996); *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp., p. 1328 (E.D. Mo. 1996); *Bensusan Restaurant Corp. v. King*, 937 F. Supp., p. 295 (S.D.N.Y. 1996); *Vitullo v. Velocity Powerboats*, 1998 WL 246152 (N.D. Ill. 1998); *Park Inns International v. Pacific Plaza Hotels*, 21 F. Supp. 2d, p. 27 (D.C. 1998); *Blumenthal v. Drudge*, 992 F. Supp., p. 44 (D.D.C. 1998); *Mink v. AAAA Development LLC et al.*, 1999 WL 728101 (5th Cir. 1999). For overviews and analyses of this case law, see, *inter alia*, Rollo, 'The Morass of Internet Personal Jurisdiction: It is Time for a Paradigm Shift' (1999) 51 *Florida Law Review*, pp. 667–694; Donohue, 'Litigation in Cyberspace: Jurisdiction and Choice of Law – A United States Perspective' (1997), available at http://www.abanet.org/buslaw/cyber/archive/jiusjuris.html (last visited 4.4.2000); Perry, 'Personal Jurisdiction in Cyberspace' (1998) *Media Law & Policy*, available at http://www.cmcnyls.edu/public/MLP/perryf98.HTM (last visited 4.4.2000).

exchange information with it? One can envisage a multiplicity of other factors that could also be taken into account in a truly international context: e.g. the language used on the website, the national indicia in the domain name used, the type of currency accepted for payments, etc.

Adopting an approach based on the above-cited case law makes good sense in cases when jurisdiction is to be determined *solely* through assessing whether an Internet-based activity has effects in, or is directed at, a particular country. In Europe, such cases will usually arise in the context of disputes over tortious liability. Were website operators left in such cases having to potentially fight disputes in the courts of any country from which it was possible to access their websites, they would face large problems in predicting the extent and nature of their legal liabilities. Moreover, the risk of forum shopping would increase considerably. At the same time, though, adopting an approach based on the above-cited case law will not cause problems concerned with lack of legal certainty to disappear completely.

The latter point would apply with equal force were the same sort of approach to be applied also in the context of disputes arising out of consumer contracts. The types of criteria used to determine jurisdiction pursuant to the above-cited case law would not allow vendors to predict with great certainty where their marketing activity over the Internet is deemed to be directed for the purposes of Art. 13(1)(3). Use of country-specific indicia on their websites could alleviate this problem somewhat but would not extinguish it. Take, for instance, the hypothetical case of a Greek vendor who sells a product that, offline, is normally only purchased by Greek consumers, and whose website uses only the Greek language, has a domain name ending in '.gr', and lists the product price in Greek currency only. On the basis of these factors, one would be entitled to conclude that the vendor's marketing activity is directed at consumers in Greece. But it is considerably less certain that one would be entitled to conclude that the vendor's marketing activity is *exclusively* directed there, particularly in light of the fact that large numbers of ethnic Greeks are domiciled in other countries. This would be the case *a fortiori* if it were shown that the vendor intentionally trades with the latter groups of people. The example illustrates that while reliance on country-specific indicia can greatly aid in *positively* determining which countries an Internet-marketing operation is directed at, it is much less able to determine at which countries such an operation is *not* directed.

There is considerably less justification for adopting a jurisdictional approach based on the above-cited case law in the context of disputes arising out of consumer contracts than in the context of other sorts of disputes. Under the Brussels Convention, vendors will not risk having to fight disputes in the courts of a broad range of States just because they have decided to offer their products to consumers over the Internet. If a vendor is found to direct his/her/its Internet-marketing activity at consumers domiciled in, say, Denmark, only one of several cumulative conditions

has been met for a Danish court to be accorded jurisdiction pursuant to Arts. 13–15 of the Brussels Convention. Ultimately, a vendor will always be able to refrain from entering into contracts with consumers domiciled in Denmark.[64] Concomitantly, vendors will have the possibility to predict in which State(s) they risk being called before a court, particularly given that their good faith is protected in situations where a consumer misrepresents his/her place of domicile.[65] At the same time, the risk of forum shopping will be diminished due to Art. 14 (set out infra section 1). Moreover, there is little doubt that vendors will tend to be better able than consumers to cope with the difficulties associated with having to fight disputes in foreign courts.[66]

To conclude so far, when answering the question as to where a webpage-based marketing activity is directed, regard should be had to all States from which it is possible to access the relevant webpages if, as will often be the case, it is impossible to accurately determine a (more limited) target area for the marketing.[67] Such a solution results in a sensible balancing of the interests of vendors and consumers, given their differing strengths. It also results in a fair balancing of these interests since it conforms with the legitimate expectations of both parties. On the one hand, a vendor who/which desires to enter into contracts with consumers

---

[64] See also Hertz, *supra* n. 21, pp. 205–206; Schu, *supra* n. 50, p. 213 (n. 130); Stone, *supra* n. 29, p. 9. On this point, it is interesting to note the somewhat analogous line taken by the US Court of Appeals in *United States v. Thomas*, 74 F.3d, p. 701 (6th Cir. 1996) – holding that if the defendants (who operated an electronic bulletin board for the storage and distribution of pornographic material) had not wished to submit themselves to the jurisdiction of courts in US States with relatively intolerant standards for assessing obscenity, they should have refrained from issuing passwords for accessing the pornographic material to residents in those States.

