

## **A LEGAL REVIEW OF ASSERTING JURISDICTION IN CROSS-BORDER ELECTRONIC COMMERCE DISPUTES ADJUDICATION IN THE EUROPEAN UNION**

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**ABSTRACT:** *As electronic-commerce becomes cross-border transaction, Questions about which country's court has the competent jurisdiction to adjudicate cross border electronic commerce disputes are been asked. Countries need to have the capacity to guarantee the protection of local organizations. Be that as it may, asserting jurisdiction in adjudicating over online business transactions is vital in this protection. Despite the numerous researches on electronic-commerce disputes adjudication, it is interesting to know that there is limited empirical evidence that shows how and why parties choose a particular jurisdiction in an event of a disputes adjudication. This paper critically examines and review the current legal administrative rules and regulations adopted by the European Union in asserting jurisdiction in E-commerce disputes adjudication. It also outlined the shortcoming of the European Union approach and the recommendation on how to evacuate this shortcoming in asserting jurisdiction in cross border E-commerce disputes adjudication.*

**KEYWORDS:** electronic commerce, asserting jurisdiction, dispute adjudication, the eu

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### **INTRODUCTION**

As most academic works were carried out with regard to the formation of an E-contract and the clarification of issues of offer and acceptance, the essential issue of jurisdiction for disputes adjudication in cross-border E-commerce have not well been addressed. In fact, legal researchers have offered different proposals for enhancing jurisdiction of cross-border E-commerce disputes adjudication but the discussion of these splendid proposals in an attempt to assert jurisdiction either prove too lofty or not practical. The conflicting interest between sellers and buyers generates this jurisdictional problem, sellers do not want to be sued abroad and buyers prefer to seek solutions near home. If there is no agreement on jurisdiction, then the lack of this uniformity means that E-business organizations are confronted with the likelihood of being liable to any foreign lawful jurisdiction.

In the EU, the Electronic Commerce Directive outlined extra standards for private international law and manages the issue of court's jurisdiction.<sup>1</sup> However, the jurisdiction on E-commerce disputes adjudication was not covered in this Directive, hence the Brussels I Regulation,<sup>2</sup> plays out its part without significant legislation. Nonetheless, Article 23(2) of the Brussels I Regulation unequivocally recognizes conventions with E-commerce transactions. The Brussels I Regulation covers all member countries that are a signatory to it. Additionally, it applies to new member states as a major aspect of the *acquis communautaire*,<sup>3</sup> in this way it stretch out to the ten new EU individuals states<sup>4</sup> on their accession in 2004<sup>5</sup> and two more EU member states in 2006.<sup>6</sup> The Brussels I Regulation assumes an extremely critical part blending legal participation between members states and its accomplishment in encouraging cross-border suit cannot be undermined. Be that as it may, with the new difficulties of current business life, specifically new legal issues of E-commerce disputes adjudication, it is debatable to prove whether the Brussels I Regulations remain adequate to improve the efficiency of cross-border E-commerce disputes adjudication.

The Green Paper issued on 21<sup>st</sup> April 2009, accompanies the commission's report to launch a broad consultation with eight questions on the evaluation of the Brussels I Regulation.<sup>7</sup> These questions include:

1. The cancelation of middle measures to perceive and implement judgments of foreign nature. ("exequatur").
2. The function that comes with Regulation in the international legal order
3. The agreements by the choice of court clause
4. Industrial property
5. *Lis pendens*<sup>8</sup> and related actions
6. Provisional measures
7. The connection of the legislative rules and arbitral process, and
8. Other issues including consumer contract

The fundamental function of these questions is to gather conclusions on the most proficient method to adopt in order to expel the hindrances to free dissemination of judgments, improve assurance in cross-border jurisdiction identifying with one of the parties domiciled in a third nation instead of

<sup>1</sup> Recital 23 and Article 1(4) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (thereafter "EC Directive on electronic commerce").

