CJEU on international element requirement for jurisdiction over consumer contracts in the case Commerzbank, C-296/20

Is the international (foreign) element required at the outset, at the time of conclusion of the contract, in order to trigger the applicability of the rules on jurisdiction of the Lugano II Convention on jurisdiction over consumer contracts and to protect the consumer from being sued outside of the State of his (her) domicile?

This is the question that the Court of Justice addresses in its judgments delivered this Thursday in the case Commerzbank, C-296/20.

Factual background

A consumer domiciled in Germany concludes a contract, through a branch in the same State, with a company whose head office is also situated in the said State.

Fast-forward a few years, the consumer relocates to Switzerland. Few months later, the professional brings an action against the consumer before a German court.

The first instance court declares the action inadmissible on the ground that it lacks jurisdiction. The appeal brought by the professional before the second instance court is unsuccessful. Ultimately, the case is brought before the Bundesgerichtshof, which refers the case to the Court of Justice.

Outline of the preliminary questions…

In its request for a preliminary ruling, the Bundesgerichtshof acknowledges that the sole possible basis for the international jurisdiction of the German courts lies within Article 5(1) of the Lugano II Convention (jurisdiction in matters relating to

contract: place of performance of the contractual obligation; supposedly in Germany). In fact, the consumer was domiciled in Switzerland at the time when proceedings were brought and thus the German courts have no international jurisdiction either under Article 2(1) of the Convention (domicile of the defendant) or under its Article 16(2) (jurisdiction for the proceedings brought against a consumer: domicile of the defendant).

However, in the light of Articles 15(1)(c) and 16(2) of the Lugano II Convention, the consumer can be sued before the courts of the State in which he or she is domiciled, if – as the former provision puts it – "the contract has been concluded with a person who pursues commercial or professional activities in the State bound by this Convention of the consumer's domicile or, by any means, directs such activities to that State or to several States including that State, and the contract falls within the scope of such activities".

It may seem that, for the Bundesgerichtshof, Article 15(1)(c) presupposes that the other party to the contract is a person who pursues commercial or professional activities abroad, in the State bound by the Convention of the consumer's domicile or, by any means, directs such activities to that State and the contract comes within the scope of such activities.

Thus, a doubt arises: a contract concluded in a purely national situation, with no international (foreign) element present, is capable of falling within the scope of Article 15(1)(c) of the Lugano II Convention due to the subsequent relocation of one of the parties to the contract to a different State?

In substance, this is the legal issue that lies at the heart of the preliminary questions referred to the Court.

The first preliminary question boils down to the following point: does Article 15(1)(c) of the Lugano II Convention apply also in the situation where the parties were domiciled in the same State bound by the Convention at the time when the contract was concluded and a foreign element to the legal relationship arose only subsequently because the consumer relocated at a later date to another State bound by the Convention.

In the affirmative, by its second question, the Bundesgerichtshof asks whether it also necessary for the activities of the professional to be pursued in or directed to the new State of domicile of the consumer and for the contract to come within the

scope of such activities.

… and of the Court’s answer

Earlier this month, AG Campos Sánchez-Bordona delivered his Opinion in the case at hand. Geert Van Calster provided a comprehensive summary of its findings and I am happy to refer to his contribution. For some further interesting remarks see also the editors’ post at the EAPIL blog.

As for the judgment itself, the reasoning of the Court is straightforward: referring to the order in mBANK on the Brussels I bis Regulation, the Court hold that also under the Lugano II Convention the concept of “consumer’s domicile” must be interpreted as designating the consumer’s domicile at the date on which the court action is brought (paragraph 36).

The Court observes then, in particular, that Article 15(1)(c) of the Lugano II Convention does not require, neither explicitly nor implicitly, for the activities of the professional to be directed to a State other than the State in which the professional is established (paragraph 42).

Concerning the predictability of the forum for the professional, the Cour observes that actor sequitur forum rei is a principle central for the Convention itself, pursuant to its Article 2(1) (paragraph 54).

In the light of the above, the Court provides an answer according to which a contract falls within the scope of Article 15(1)(c) of the Lugano II Convention also in the event of a subsequent appearance of the international (foreign) element, due to the relocation of the consumer’s domicile.

The judgment is available here (in French and German, no English version at the time of posting).