[65] See *supra* section 2.3 and references cited therein. A vendor can gather information about the domicile and consumer status of the parties with whom he/she/it electronically transacts by installing certain technical devices on his/her/its website. Such devices would cut out the possibility of concluding a contract unless the would-be purchaser first states his/her domicile and consumer status and the vendor accepts this information. For example, the would-be purchaser would have to register his/her consumer status on a special scroll-menu set up on the vendor's website and would have to declare that he/she is domiciled in one of the States that the vendor lists as acceptable to trade with. See further Norwegian Research Center for Computers and Law, *Technology for resolving interlegal issues*, ECLIP Research Paper, January 2000, available at http://www.jura.uni-muenster.de/eclip (last visited 3.4.2000). It could be objected that vendors' use of such mechanisms for avoiding contracts with certain classes of consumers is in conflict with the principle of non-discrimination embodied in Arts. 28–30 of the Treaty of Rome (as elaborated upon in ECJ case law). However, the objection is probably without solid legal foundation as any discrimination is due not to governmental regulation but the freedom of private parties to contract as they see fit. Nevertheless, the legal validity of such an objection warrants closer and more extensive analysis – which is beyond the scope of this paper. Such analysis should also extend to assessing whether vendors' use of disclaimer clauses and other mechanisms for discriminating between consumers is in harmony with general EC competition rules as embodied in Art. 81 *et seq.* of the Treaty of Rome (and elaborated upon by the ECJ).

[66] See also Hertz, *supra* n. 21, p. 206.

[67] This conclusion applies also in cases where a vendor markets his/her/its products through the webpages of a third party (e.g. the webpages of an Internet edition of a newspaper or magazine). Such cases do not vary so fundamentally from those where the marketing occurs via the vendor's own webpages as to warrant a separate and different conclusion.

in other countries than that where he/she/it is established, should expect to risk having to fight disputes arising out of those contracts in the courts of those countries. On the other hand, a consumer who is situated in his/her own country of domicile when entering into a contract with a foreign vendor should usually be entitled to expect that he/she may sue the vendor in the local courts.[68]

As far as marketing via e-mail is concerned, this should be regarded as directed at the State indicated by the e-mail address of the addressee. Accordingly, if promotional information is sent to an address ending with '.nl', the marketing should be treated as directed at the Netherlands. The possibility that the mailserver to which e-mail is sent is localized in another State than that indicated by the domain name should be irrelevant here – otherwise, the results for both vendors and consumers would often be quite arbitrary. The fact that the person to whom the e-mail address attaches is, at the time of receiving the vendor's communication, actually situated in another State than that indicated by the domain name, should also be irrelevant, as long as the vendor does not know of this fact. What should be of decisive importance is that the vendor believes and intends (objectively speaking) that the e-mail will most probably be read in the State indicated by the domain name.

What should be the result if the address to which the e-mail is sent does not have any country-specific indicia (e.g. it ends with '.com')? In such a case, the vendor should be regarded as directing the e-mail to the addressee's place of domicile no matter which State that is. The reason for this view is that, for the vendor, it is (objectively speaking) most likely that the addressee will receive and read the e-mail in his/her country of domicile.

As for the question of where marketing occurs (as opposed to where the marketing is directed), when answering this it is important to determine not where the vendor's marketing activity *begins* but to where the marketing *spreads* (as a result of the actions of the vendor or his/her/its agents).[69] Moreover, it cannot be assumed that just because marketing is initiated in one State, the marketing does not carry over to, and occur in, other States.

Looking more closely at how the question might be answered in an e-commerce context, let us consider a situation in which a vendor operates with a website located on a server in Germany and the website contains several webpages with promotional information about the vendor's products. Let us assume that the promotional information is undoubtedly intended for consumers domiciled in France; in other words, the first-listed

[68] Cf Powell & Turner-Kerr, *supra* n. 6, p. 26 (apparently questioning the veracity of this point).
[69] See also Kaye, *supra* n. 13, p. 835 *et seq.*

of the above questions is answered.[70] The question then arises as to where the marketing occurs.

To begin with, it could be argued that marketing occurs in the country where the server supporting the vendor's website is located – i.e. Germany. The argument rests on the fact that, in order to access the promotional information, the browser of a French consumer must visit the website, and it is through the server in Germany that the contents of the relevant webpages are made available to the consumer.[71]

However, even if one accepts that the marketing occurs in Germany on account of it being initiated there along the lines described, the marketing does not stop in Germany but carries on over to France (or wherever the user of the browser programme is situated at the time). It is clear that the promotional information is made manifest in France; indeed, technically, the contents of the webpages are first revealed (visually or otherwise) to the consumer only once they have been transferred to a computer there. Moreover, the consumer is not the only actor responsible for bringing the promotional information to the State of his/her domicile. The consumer does not simply collect the information; he/she requests that the information be transferred and the vendor is ultimately responsible for effectuating (or denying) that request.[72] Technically, the browser programme of the consumer contacts the server at which the website is located and asks for the transfer of the relevant webpages. The request is processed by a programme that is (normally) localized on the same server as where the website is. The programme will either ensure that the request is acceded to or denied.[73] If the request is acceded to (which is usually the case), the webpages are transferred from the website to the consumer's computer.[74] Thus, the whole transaction closely resembles a situation in which a consumer telephones a (foreign) shop and asks to be sent advertising material. The only possible differences are that, with the Internet transaction, the processing of the request occurs automatically and the promotional information is not attached to a physically tangible

[70] Note that for some jurists (e.g. Benno: see Benno, *supra* n. 24, p. 88 *et seq.*), the fact that the marketing is directed at consumers domiciled in France would not be sufficient to bring the situation within the ambit of Art. 13(1)(3)(a) (assuming that the marketing qualifies as 'advertising' or a 'specific invitation'). For present purposes, this view seems plausible though its validity is not beyond doubt. In any case, the importance of this point is diminished by the outcome of the question of where the marketing occurs.

[71] The argument is advanced in, *inter alia*, Benno, *id.*

[72] Cf. Benno (*ibid.*, p. 88): 'In videotex-type systems the consumer connects up to a database, and *from* that database *collects* the information he wants to take part of, ie it is *in* the database the information is made publicly available for 'collection'. Thus, an *advertisement* must, in this context, be considered to take place in the State where the database is located'. This description pertains primarily to videotex-type systems in use in the early 1990s and not necessarily to the mechanisms of the World Wide Web. If applied to the latter mechanisms, the description is simplistic and misleading.

