Protection of weaker parties

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Protection of weaker parties

- Procedural law – Regulation Brussels I
- Substantive Law – Regulation Rome I, Rome Convention, Directive on Unfair Contracts Terms and other directives and initiatives
- Arbitration
Protection of weaker parties

• Consumer
• Employee
• Insurance contracts

• Weaker party – bargaining power, level of knowledge, commercial terms and conditions
Brussel I. Regulation

• The articles 15-21 of the Regulation set down special rules for jurisdiction in chosen matters – consumer contracts and individual contracts of employment.

• The reason for such provisions – protection of the „typically“ weaker party.
Brussel I. Regulation

• Brussels I Regulation - application
• Lex specialis:
  – Art. 2 – general provisions
  – Art. 5 and 6 – special jurisdiction
  – Art. 35

Defendant must be domiciled in Member State (MS)
  – Art. 4

Interpretation – autonomous, restrictive
Brussel I. Regulation

• 3 steps of protection of weaker party in procedural law:
  – Prorogation clause – Art. 17, 21
  – Right to sue – Art. 16 - mandatory
  – Entitlement to be sued – Art. 16
Jurisdiction over consumer contracts

- Articles 15-17 of the Regulation
- The weaker party – the consumer – adhesive contracts.
- The contracts for a purpose which can be regarded as being outside of his trade or profession.
- „passive consumer“ - the one who buys only in the Member state, where he is domiciled x active
- Does not apply to contracts of transport, unless they are combined with accommodation.
- Active x passive consumer - examples
Jurisdiction over consumer contracts

Consumer contracts – requirements – Art. 15:

a) Contracts for the sale of goods on instalment credit terms.

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

c) In all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.
Jurisdiction over consumer contracts

- Prorogation agreement
- Article 17 – protects consumers from being deprived from procedural rights

The application of the article 23 contrary the provisions of this section is not allowed, however the article 17 allows prorogation agreement over consumer contracts, if:

a) It is entered after the dispute – why?
b) It allows to chose the court to the consumer,
c) It confirms the jurisdiction of courts of Member state, where both contract parties are domiciled.
Jurisdiction over consumer contracts

- List of possible unfair terms
- „clause in a consumer contract which has the purpose or the effect of depriving the consumer of his right to go to court may be set aside as invalid“
- -> jurisdiction agreement permissible under Art. 17 may be set aside
Jurisdiction over consumer contracts

- **Case C-240/98 Océano Grupo Editorial**
  - Two Spanish companies had entered into contracts with a number of consumers domiciled in Spain, purchase by instalments of encyclopaedias
  - The contract contained clause on exclusive jurisdiction on the Spanish court – where the sellers had their principal places of business
  - Purely national case -> Brussel Convention not applicable
Jurisdiction over consumer contracts

• Small claims
• Consumers did not pay the sums – companies instituted proceedings at the designated court
• The Spanish court – questions on jurisdiction – ECJ:
  – Can the national court of its own motion determine whether an unfair term is void under the Unfair Contracts Terms Directive?
Jurisdiction over consumer contracts

• ECJ’ answers:

• Unfairness of the jurisdiction clause – court may be of long distance away from the consumer’s domicile

• Case concerning small claims – large costs for the consumer, deterrent to forgo any legal remedy

• Jurisdiction clause was not individually negotiated – unfair

• The national court is of its own motion able to determine unfairness of terms in consumer contracts
Jurisdiction over consumer contracts

- Prorogation clauses - Art. 23 – above
- Tacit jurisdiction agreement – Art. 24 – applicable in consumer contracts?
- ...a court of a MS which a defendant enters an appearance shall have jurisdiction.
- Literature, commentaries – not in consumer contracts, ECJ has not decided...
Jurisdiction over consumer contracts

☐ Lack of **definition** of „consumer“ – autonomous definition (LTU v. EUROCONTROL)

☐ **Case C-464/01 Johann Gruber v. Bay Wa AG**

- Gruber (Austrian citizen) was running a business in his farm, his business took 40% of the activities concerning the functioning of the farm, 60% of them were private.