<sup>2</sup> Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matter ("Brussels Regulation"), see Council Regulation (EC) No. 44/2001, 22 December 2000, Official Journal L 012, 16.01.2001.

<sup>3</sup> Hill (2005), p.51

<sup>4</sup> Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia and the same rule applied to Denmark as well from July 1, 2007.

<sup>5</sup> The Treaty of Accession sets out a number of technical amendments to the Brussels I Regulation: Annex II, [2003] OJL 12/1.

<sup>6</sup> Bulgaria and Romania, Council Regulation (EC) No. 1791/2006 of 20 November 2006, OJ L 363, 20.12.2006.

<sup>7</sup> Green Paper on the review of Council Regulation (EU) available at <http://www.ipex.eu/IPEXL-WEB/dossier/document.do?code=COM&year=2009&number=0175&extension=FIN>.

<sup>8</sup> A pending lawsuit.

a member state and avoid parallel procedures in various individual's states. Question 2 and 3 are concern with international jurisdiction issues. Despite the fact that the concern brought up in the review of the Brussel I Regulation do not directly focus on the vulnerability of asserting jurisdiction in cross-border E-commerce disputes adjudication, the subject is of paramount importance as such that all things considered in guaranteeing the smooth activity in the international legal order will think about the help of jurisdiction in E-commerce disputes adjudication. The Regulation of Brussels I only assert jurisdiction in civil and commercial matters.<sup>9</sup> Other important issues are excluded from the regime's scope.

### **The Brussels I Regulation**

The Brussels I Regulation undoubtedly dispensed the issue of jurisdiction and there was no expectation from the Convention that matters such as the internet and numerous other problems of E-commerce would cause the law courts to figure out where cases ought to be adjudicated. Moreover, the issue of E-commerce being addressed by the EU unmistakably fell overdue by the United States of America,<sup>10</sup> and a lot of this was ascribed to the absence of a consumer trust especially in security during internet transactions.<sup>11</sup>

Accordingly, the EU Council of Ministers on December 22, 2000, adopted the Brussels I with the main aim of modernizing the Brussels Convention.<sup>12</sup> On March 2002 Brussels I came into force.<sup>13</sup> The Brussels I regulation varied from the Convention with regards to its adoption, for it binds the individuals from the EU directly, as opposed to having every country adopting its own specific form in the legislative code.<sup>14</sup> There was a great academic discourse on if the Brussels I regulation would grant the country of origin approach or the country of destination approach during customer transaction.

The methodology used by the country of origin principle is that it manages every single legitimate argument about transactions that have been done online would be dictated by the law that governs the supplier, where the good or service started.<sup>15</sup> Customers that are believed to be hindered through this methodology in light of the fact that the methodology focuses on extraterritorial laws

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<sup>9</sup> Article 1(1) of the Brussels I Regulation.

<sup>10</sup> FRANDA, *supra* note 65, at 91 ("In 1999, for example, the EC [European Community] estimated e-commerce revenues for the fifteen EC nations at only \$16.8 billion, compared with \$71.4 billion ... for the United States alone.").

<sup>11</sup> Victorya Hong, "Brussels I" Angers EC Businesses, *INDUS. STANDARD*, Dec. 1, 2000 (on file with author) (quoting Leonello Gabrici, a commission spokesman, stating "a lack of consumer confidence is the main thing holding up the development of e-commerces").

<sup>12</sup> Brussels I, *supra* note 4.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Elisa Alexandridou, The Country of Origin Principle in E-Commerce Viewed from a Greek Law Perspective, in *Consumer Law in The Information Society* 103, 104 (Thomas Wilhelmsson Et Al. Eds., 2001) (Explaining the Country-Of-Origin Principle).

that they may not necessarily be comfortable when buying an item in a different state that is a member of the EU.