[73] Denial could occur if the programme does not allow the webpages to be transferred to specified Internet Protocol (IP) addresses.

[74] See further Gralla, *supra* n. 51, pp. 142–149, cf. pp. 20–23, 150–157.

object (e.g. paper) before and during the transfer phase. However, these differences are immaterial to the legal issue at hand.

To conclude, the transfer of the promotional information in the hypothetical case described above is highly likely to qualify as marketing that occurs in the State of the consumer's domicile. The same conclusion would apply, of course, were the promotional information sent (either on webpages or in an e-mail) to the consumer independent of the latter's request.

2.5.3 The criteria in Article 13(1)(3)(b)

If a consumer contract is to fall within the scope of Art. 13(1)(3), it must meet the criteria listed in Art. 13(1)(3)(b) in addition to those of Art. 13(1)(3)(a). In other words, the consumer must take in the State of his/her domicile 'the steps necessary for the conclusion of the contract'.

Besides analyses in the academic literature, the only authoritative guidance on the criteria in Art. 13(1)(3)(b) is to be found in the Giuliano/Lagarde Report. The guidance is meagre:

> The Group [responsible for drafting the Rome Convention] expressly adopted the words 'steps necessary on his part' in order to avoid the classic problem of determining the place where the contract was concluded. This is a particularly delicate matter in the situations referred to, because it involves international contracts normally concluded by correspondence. The word 'steps' includes *inter alia* writing or any action taken in consequence of an offer or advertisement.[75]

From this, it would seem that the term 'steps' should be construed as denoting factual (and not merely legal) measures.[76] In an e-commerce context, therefore, 'steps' will consist of actions such as the consumer's typing on a computer keyboard or clicking with a 'mouse'.[77]

At the same time, Art. 13(1)(3)(b) indicates that the only relevant steps will be those that are indispensable ('necessary') for concluding the contract. These steps would consist of the actions taken by the consumer to accept the vendor's offer to purchase or to make a counter-offer for acceptance by the vendor.[78] For instance, it is doubtful that the gathering of product information by an intelligent agent on behalf of a consumer prior to contractual negotiations would qualify as such steps.

Finally, Art. 13(1)(3)(b) indicates that the necessary steps for concluding the contract must be taken by the consumer when he/she is actually

---

[75] Giuliano/Lagarde Report, *supra* n. 15, p. 24.

[76] See also, *inter alia*, Kaye, *supra* n. 25, p. 216; Schu, *supra* n. 50, p. 215; Morse, 'Consumer Contracts, Employment Contracts and The Rome Convention' (1992) *International and Comparative Law Quarterly*, p. 1, 7.

[77] See also Heine *et al.*, *Internet.Jura* (København 1997), p. 347.

[78] See also Kaye, *supra* n. 25, p. 217.

situated in the State of his/her domicile. This requirement would not be met if, for example, the consumer used his/her portable computer to conclude a contract whilst on a trip to another country.

2.6 *The scope of Article 13(2)*

It will be recalled that a basic point of departure for the Brussels Convention is that its provisions only apply when the defendant is domiciled in one of the Convention's Contracting States. An exception to this rule is provided by Art. 13(2), which reads:

> Where a consumer enters into a contract with a party who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

Article 13(2) will only apply if the consumer contract meets the criteria in Art. 13(1).

In the context of e-commerce, an important issue arises in the case of a vendor who/which is not domiciled in any of the Contracting States but offers products via a website that is supported by a server situated in one of those States. Can the vendor be properly deemed to be domiciled in that State pursuant to Art. 13(2)? The answer to this question hinges on whether the operations of the website and/or server can properly qualify as the operations of a 'branch, agency or other establishment'.

It need scarcely be said that the question has not been directly addressed by the ECJ nor by the *travaux préparatoires* to the Brussels, Lugano and Rome Conventions.[79] There is also a paucity of ECJ decisions specifically construing the expression 'branch, agency or other establishment' in Art. 13(2). There are, however, several ECJ decisions construing the equivalent and identical expression in Art. 5(5) of the Brussels Convention. Furthermore, there is nothing to indicate that the core meanings of the two expressions are intended to be substantially different from each other.[80] Hence, the Art. 5(5) case law should be given significant weight when construing the expression in Art. 13(2).

In its case law pursuant to Art. 5(5), the ECJ has ruled that the expression 'branch, agency or other establishment' is to be construed independently of the domestic laws of the Contracting States.[81] The Court has gone on to

---

[79] Cf. Hoeren & Käbisch, *Taxation*, ECLIP Research Paper, October 1999, available at http://www.jura.uni-muenster.de/eclip (discussing whether a website meets the criteria of 'permanent establishment' pursuant to the Model Tax Convention issued by the OECD). Their discussion has some similarities with the discussion here, but is not directly relevant.

[80] This also seems to be the view of Kaye: see Kaye, *supra* n. 25, pp. 590, 842 *et seq.* Note, though, the conclusion in section 3 of this paper which suggests that the two expressions may have different ambits in relation to online operations.