- He ordered roof tiles from German company and just said he is a entrepreneur, but did not specified he needs the roof tiles as a private consumer or as entrepreneur.
Jurisdiction over consumer contracts

- *The tiles had defects and he wanted to sue in Austria according to article 16 of the Regulation.*

Questions to ECJ:

1. Where the purposes of a contract are partly private, does the status of “consumer” for the purposes of Article 15 of the Regulation depend on which of the private and the trade or professional purposes is predominant, and what criteria are to be applied in determining which of the private and the trade or professional purposes predominates?
Jurisdiction over consumer contracts

2. Does the determination of the purpose depend on the circumstances which could be objectively ascertained by the other party to the contract with the consumer?

3. In case of doubt, is a contract which may be attributed both to private and to trade or professional activity to be regarded as a consumer contract?
Jurisdiction over consumer contracts

- Person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade or profession **may not rely on the special rules of jurisdiction** laid down in Articles of the Regulation, unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply.

- It must be taken into account all the relevant factual evidence objectively contained in relationship.
Jurisdiction over consumer contracts

• Person who claims the capacity of consumer must not behave in such a way as to give the other party to the contract the legitimate impression that he was acting for the purposes of his business.

• If a person can be considered as entrepreneur and consumer according to one contract, he should be considered as the entrepreneur unless the business purpose is insignificant (trivial).
Jurisdiction over consumer contracts

- **Case C-269/95 – Francesco Benincasa v. Dentalkit Srl.**

- Benincasa (Italian citizen) concluded a franchising contract with Dentalkit with a view to setting up and operating a shop in Munich. In that contract Dentalkit authorized Mr Benincasa to exploit the exclusive right to use the Dentalkit trade mark within a particular geographical area.

- The contract contained a prorogation clause for Italian courts.

- Mr Benincasa set up his shop and made several purchases, for which, he never paid.
Jurisdiction over consumer contracts

• Questions to the ECJ:
1. Conclusion of contract for future, not at the present – can be regarded as consumer contract?
2. Has the court seized in prorogation clause right to rule on his own jurisdiction?
Jurisdiction over consumer contracts

• Plaintiff who has concluded a contract with a view to pursuing a trade or profession, not at the present time but in the future, may not be regarded as a consumer.

• The court agreed upon in the prorogation clause has right to rule on his own jurisdiction even in case when the contract is contested to be invalid (void)
Jurisdiction over consumer contracts

• **Case C-96/00 Gabriel**

• Art. 15 v. Art. 5.1 and 5.3

• Mr. Gabriel in Austria got personalised letters from company Schlank&Schick in Germany – he was winner of amount of 3500 Euro, the claim was subordinate to order of goods of minimum value 15 Euro, he ordered the goods, he got the goods but not the promised price.
Jurisdiction over consumer contracts

• Questions:
• (1) a contractual claim under Article 15; or
• (2) a contractual claim under Article 5(1); or
• (3) a claim in respect of a tort, delict or quasi-delict under Article 5(3)?
Jurisdiction over consumer contracts

- Answers:
- Article 5(3) – excluded – non-contactual obligations!
- Article 15 – lex specialis for Article 5(1)
Jurisdiction over consumer contracts

☐ Consumer domiciled in MS requiring a mail-order company established in another Contracting State to pay him a financial benefit in circumstances where that company had sent to that consumer in person a letter likely to create the impression that a prize would be awarded to him on condition that he ordered goods to a specified amount, and where that consumer actually placed such an order in the State of his domicile without obtaining payment of that financial benefit, are contractual in nature in the sense contemplated in Article 15 of Regulation
Jurisdiction over consumer contracts

- **Case C-27/02 Engler v. Janus Verand GmbH**

  Engler from Austria received payment notice, according to which she was entitled to a price, she only had to turn it back. She sent the payment notice back, did not get any money.

- Articles 5(1), 5(3), 15

- Differences from Gabriel
Jurisdiction over consumer contracts

• **Case 150/77 Bertrand v. Paul Ott**

German company concluded sales agreement with French company. The price should have been paid in two instalments. The French company did not paid the first – the German company initiated proceedings in Germany.