However, this issue is intensified in the event that a seller veils his abode on their website.<sup>16</sup> On the other hand, the methodology of the country goal pertains to the law of the purchaser's domicile in times of legal disputes. The principle is favorable to consumers,<sup>17</sup> yet it leaves a seller helpless against liability towards any extraterritorial jurisdiction when their website is able to be retrieved. The Brussels I regulation drafters grasped the country of destination methodology for the sake of increasing consumers trust in E-commerce. Article 15 of the Brussels I regulation widened the meaning of a consumers' transaction under Article 13, of the Brussels Convention. While the Brussels Convention required for a customer to a contract, there must be an accompaniment of a particular invite and also be finalized in the domicile of the consumer,<sup>18</sup> Brussels I regulation make no reference to the last prerequisite that states that the agreement should be finished in the supplier's place of residence<sup>19</sup> since the purchaser's actual physical area is difficult to find out.<sup>20</sup>

Again, the Brussels I clarify that agreements completed by means of an interactive site falls within its limits<sup>21</sup>, in this manner giving a consumer who is part of the EU a chance to purchase goods or services concluded online the benefit of disputing within their domicile. The consumers' flexibility in picking the domicile he or she will institute legal proceedings against for activity is therefore essentially fortified.<sup>22</sup>

The Brussels I additionally held that the Brussels Conventions confinement which limited the choice of a supplier's option on the choice of law to pick in the event of a legal suit being instituted in the customers' domicile.<sup>23</sup> Ultimately, even though Article 17 of the Brussels I takes into account the clauses for forum selection,<sup>24</sup> it will not be able to allow such legally binding understandings to take away from the customer's entitlement in instituting legal proceedings in their domestic jurisdiction unless such agreement has been concluded following the emergence of the dispute.<sup>25</sup>

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<sup>16</sup> Elisa Alexandridou, The Country of Origin Principle in E-Commerce Viewed from a Greek Law Perspective, in Consumer Law in The Information Society 103, 104 (Thomas Wilhelmsson et al. eds., 2001) (explaining the country-of-origin principle).

<sup>17</sup> Avril D. Haines, The Impact of the Internet on the Judgments Project: Thoughts for the Future, Preliminary Document No. 17, at 10, Hague Conference on Private International Law (Feb. 2002) (discussing the impact of the internet on the draft [Hague] Convention), available at <https://www.hcch.net/en/home>.

<sup>18</sup> See Brussels Convention, supra note 3, art. 13.

<sup>19</sup> Compare Brussels I, supra note 4, art. 15(1)(c) (explaining when and how a contract is concluded) with Brussels Convention, supra note 3, art. 13(3) (describing extra requirements for conclusion of a contract).

<sup>20</sup> Commission Proposal for Council Regulation Concerning the Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters, COM (99)348.

<sup>21</sup> Brussels I, supra note 4, art. 15(c) (making clear that a supplier who pursues or directs commercial activity into a consumer's member state has taken the necessary step towards linking the transaction to the consumer's domicile).

<sup>22</sup> Id. art. 16(1).

<sup>23</sup> Id. art. 16(2).

<sup>24</sup> Forum selection clauses are agreements between both parties of a contract to select a predestined jurisdiction to resolve any potential conflicts arising from the contract

<sup>25</sup> Brussels I, supra note 4, art. 17.

All in all, in the event, that a seller is operating a website that is “coordinating its activities” within member states of the EU, and as per Brussels I, the seller would be considered to be under the jurisdiction of that member state of the EU.<sup>26</sup> Brussels I brazenly ensures the customer’s forum choice through grasping the approach of the country of destination.

## **Principles of Jurisdictional Rules Embedded in Brussels I Regulation**

### ***General Jurisdiction***

Article 2 of the Brussels I Regulation states that a person who is a domicile in a member state might, whatsoever the nationality they are, be in a position to be sued in the legal system of such state. Besides, the rules of domicile within the Regulation of Brussels I regulate the domicile of peoples and a domicile of that company.<sup>27</sup> With regard to contracts that are contracted online, it becomes difficult to figure out the area that one of the parties is domiciled in, notwithstanding the fact that the complainant may be able to recognize the person to find out about the contract.<sup>28</sup> Under Article 59(1) of the Regulation states, for a natural individual, keeping in mind the end goal to decide if one or more of the persons is domiciled in specific member states or state, the applicable law that court should apply is the law of that particular court.