[81] Case 33/78, *Somafer SA v. Saar-Ferngas AG* [1978] ECR, p. 2183, para. 8.

hold that the notion of 'establishment' is coloured by the notions of 'branch' and 'agency': 'the spirit of the Convention requires that the concept of 'establishment' … shall be based on the same essential characteristics as a branch or agency'.[82] One such characteristic is 'the fact of being subject to the direction and control of the parent body'.[83] Other characteristics are delineated as follows:

> the concept of branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension.[84]

Elaborating on these characteristics, a branch, agency or other establishment does not exist if it 'merely transmits orders to the parent undertaking without being involved in either their terms or their execution'.[85]

At the same time, some legal commentators suggest that a person/organization must have a certain degree of independence from the parent undertaking – in effect, a management of its own – in order to constitute a branch, agency or other establishment pursuant to Art. 5(5).[86] Other commentators doubt this is necessary.[87] The latter view seems correct. It is very difficult to find any solid legal (or other) basis for reading in such a requirement, particularly in cases when the other criteria for what constitutes a branch, agency or establishment are met. And it is arguable that the ECJ has implicitly ruled out the need for the requirement in its decision in the Rothschild case.[88]

A related question is whether the person/organization must have a certain ability to make decisions. One commentator claims that a 'véritable

---

[82] Case 14/76, *Ets. A. De Bloos, S.P.R.L. v. Société en commandite par actions Bouyer* [1976] ECR, p. 1497, para. 21.

[83] Id., para. 20; Case 139/80, *Blanckaert & Willems PVBA v. Luise Trost* [1981] ECR, p. 819, especially para. 13.

[84] Somafer decision, *supra* n. 81, para. 12.

[85] Blanckaert & Willems decision, *supra* n. 83, para. 13.

[86] See e.g. Pålsson, *supra* n. 12, p. 98; Rognlien, *supra* n. 25, p. 154.

[87] See e.g. Bogdan, 'Kan en Internethemsida utgöra ett driftställe vid bedömningen av svensk domsrätt och tillämplig lag?' (1998) *Svensk Juristtidning*, p. 825, 833.

[88] Case 218/86, *SAR Schotte GmbH v. Parfums Rothschild SARL* [1987] ECR, p. 4905. The case concerned two companies bearing the same name and effectively under the same management. These features did not prevent the Court from holding that the one company could be a branch, agency or other establishment of the other company. However, the case is somewhat special as the company that was found to be an agent for the other company was, in reality, the main steering company. At the same time, the Court laid considerable weight on how the companies appeared to third parties (*id.*, para. 14 *et seq.*). Thus, if the one company presented itself to third parties as the agent of the other, the third parties were held to be entitled to rely on this impression even if it did not accord with the actual legal relations between the companies.

pouvoir de décision' is required.[89] Again, though, it is doubtful that such an ability is necessary,[90] particularly when the other criteria for what constitutes a branch, agency or establishment are fulfilled. The only basis for reading in such an ability is the presence of the term 'negotiate' in the above-cited passage from paragraph 20 of the Somafer decision. However, the term is ambiguous and need not be construed as synonymous with a 'real decision-making ability'. Read in context, the term seems to imply that the agency in question is designed/structured in such a way that a would-be purchaser is able to enter into a sales contract directly with it (the agency) – i.e. without having to contact the parent undertaking. This requirement could be fulfilled even if the agency operates with an automated mechanism for concluding contracts.[91]

Functionally, a website can play much the same role as a branch or agency – particularly if it utilizes advanced, intelligent-agent software to process and execute customer orders. Moreover, it should be relatively easy for a website to meet the control criterion laid down by the Court in the De Bloos case, especially when the site is supported by a server that is owned, run or otherwise controlled by the vendor. But even when the website is supported by a server that is not owned, run or otherwise controlled by the vendor, the control criterion is probably still fulfilled if the vendor determines the content and functions of the site. The fact that the vendor does not determine where the site is located on the server is of relatively little importance. At the same time, a server (as opposed to website) which is not owned, run or otherwise controlled by the vendor cannot meet the control criterion and cannot, accordingly, qualify as a branch, agency or other establishment of the vendor.

What of the criteria laid down by the ECJ in its Somafer decision and elaborated upon in the Blanckaert decision? To begin with, a server *per se* probably cannot be said to meet the requirement 'materially equipped to negotiate business', as it is analogous to an empty business office. Only when the server is equipped with software (i.e. develops a website) allowing a person/organization to transact with the vendor is it possible for the requirement to be met. Thus, the next question is whether a website can meet the requirement. The answer to this question is most likely to be in the affirmative if the website has the necessary software allowing for either the setting of terms for, or the execution of, business transactions between the vendor and consumer (and not merely the transmission of orders). At the same time, there is no necessity for the website to be able to handle all

[89] Gaudemet-Tallon, *Les conventions de Bruxelles et de Lugano* (Paris 1996, 2nd ed.), p. 154.

[90] See also Bogdan, *supra* n. 87, p. 834.

[91] Cf. interpretation of the notion of 'permanent establishment' in Art. 5 of the OECD Model Tax Convention. Paragraph 10 of the explanatory memorandum ('Commentary') to Art. 5 of the Convention makes clear that a 'permanent establishment' may consist of gaming or vending machines. See further Hoeren & Käbisch, *supra* n. 79.

sorts of enquiries (e.g. enquiries from persons/organizations wishing to place advertisments on the website).[92]

It should be emphasized that the webpages transferred (downloaded) from the vendor's website to the server of the customer upon the latter's request, will not satisfy the requirement. Such pages do not contain the necessary software permitting the vendor and customer to enter into a business agreement.[93] The pages are analogous to, *inter alia*, advertisement material. It is trite that the presence of such material in a foreign country cannot amount to the existence of an agency, branch or other establishment for the vendor.

