

«Some impacts of article 15 paragraph 1 litera c of the Revised Lugano Convention»

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Requirement of «direction of commercial or professional activity by any means»

- Problem: Lack of legal definition of this connecting criterion in the Revised Lugano Convention
- Yet high degree of practical relevance
- Interpretation of this legal term according to jurisprudence and prevailing doctrine

Requirement of «direction of commercial or professional activity by any means»

- Full range of communication tools in regard of market processing from abroad (advertisement in newspapers, tv, cinema, internet, radio etc.)
- For banks: assignment of external asset managers
- No physical presence of the service provider in state of consumer's domicile needed
- Problem: operation of website

Operation of website as a directed commercial or professional activity

- Before September 2012 distinction between an active and passive website (see EJC decision C-190/11 Daniela Mühlleitner / Ahmad Yusufi / Wadat Yusufi)
 - ➔ only a website granting possibility of direct conclusion of contract was deemed to be a directed commercial or professional activity
- Today no necessity of such distance contract
- Instead case by case assessment – problem of foreseeability

- Possible criteria:
 - International nature of provider's activity
 - International travel instructions
 - Use of other language than language at company's head office
 - Use of other currency than currency at company's head office
 - Telephone number with international country code
 - Use of other domain than domain of company's head office (e.g. .com instead of .ch)
 - Mentioning of international customers with domicile abroad
- Possibility of protection: Disclaimer

Requirement of «connection»

- Consumer contract in question falls within the scope of the directed commercial or professional activities
- If service provider only directs one part of its activity to the state of consumer's domicile and the contract does not fall within this part, there is no privilege under Article 15 paragraph 1 litera c.

Jurisdiction

When all requirements pursuant to article 15 paragraph 1 litera c of the Lugano Convention apply, then

- exclusive jurisdiction in the state of consumer's domicile for claims against consumer by service provider
- consumer's choice of jurisdiction for claims against service provider: state of service provider's domicile or consumer's domicile

Applicable law

- Swiss court applies Swiss Code on Private International Law («CPIL»)
- A contract is generally governed by the law chosen by the parties (Art. 116 para. 1 CPIL)
- A consumer contract pursuant to CPIL is mandatorily governed by the law of consumer's habitual place of residence. No choice of law (Art. 120 CPIL).
- Definition of consumer and consumer's contract according to CPIL differs from Lugano Convention

- Courts of the European Union apply the «Rome I Regulation» («Rome I»)
- A contract is generally governed by the law chosen by the parties (Art. 3 para. 1 Rome I)
- A consumer contract is generally governed by the law of the country where the consumer has his habitual residence
- A choice of law is possible, but only if not resulting in depriving the consumer of the protection accorded to him by provisions of his domicile law
- Competent court will make a prognosis of favorability and selectively apply favorable law
- Favorable law: (i) national law of State of residence and/or (ii) MiFID (“Markets in Financial Instruments Directive”)

Precautionary measures in regard of cross-border private banking activities?

- Adaptation of internal rules in line with foreign law
- Disclaimer on webpage
- Arbitration clause
 - Banking contracts are of pecuniary nature and may be submitted to arbitration (Art. 177 CPIL)
 - Arbitral tribunal rules according to the law chosen by the parties (Art. 187 CPIL)
 - Enforcement according to the New York Convention
 - Problem: Arbitration clause in a consumer contract may be deemed unfair → objection of order public violation in the process of enforcement