*The question – are two instalments sufficient to take the contract as sale on instalment credit? And when two companies conclude sales agreement – is one of them weaker (consumer)*?
Jurisdiction over consumer contracts

- Sale of instalment credit – autonomous interpretation
- Article 15 – restrictive interpretation
- Instalment credit – protection of weaker party, not two companies – not consumer
Jurisdiction over individual contracts of employment

- Articles 18-21 Regulation Brussles I
- Article 20(2) – right to counter claim
- The weaker party is employee
- The former Brussels Convention did not include any provisions in relation to individual empl. Contracts
- Later part of the Art. 5(1)
Jurisdiction over individual contracts of employment

☐ The employer may be sued:

a) In the courts of the Member state where he is domiciled
b) In another Member state:

1. In the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or

2. If the employee does not or did not habitually carry out his work in any one country, in the courts for the place, where the business which engaged the employee is or was situated.

☐ The employee may be sued only in courts in the Member state where he is domiciled.
Jurisdiction over individual contracts of employment

☐ **Prorogation agreement**

☐ The application of the article 23 contrary the provisions of this section is not allowed, however the article 21 allows prorogation agreement individual contracts of employment, if:

a) It is entered after the dispute has arisen,
b) It allows the employee to chose the courts.

Be aware of Art. 35!
Jurisdiction over individual contracts of employment

• Limitations on jurisdiction agreements:
  1. Non-acceptance of tacit submissions according to Art. 24
  2. Restriction on the freedom of choice of the competent court – in Art. 21 there os lack of similar provision as in Art. 13(3) or 17(3)
Jurisdiction over individual contracts of employment

- **Case C-383/95 Petrus Rutten v. Cross Medical Ltd.**

Rutten was an employee of Cross Medical Ltd. (UK) – he exercised his work in Netherlands and in other countries. After he terminated the work for the company he sued the company in Amsterdam.

The question – how to determine **the place of work** – where he habitually carries out his work?

The place which is the real centre of his work activities.
Jurisdiction over individual contracts of employment

• Where an employee carries out his work in several MS - the place where he habitually carries out his work, is the place where he has established the effective centre of his working activities.

• It is necessary to take into account the fact that the employee spends most of his working time in one of the MS in which he has an office where he organizes his activities for his employer and to which he returns after each business trip abroad.
Jurisdiction over individual contracts of employment

*Case C-437/00 Giulia Pugliese v Finmeccanica SpA*

- Ms. Pugliese worked for Italian company in Torino.
- Since 1990 she held up this employment contract and started to work for company in Muenchen, Germany. The Italian company had 20% of shares of the German company.
- The Italian company paid Ms. Pugliese her appartment, travel expenses, insurance...
- In 1995 Italian company cancelled the first contract and failed to pay expenses and salary.
Jurisdiction over individual contracts of employment

• Question to ECJ:

1. Where is the place, where the employee habitually carries out his work in case of two employment contracts?
Jurisdiction over individual contracts of employment

• In a dispute between an employee and a first employer, the place where the employee performs his obligations to a second employer can be regarded as the place where he habitually carries out his work when the first employer, with respect to whom the employee's contractual obligations are suspended, has, at the time of the conclusion of the second contract of employment, an interest in the performance of the service by the employee to the second employer. The existence of such an interest must be determined on a comprehensive basis, taking into consideration all the circumstances of the case.
Protection of weaker parties

• Substantive law
• Choice of law rules
Protection of weaker parties

- Czech Law – Civil Code – consumer protection
- European Directives on consumer protection:
Protection of weaker parties

• **Rome Convention** – choice of law rules

• Article 5 – certain consumer contracts
  - Be aware of Art. 5(5) - apply to a contract which provides for a combination of travel and accommodation

• Article 6 - individual employment contracts

• Article 7 – mandatory rules – especially for employement contracts (public laws)
Protection of weaker parties

• Regulation Rome I
• Art. 6 – consumer contracts
  – Habitual residence of the consumer
  – Interesting – 6(1)b – conclusion of contracts via internet, examples
  – „directs“ such activities

Article 8 - individual employment contracts
Protection of weaker parties in arbitration

- **Arbitration**
- Many problems – consumers, employees
- Directive on Unfair Terms – arbitration clause in consumer contracts – unfair
- Growing number of disputes especially in consumer cases, no case law in employment disputes
- Possible ways – constitutional procedural rights, European Convention on Human Rights
Protection of weaker parties in arbitration
Děkuji za pozornost

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