The next question is whether a website can properly be regarded as 'a place of business which has the appearance of permanency'. If this expression is construed as requiring an agency etc. to be continuously situated in the same physical place, a website will probably be unable to meet the criterion if it is moved about on the server of the host provider or moved from one server to another (such movement does occur). However, such movement should not be decisive for answering the question as it has no significant consequence for the ability of a website to function commercially with potential purchasers and is usually not apparent to the latter (or the vendor).[94] Of far greater importance is whether the website continuously operates under one unique domain name through which the site can always be found and accessed. Essentially, it is the logical/virtual area constituted by the domain name which appears to purchasers as a 'place of business'. And it is the degree of apparent permanency of this area which should be decisive for answering the question at hand.[95]

To sum up so far on this question, a website that continuously operates under one domain name would seem capable of qualifying as 'a place of business which has the appearance of permanency'. If the website also meets the other criteria laid down by the ECJ in the Somafer and Blanckaert decisions, it would seem capable of qualifying as an 'agency, branch or other establishment' pursuant to Arts. 5(5) and 13(2).[96] However, this does not mean that such a website should qualify as such, either *de lege lata* or *de lege ferenda*.

One difficulty with concluding that a website may qualify as such is that the above-cited judgments of the ECJ have been formulated in an era predating the emergence of the Internet as a major medium for

[92] See also Bogdan, *supra* n. 87, p. 833.

[93] The same applies to proxy servers used to cache the vendor's webpages.

[94] The same can be said of the fact that the various components of a website are occasionally stored on different servers.

[95] Exactly how long a period is necessary to satisfy the 'permanency' criterion is impossible to determine in the abstract. This issue is not dealt with here as it does not raise problems unique for e-commerce.

[96] See also Bogdan, *supra* n. 87, p. 834 (writing that a website 'kan tänkas' as constituting a 'branch, agency or other establishment' for the purposes of Art. 5(5) of the Brussels Convention). Cf. Hoeren & Käbisch (*supra* n. 79), who take a contrary view in the context of international tax law.

communication and commerce. The judges involved can scarcely have had in mind the possibility of virtual offices/shops/agencies and the like when they construed the provisions in question. Accordingly, it can be plausibly argued that they have operated entirely within an offline paradigm and that their decisions pertain only to offline, physical manifestations of businesses. The same applies for the drafters of the Brussels Convention – and, for that matter, the Lugano and Rome Conventions.

Nevertheless, the probability that the case law, Conventions and their *travaux préparatoires* have been drafted entirely within an offline paradigm does not necessarily exclude the possibility of elements of the online world being embraced by the provisions concerned. Given the fact that none of the relevant, authoritative legal sources unambiguously support the one or other view on the main issue at hand, one is forced to assess which view is most appropriate in light of the purposes of Art. 13(2) particularly and Arts. 13–15 more generally.

In the Schlosser Report, the rationale for Art. 13(2) is expressed in terms of ensuring fairness for consumers. More specifically, the Report describes as unfair the situation in which a consumer who contracts with a vendor based outside the European Economic Community (EEC), is unable to sue that vendor in the courts of his/her own State even though the vendor has a branch or agency in the EEC.[97] The Report does not elaborate on what is unfair about this situation. Yet it is safe to assume that the existence of a branch or agency of the vendor in the State of the consumer's domicile has been regarded as creating a sufficiently strong connection between that State and the vendor's operations to justify protection of the consumer pursuant to Arts. 13–15, particularly in light of the consumer's relative weakness as a litigant. Also of probable importance are the reasonable expectations of the consumer regarding which courts he/she should be able to use in the event of a legal dispute with the vendor.[98]

Accordingly, what needs to be assessed is whether a vendor's website can create such a strong connection with a particular Contracting State to the Brussels Convention that the application of Arts. 13–15 is justified despite the vendor being domiciled in a non-contracting State. In undertaking this assessment, it is first necessary to clarify with which States (if any) a website can create a close connection.

To begin with, a website cannot and should not be said to have a stronger connection to one State than another solely on the basis of the geographical location of the server upon which the website is stored. The consumer will rarely be aware of where the website is physically located, as will the

[97] Schlosser Report, *supra* n. 15, p. 119, para. 159.

[98] See Giuliano/Lagarde Report, *supra* n. 15, p. 24 (rationalizing the exclusion of the contracts listed in Art. 5(4) of the Rome Convention from the ambit of the consumer protection provisions in the rest of Art. 5 on the grounds that a consumer entering into such contracts 'cannot reasonably expect the law of his State of origin to be applied in derogation from the general rules of Articles 3 and 4').

vendor in those cases when he/she/it leases storage space on the server. Furthermore, were the geographical location of the server to be regarded as decisive, vendors would easily be able to avoid the application of Arts. 13–15 by simply ensuring placement of their websites on servers located outside Contracting States.

Secondly, a website cannot and should not be said to have a stronger connection to one State than another solely on the basis of the domicile of the vendor operating the site. There is no necessary link between the vendor's State of domicile and the State to which the website appears most naturally connected.

Thirdly, it is trite that a website will not always have an equally close connection to all of the States from which it can be accessed.

The determination of which State(s) is/are most closely connected with a website must rest on a concrete assessment of the design and appearance of the website concerned. Account will have to be taken of which country-specific indicia appear on the site. Such indicia include the country specification (if any) in the site's domain name, the language(s) used on the site, and the currency specified for purchases of the advertized products. Account could also be taken of other factors, such as whether the site replaces or augments an ordinary business establishment that is or has been located in a particular State.

An example of a website that has an obviously close connection with a certain State is http://www.amazon.de – the German 'branch' of the well-known parent undertaking based in the USA. The webpages of this site have a domain name ending in '.de', the sole language used in these pages is German, the book prices are only specified in 'DM' (in addition to 'EUR'), and the pages operate with best-seller lists for the German market. There can be little doubt that the site has a strong connection with Germany.

Thus, it may be concluded that a website can have a stronger connection with one (or more) State(s) than with others. Does this then mean that a website can have such a strong connection with a particular Contracting State to the Brussels Convention that the application of Arts 13–15 is justified even if the vendor operating the site is domiciled in a non-contracting State? The answer is in the affirmative when the website clearly appears to be linked to a specific State – as is the case with the amazon.de site. Regarding the latter site, a German consumer purchasing products through it would have almost, if not equally, as great expectations of being able to litigate in German courts in the event of a legal dispute with the vendor as he/she would have were he/she to purchase the book at an ordinary store established by Amazon in Germany. There can be little doubt that these expectations would be reasonable in the circumstances.