Under Article 60(1), it is clear that the Brussels I Regulation reasons that an organization or any other lawful individual or relationship concerning a legal or natural person is domiciled in an area that has;

- 1) A statutory seat; or
- 2) A focal organization or administration; or
- 3) A central area to conduct commercial activities

Across the internet, because the electronic transaction may be done after deliberation through audiovisual conferencing amid high ranking officers that live within various countries, it turned out to be more problematic to discover the area of the local administration.<sup>29</sup> According to the UN Convention on the Use of Electronic Communications International Contracts, “the area of the parties” is characterized as “a party’s place of business”.<sup>30</sup> In the event that natural individuals do not have a place to conduct their commercial activities, the individual's usual place of residence ought to be considered to be a factor when asserting jurisdiction.<sup>31</sup> It is important to note that the

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<sup>26</sup> Steve Hill, Trouble in Store? Many E-Commerce Sites are Breaking the Law Without Even realizing It. Make Sure You Don't Get Caught Out by Following Our Guide to Keeping Your Online Store Legal, INTERNET MAGAZINE, Apr. 2002.

<sup>27</sup> Article 60 of Brussels I Regulation.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Article 6(1) of the UN Convention

<sup>31</sup> Article 6(3) of the UN Convention; Article 15(4)(b) of the UNCITRAL model Law on Electronic Commerce.

UNCITRAL Model Law on Electronic Commerce is quite similar to the UN Convention, giving “if the creator or recipient does not necessarily have a place of commercial trade”.<sup>32</sup>

Personally, I think the individual's constant habitation on the Internet ought to be dealt with in the same way as an off-line rule, which is customary and ought to be associated with the normal dwelling place of the offender and not the complainant.

Besides, according to the UN Convention, an individual need not to demonstrate their area of trade which have two or more areas of commercial activity, and at that point, the area of commercial activity is what has the closest affiliation to relevant contracts.<sup>33</sup> The nearest linking influences are those that happen previously or during the concluding of that agreement.<sup>34</sup> As I would like to think, such issues do not have a distinction after the off-line world, which ought to identify with a legal base, focal management or central area of commercial activity.

As an individual or a lawful individual conducting electronic trade, their legal base, focal management or the key area of commercial activity can be proved by the plaintiff, then the outcome will be found by certain interfacing elements, for example, the enlistment of an offender's commercial activity, electronic outflows, licenses and a place of delivering goods or services, it would prompt an accompanying problem of unique or special jurisdiction.

### ***Special Jurisdiction***

The Brussels I Regulation, particularly Article 5, repeals after the over-all standard restricted by Article 2, that gives the plaintiff a chance to continue alongside an offender who is in a member state which the offender is not a domicile of. In such an arrangement, it has seven issues, for example, Article 5(1), regulates matters identifying with certain contractual agreements. This overall rule does not make a relationship to certain contracts such as insurance, consumer, and job contractual agreements.<sup>35</sup>

In order to determine “the area of execution of such a contractual commitment being referred to”<sup>36</sup> it becomes the central point on how to decide on any matter pertaining to jurisdiction. The area where the contract is executed, as per Article 5(1)(b), is the area of conveyance of where the goods or services were given or ought to be given. Meanwhile, the conveyance area is a nearby connecting factor for asserting a special and unique jurisdiction, and an automated contract will have no distinction from a contract that is paper-based when the agreement includes material conveyance of commodities. The problem faced when applying Article 5(1) falls on the understanding of whether there are a lot of places in the extent this article.