Reinforcing an affirmative answer is that it would be unfair to consumers were they to be deprived of the possibility of suing a vendor they previously

could sue in the courts of their State(s) of domicile (on account of Art. 13(2)), simply because the vendor switches to an online method of conducting business with them. This applies *a fortiori* if the online method fulfils essentially the same commercial functions as the previous method. Moreover, it can scarcely be claimed that applying Art. 13(2) to the new method would be unfair to the vendor in cases when he/she/it creates the impression of a close connection between the website activity and the Contracting State(s). Further, to avoid application of Art. 13(2), the vendor needs merely to avoid creating such an impression. Finally, it should be remembered that application of Art. 13(2) does not of itself mean that a vendor can be sued in the courts of a Contracting State; the requirements of Art. 13(1) must be met too. As pointed out in section 2.5, a vendor can always avoid having to fight court battles in the State of a consumer's domicile simply by refraining from entering into a contract with the consumer.

3 Article 5(5)

Article 5(5) provides that the defendant party to a dispute 'arising out of the operations of a branch, agency or other establishment' may be sued 'in the courts for the place in which the branch, agency or other establishment is situated'. The application of this rule is not limited by Arts. 13–15. And, in contrast to the latter, the rule in Art. 5(5) may be utilized by both consumers and non-consumers. Thus, a person who does not fall within the category of consumer for the purposes of Arts. 13–15, or who enters into a consumer contract that does not meet the criteria laid down in Art. 13(1), may apply the rule in Art. 5(5). At the same time, Art. 5(5) – unlike Art. 13(2) – may only apply when the defendant party is domiciled in a Contracting State to the Brussels Convention.

The major issue arising with respect to the application of Art. 5(5) in the context of e-commerce is identical to that canvassed in section 2.6; i.e. can the operations of a website properly qualify as the operations of a 'branch, agency or other establishment'? Given the conclusions in section 2.6 with respect to Art. 13(2), there would appear at first sight to be very strong grounds for answering the question in the affirmative. However, close analysis of the case law on Art. 5(5) provides arguably even stronger grounds for answering the question in the negative.

A basic point of departure for this case law is that the terms of Art. 5(5) are to be construed in light of the purposes and scheme of the Brussels Convention. The rationale for the exceptions in Art. 5 to the general rule on jurisdiction in Art. 2 is described by the ECJ as the 'interests of due administration of justice' or, more specifically,

> the existence, in certain clearly defined situations, of a particularly close connecting factor between a dispute and the court which may be called

> upon to hear it, with a view to the efficacious conduct of ... proceedings.[99]

Concomitantly, Art. 5(5) is not intended to promote the possibility of a party to a dispute 'to escape the jurisdiction of a foreign court'.[100]

Further, because Art. 5(5) constitutes an exception to the basic rule on jurisdiction in Art. 2(1), its terms are to be construed restrictively:

> Multiplication of the bases of jurisdiction in one and the same case is not likely to encourage legal certainty and the effectiveness of legal protection throughout the territory of the Community and therefore it is in accord with the objective of the Convention to avoid a wide and multifarious interpretation of exceptions to the general rule of jurisdiction contained in Article 2.[101]

These statements of the Court make abundantly clear that Art. 5(5) is intended to serve different purposes to those served by Art. 13. Determination of whether a website can properly qualify as a 'branch, agency or other establishment' pursuant to Art. 5(5) must hinge on an assessment of the extent to which the website may create such a close connection to one or more specific States that the court(s) of those States should be given jurisdiction in the 'interests of due administration of justice' or the 'efficacious conduct' of litigation. This sort of assessment is quite unlike the equivalent assessment that should be undertaken with respect to Art. 13(2).

Before undertaking such an assessment, it is necessary to make some comments as to why it is in the 'interests of due administration of justice' to accord jurisdiction to the courts of the State where the defendant's 'branch, agency or other establishment' is located. Neither the case law of the ECJ nor the *travaux préparatoires* to the Brussels and Lugano Conventions expressly address this point. Yet it is safe to say that the reason is primarily of a practical nature. Given that the dispute must have arisen out of the operations of the branch/agency, the staff of the latter will tend to be amongst those persons who know the details of the dispute best. As a result, they will tend to be called before the court as witnesses or representatives of the defendant. In addition, much of the relevant evidence (documentation, etc.) will be found at the branch/agency. When a local court is given jurisdiction, the costs and delays involved in sending persons and evidence to another country are avoided.

When one considers litigation of a dispute arising out of the operations of a website, it is very difficult to see how the factors identified above can

---

[99] Somafer decision, *supra* n. 81, para. 7.

[100] *Id.*

[101] *Id.* See also the Mietz decision, *supra* n. 18, para. 27 ('... the rules of jurisdiction which derogate from the general principle on jurisdiction ... cannot give rise to an interpretation going beyond the cases envisaged by the Convention ...').

have much, if any, real relevance. To begin with, there are no persons at the website who can act as court witnesses. Secondly, evidential information stored at the site will tend not to be any easier to access from the State where the site is regarded as located than from other States from which the information can be accessed.

To conclude, a website is highly unlikely to qualify as a 'branch, agency or other establishment' pursuant to Art. 5(5). This conclusion is reinforced by the probability – noted in section 2.6 – that the above-cited case law, along with the Conventions and their *travaux préparatoires*, have been drafted entirely within an offline paradigm that could not entertain the possibility of virtual offices/shops/agencies and the like. It is further reinforced by the fact that the terms of Art. 5(5) are to be construed restrictively.

4 Proposed revision of the Brussels and Lugano Conventions

Moves are afoot to revise the Brussels and Lugano Conventions. As noted at the beginning of this paper, the EC Commission has recently issued a proposal for a Regulation (under the new Title IV of the EC Treaty) which would replace the Brussels Convention and update its provisions to reflect, *inter alia*, the development of e-commerce.[102] The text of the proposed regulation is intended to steer revision of the Lugano Convention as well. It will also exercise significant influence on the work of the Special Commission of the Hague Conference on Private International Law when finalizing the draft Hague Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters.[103]

The Commission proposal seeks to amend and replace the current

[102] Proposal for a Council Regulation (EC) on jurisdiction and enforcement of judgements in civil and commercial matters, COM(1999) 348 final, 14.07.1999.

[103] A preliminary draft Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters (available at http://www.hcch.net/e/conventions/draft36e.html (visited 4.4.2000)) was adopted by the Special Commission of the Hague Conference on Private International Law on 30.10.1999. Article 7 of the preliminary draft Convention reflects and follows Arts. 13–15 of the Brussels and Lugano Conventions, and, with one major exception (see *infra* n. 113), accords with Art. 15 of the proposed Regulation (set out below). At the same time, a committee has been set up to assess whether the provisions of the preliminary draft Convention take sufficient account of e-commerce. Cf. the OECD *Guidelines for Consumer Protection in the Context of Electronic Commerce*, approved 9.12.1999, (available at http://www.oecd.org/dsti/sti/it/consumer/prod/guidelines.htm (visited 4.4.2000)) which do not specify any particular line with respect to jurisdictional and choice-of-law matters. During the process of drafting the new Hague Convention, some consideration has been given to a proposal that would allow consumers to contract out of the rules on special jurisdiction in Art. 7: see Federal Attorney-General's Department of Australia, *International Jurisdiction and the Enforcement of Foreign Judgements in Civil Matters*, Issues Paper No. 2, July 1999, para. 3.14 *et seq.*, available at http://law.gov.au/publications/hagueissue2/issuespaper2.html (visited 4.4.2000). However, the proposal has met resistance from the majority of delegations for fear that its implementation would be abused by businesses to the detriment of consumers.

provisions of Article 13 of the Brussels Convention (and, indirectly, the Lugano Convention) through the provisions of Art. 15 in the proposed Regulation. Article 15 reads as follows:[104]

> **In matters relating to a contract concluded by a person, the consumer**, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and Article 5(5), if:
>
> (1) it is a contract for the sale of goods on instalment credit terms; or
>
> (2) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
>
> (3) **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 countries including that Member State, and the contract falls within the scope of such activities.**
>
> Where a consumer enters into a contract with a party who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of that branch, agency or establishment, be deemed to be domiciled in that Member State.
>
> This section shall not apply to a contract of transport **other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.**

It will be readily apparent that the proposed Art. 15 introduces some significant changes to Art. 13(1)(3) of the Brussels Convention. If introduced, these changes should make it easier to bring Internet-based marketing and contractual operations within the ambit of the special jurisdictional rules for consumer contracts.

It is largely this feature of the proposed provisions which has raised the ire of many businesses involved or planning to become involved in e-commerce. Their basic concern is that the proposed extension of the present jurisdictional rules governing transnational consumer contracts to the online environment will bring about significant legal uncertainties and costs for businesses, thereby discouraging them from employing electronic communications networks as media for trade.[105] At the same time, they point to empirical evidence suggesting that the current jurisdictional rules for consumer contracts frequently do not result in effective protection for consumers in the event of cross-border legal disputes.[106] Further, they

[104] The text in bold indicates where the proposed provisions differ from the current provisions of Art. 13.

[105] See references cited *supra* n. 6.

[106] The evidence is summarized in the EC Commission's Action Plan on consumer access to justice and the settlement of consumer disputes in the internal market (COM (96) 13 final, 14.02.1996), pp. 8–11.

argue that the jurisdictional rules for e-commerce transactions with consumers – and the equivalent rules governing applicable law – should be changed to better reflect the 'country of origin' principle that is embodied or in the process of being embodied in much of the EC legislation on information services.[107] More specifically, they claim that there is a tension between Art. 15 of the proposed Regulation on jurisdiction and Art. 3 of the proposed Directive on certain legal aspects of electronic commerce.[108]

The latter claim, however, is misleading. The proposed e-commerce Directive does not touch on the matter of court jurisdiction. It does deal, though, with the issue of applicable law, but makes specific exemption for consumer contracts (see Art. 3 and Annex).[109]

As for the other above-mentioned criticisms from business groups, these need to be weighed against the fact that consumers' need for special protection in jurisdictional matters is just as great in an e-commerce context as it is in a traditional transactional context. Similarly, consumers' expectations of being able to sue in their local courts are probably much the same in both situations.[110] As for vendors, their expectations about the risk of being sued in foreign courts are probably not diminished in relation to e-commerce transactions; if anything, such expectations are probably heightened. Even if vendors are faced with significant uncertainties and costs because of the extension of current jurisdictional rules governing consumer contracts to the online environment, they are probably better able and better placed, on average, to cope with such problems than are consumers. As pointed out in section 2.5, a vendor can avoid having to face litigation in the State of a consumer's domicile simply by refraining from entering into a contract with the consumer.

Moreover, e-commerce is unlikely to flourish if consumers lack confidence in their ability to expeditiously maintain and pursue their domestic legal rights. Even if there is empirical evidence indicating that the current jurisdictional rules for consumer contracts frequently fail to result in effective protection for consumers in the event of cross-border legal disputes, these rules are likely to be of significant *symbolic* value for consumer confidence. Nevertheless, there can be little doubt that the rules need to be supplemented by serious efforts to improve the efficacy of transnational dispute resolution procedures, particularly when small claims are at stake.