<sup>32</sup>Article 15(4)(b) of the UNCITRAL Model Law on Electronic Commerce.

<sup>33</sup> Article 6(2) of the UN Convention

<sup>34</sup> Article 6(2) of the UN Convention

<sup>35</sup> Article 8-14 of the Brussels Regulation governs insurance; Article 15-17 is about consumer contracts; Article 18-21 provides about employment contracts.

<sup>36</sup> Article 5(1) (a) of the Brussels I Regulation states that “A person domiciled in a Member State may, in another Member State, be sued in matters relating to a contract, in the courts for the place of performance of the obligation in question”. “The obligation in question” means that which is relied upon as the basis for the claim, explained by Morris, McClean & Beevers (2005), p.72.



Sadly, Article 5(1)(b) explicitly does not speak to the posture by the circumstances with regards to a contractual agreement of service. There are a lot of places for execution of the contracts issues and as to numerous places of conveyance of properties or the provision of a service<sup>37</sup>, This split into two classifications: the first is that distinctive contractual commitments have better areas of conveyance, and the second is the important contractual commitment have a lot of areas of conveyance.

With the first classification, two potential outcomes are apparent: First and foremost, disagreements concern in excess of a commitment. Article 5 (1) designates to the court's jurisdiction for each area of the contract execution concerning the dispute emerging out of the contractual commitment, which ought to be executed already at that particular area.<sup>38</sup> Secondly, circumstances that include more than one contractual commitment with more than a single principal contractual commitment. The principal contractual agreement will be executed in a court or courts that have jurisdiction over the entire case.<sup>39</sup>

With the second classification, there is an additional number of outcomes: First and foremost, as illustrated in *Color Drack GmbH v. Lexx International Vertriebs GmbH*<sup>40</sup>. The question was "whether the primary indent made under Article 5(1)(b) of Brussels I Regulation connected on account of a contractual agreement concerning the sale of goods including all areas of conveyance in a solitary member state",<sup>41</sup> then, provided that this is true, "regardless of if the complainant could sue in a court for its preferred area of conveyance"<sup>42</sup> amongst all areas of conveyances.

It was decided by the court on the relevancy primarily under Article 5(1)(b) that there are a lot of places of conveyance in a solitary member state that conforms to goals of consistency. Also, fundamental closeness of the principals of unique jurisdiction in issues which relate toward contractual agreement.<sup>43</sup> At the point when disputes emerge, the defendant ought to assume that they might be open to being sued in courts of member states other than courts where they are domiciled.

In spite of facts that an offending litigant may not have knowledge of how precisely which court the complainant may be able to sue them. They would absolutely have some knowledge that any court that the complainant may pick would be arranged in a member state of execution of such contractual commitment. With regards to inquiries on if the complainant can be able to sue on their very own option of court as per Article 5(1)(b). The court decided that for the reasons behind the use of this provision, the area of conveyance should have the nearest connecting issues between the contractual agreement with the court and "in such a matter. The reason for close connection

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<sup>37</sup> Hill (2005), p.135

<sup>38</sup> Case C-420/97 *Leathertex Divisione Sintetici SpA v. Bodetex BVBA* [1999] ECR I-6747, cited from Hill (2005), p.135.

<sup>39</sup> Case 266/85 *Shenavai v. Kreischer* [1987] ECR 239, cited from Hill (2005), p.135

<sup>40</sup> *Color Drack GmbH v. Lexx International Vertriebs GmbH* (Case C-386/05), [2007] I. L. Pr. 35

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

will come to play when in doubt about the place of the principal conveyance, which must be determined based on financial criteria".<sup>44</sup>