---

[107] Again, see references cited *supra* n. 6. For an overview of the relevant provisions in this body of legislation, see Bing, *The Identification of Applicable Law and Liability with Regard to the Use of Protected Material in the Digital Context*, ECLIP Research Paper, January 2000, available at http://www.jura.uni-muenster.de/eclip (last visited 3.4.2000), sections 5.2–5.3.

[108] See Amended proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the Internal Market (COM (1999) 427 final, 17.08.1999). The proposed Directive has now been adopted, with minor changes, in May 2000. See text of Common Position (EC) No. 22/2000 (Official Journal 2000 C 128, p. 32).

[109] Further on this matter, see e.g. Dutson, 'Transnational E-Commerce' (2000) 10 *Computers and Law*, issue 6, pp. 25–27; Stone, *supra* n. 29, p. 12.

[110] Cf Powell & Turner-Kerr, *supra* n. 6, p. 26 (apparently questioning the veracity of this point).

What is most problematic with the provisions of the proposed Regulation, along with the Commission commentary on them, is that they fail to resolve – let alone address – many of the major issues that are dealt with in this paper. To begin with, there is a failure to provide detailed guidance on the meaning of the expression "directs such activities" (Art. 15(1)(3)) in the context of Internet-based marketing and contracting. Recital 13 in the preamble to the proposed Regulation seems to indicate that the mere fact that a vendor's website is accessible from a particular state is sufficient to deem the vendor as having 'directed' activity to that state for the purposes of Art. 15(1)(3).[111] In its explanatory memorandum, however, the Commission appears to limit inclusion of such activities within the scope of Art. 15(1)(3) to those carried out via *interactive* websites:

> [t]he concept of activities pursued in or directed towards a Member State is designed to make clear that point (3) applies to consumer contracts concluded via an interactive website accessible in the State of the consumer's domicile. The fact that a consumer simply had knowledge of a service or possibility of buying goods via a passive website accessible in his country of domicile will not trigger the protective jurisdiction. The contract is thereby treated in the same way as a contract concluded by telephone, fax and the like, and activates the grounds of jurisdiction provided for by Article 16.[112]

Unfortunately, the Commission does not elaborate on what is exactly meant by an 'interactive' website. It seems safe to assume, though, that interactivity entails a facility for exchange of information between the website and those visiting it, including a facility for placement of purchase orders.

A second major uncertainty concerns the vexed issue of whether digitized products may constitute goods. The proposed provisions do not bring any clarity to this issue, neither does the Commission's explanatory memorandum. Admittedly, the issue loses some of its significance in relation to the proposed Art. 15 given that Art. 15(1)(3) refers to 'all other cases'; i.e. even if digitized products are found not to constitute 'goods' pursuant to Arts. 15(1)(1) and 15(1)(2), their purchase may still fall within the ambit of Art. 15(1)(3). This notwithstanding, it would be advantageous for consumers that such products were found to be 'goods', as the purchase of the products could then fall under either of the first two (relatively uncomplicated) paragraphs of Art. 15 (granted, of course, that the purchases also satisfy the other conditions of these paragraphs).

One possible strategy worth pursuing would be to make it clear in the *travaux préparatoires* and/or recitals to the proposed Regulation that the

---

[111] Recital 13 reads: '…whereas, in particular, electronic commerce in goods or services by a means accessible in another Member State constitutes an activity directed to that State …'.

[112] COM(1999) 348 final, 14.07.1999, p. 16.

concept of 'goods' in Art. 15 covers digitized products. Another possible strategy would be to include a specific reference to digitized products in the proposed provision, such that references to 'goods' become references to 'goods and digitized products'.

Other unfortunate omissions in the proposed Regulation and Commission commentary on it include:

1. failure to address whether a website may constitute a 'branch, agency or other establishment' (Art. 15(2)); and

2. failure to address the issue of protection of the vendor's good faith (including the extent of such protection).

At the same time, the proposed provisions dispense with the requirement set down in Art. 13(1)(3)(b) of the Brussels Convention ('the consumer took in that State the steps necessary for the conclusion of the contract').[113] This omission breaks with the basic assumptions upon which current law builds and will probably enable a consumer who is situated in e.g. the vendor's State when he/she enters into an electronic contract with the vendor, to enjoy the special protection extended by Art. 15 even when it is doubtful that the consumer expects or should be entitled to expect that he/she can sue in the court of the State where he/she is domiciled. For instance, under the proposed Art. 15, a consumer who is domiciled in Germany but who travels to Italy and, whilst there, accesses an Italian website (using e.g. a portable computer), then orders and picks up a product from that site, and subsequently takes the product back to Germany, will apparently still be able to sue in a German court with respect to a dispute over the product or contract. Such a result is problematic as it is extremely doubtful that the consumer in that scenario would expect or should be entitled to expect that he/she could sue in a German court.

5 Conclusion

This paper shows that the provisions of Art. 13 of the Brussels and Lugano Conventions can be interpreted in a such a manner that they are able to satisfactorily meet the legitimate interests of both vendors and consumers in the context of e-commerce. This possibility notwithstanding, much uncertainty surrounds the exact scope of these provisions in such a context. Concomitantly, much uncertainty accompanies how the provisions will be construed by the ECJ or other judicial bodies with respect to Internet transactions. Hence, it cannot be taken for granted that the judiciary will interpret Art. 13 in the manner argued for in this paper. Unfortunately, Art. 15 of the proposed Regulation on jurisdiction fails to

[113] Cf. Art. 7(1)(b) of the preliminary draft Hague Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters which retains such a requirement.

significantly roll back the uncertainty. In the interests of establishing secure legal parameters for both vendors and consumers in an e-commerce environment, this failure must be rectified in the future work on reform of the Brussels and Lugano Conventions.