On the off chance that all areas of conveyance remain "without refinement", and "have a similar level of familiarity to the actualities in such a disagreement"<sup>45</sup>. The complainant will be able to sue in court for their preferred area of conveyance. This first inquiry prompts the second consideration: in that situation Article 5(1), (b) will still apply in the event that the areas of conveyance were in diverse member states. Where the important contractual commitment has been able to be done with regards to various areas by various member states. Subsequently the Advocate General (AG's) assessment, Article 5(1)(b) will not make a difference to such a circumstance such as the goal of foreseeability in the Brussels I Regulation which could not be accomplished<sup>46</sup>, that is a solitary area of execution for such contractual commitments being referred to could not be distinguished with the end goal of this provision. At that point, the plaintiff should swing over to the Brussels I Regulation, Article 2, as indicated by distinguishing that the court where the domicile of the defendant is will be the court to have jurisdiction over the matter.

To determine whether Article 5(1) applies to automated contractual disagreements and Article 5(1) can be employed to determine cross-border E-commerce disputes adjudication, first, it will be important to determine whether the automated contract is either for the sale of goods or for the provision of a service. A distinction will then be determined amid physical commodities and digitized products, material services and digitized services, including the physical execution and the digitized execution. In turn, this will render it conceivable to distinguish between distinctions and likenesses about the area of execution amongst both offline and online contracting.

First and foremost, commodities can be normal goods with substantial conveyance including digital goods alongside execution of the contractual obligations made over the world-wide-web, for example, eBooks, online diaries and in addition, software programs. In respect to software programs, there are scholarly experts in agreement over the fact that all software that is exchanged over the internet is categorized as "goods" this is for the purpose of the United Nations Convention on Contracts for the International Sale of Goods (CISG).<sup>47</sup>

However, the transport of goods via maritime, the provision of money-related services, giving online access to beneficiaries or planning a site for an organization ought to be termed as services rendered. Moreover, all software that passes the test of a purchasers needs ought to be seen as giving a service. Some of the time, in an unpredictable software advancement project, a bit of software system can be separated into independent areas so when there is payment by installment by concluding a milestone. The installment is to be expected from the purchase once concluding every reference point in the structure of a contract aimed at software improvement.<sup>48</sup>

Secondly, Digitized goods are tangible and intangible property and the circumstance where a party downloaded such digitized goods onto their device with the goal of having it situated on their hard

<sup>44</sup> Color Drack GmbH v. Lexx International Vertriebs GmbH (Case C-386/05), [2007] I. L. Pr. 35,

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Fawcett, Harris & Bridge (2005), p.514.

<sup>48</sup> Burnett & Klinger (2005), p.74.



drive, does not necessarily suggest that the significant site is where the electronic device is located. Or maybe, the consideration should be on whether the digitized items were situated when they are implied to be managed is the more mind-boggling inquiry.<sup>49</sup>

Finally, as examined between organizations the area of conveyance will generally be included through the contractual agreement of sale.<sup>50</sup> In any case, it winds up muddled in the event that all participants do not show the area of conveyance and services may likewise be given through the seller's offices. Besides, a much more intricate situation would occur when the transaction includes conveyance of digitized goods since there are various areas where electronically generated transactions are prepared. For instance, an area of notice and receiving of receipt of such notice, where the vendor has a predetermined individual interfacing factor and, in the event, that a beneficiary has a predetermined individual connecting.

As indicated under Article 5(1)(b) of the Brussels I Regulation, execution areas of the contractual obligation ought to be esteemed on being the area of conveyance. Because it is exceptionally hard to find out the area of execution with regards to whether goods that are digitized have anything to do with online conveyance. As I would like to think, the beneficiary's area of commercial trade ought to be a reason when considering it as a connecting factor. Such a connecting element may be likewise perfect with tests regarding jurisdiction done by the US as deliberated above.

### ***Exclusive Jurisdiction***

Article 22 of the Brussels I Regulation regulate disputes that are liable to exclusive jurisdiction as per the focal issue under discussion. It outlined numerous compulsory and exclusive principles of jurisdiction paying little attention to domicile or agreement between the parties for specific procedures identifying with immovable property. Certain procedure concerning the development and disintegrations of organizations and the choice of their organs, certain procedures concerning sections in public enlist certain procedure concerning intellectual and procedure concerning the authorization of judgments. Along these lines, courts that are part of member states in which the property is arranged should have restricted jurisdiction over disputes concerning property or tenure.

Not too long ago, Green paper on Review of the Brussels I Regulation by the EU deliberated on whether it may be necessary for expanding the extent of restricted jurisdiction in terms of company law towards extra issues identified with the internal organization and the company's decision-making policy.

In my view, whatever the result that alludes to exclusive jurisdiction as a result of the extension of its scope, the impact of the electronic contractual agreement brought in courts will not be influenced. At the end of the day, if the parties manage the above subject matter in an electronic contractual agreement indicates the article 22 ought to be applied with prejudice.

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<sup>49</sup> Fawcett, Harris & Bridge (2005), p.1301.

<sup>50</sup> Deveci (2006), p.43

## THE ROME II REGULATION

The Brussels I regulation talk about the type of court that has jurisdiction on a matter. The 1980 Rome Convention, also known as the Rome I talks about the legal substantive choices that apply when a court of law is picked for adjudicating such contract disputes.<sup>51</sup> It allowed legally binding agreements to incorporate a forum selection clause so long as a purchaser is not precluded from protection of securing from their native consumer law.<sup>52</sup>

This kind of protection for the consumers was permitted, given that such an agreement was accompanied by an invitation or by a member state of a consumer and that such agreement was resolved in the domicile of the consumer,<sup>53</sup> during a comparative initiative to refresh the Rome I, into Rome II which was drafted by the EU. The Rome II is planned to fit members states standards with respect to strife laws.<sup>54</sup> While Rome I is connected with issues that are both contractual and non-contractual in nature, the Rome II is only connected to issues that are non-contractual.<sup>55</sup> In particular, Rome II's concern is cross-border obligations aimed at disagreements where there are no agreements, to begin with. This speculative proposition also grasps the approach of country of destination<sup>56</sup> and furthermore concerns the nations law where the offended litigant lives with non-contractual commitments.<sup>57</sup> The Rome II Regulation was initially submitted by the commission in July 2003 and was fully adopted in July 2007. However, from January 2009, the Rome II Regulations creates a harmonized set of rules within the EU to regulate choice of law in civil and commercial matters with regard to non- contractual obligations.

Mark Bohannon, a member of the Software and Information Industry Association, commented that "Rome II manages practical and functional law. The idea that they will have the capacity to alter the principle of the country of destination into a practical and legal hypothesis will be very different than when one is discussing, essentially, a venue jurisdiction question."<sup>58</sup>

In July of 2003, a number of International Chamber of Commerce (ICC) business delegates communicated genuine hesitations concerning the draft of Rome II and particularly the country of destination approach.<sup>59</sup> Michael Hancock, a proven expert in the field of cyberspace, and who partly heads ICCs work on E-commerce jurisdictional matters, remarked, "Organizations rendering service to clients independent from the European Union could be sued below different kind of laws, contingent upon the area the plaintiff happened to reside or has a product."<sup>60</sup> Subsequently,

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<sup>51</sup> Rome I, supra note 5.

<sup>52</sup> Rome I, supra note 5, art. 5.

<sup>53</sup> These provisions are similar to those mandated in Brussels I. Rome I, supra note 5, art. 5(2).

<sup>54</sup> Rome I, supra note 5.

<sup>55</sup> Dr. ECommerce, (2001).

<sup>56</sup> see Green Paper, supra note 6, at 31

<sup>57</sup> Proposal of Council Regulation on the Law Applicable to Non- Contractual Obligations, art. 3 [hereinafter Rome II Draft Proposal] (describing application of provisions to non-contractual obligations), available at <http://pub.bna.com/eclr/romeeng.htm>

<sup>58</sup> Anandashankar Mazumdar, (2002).

<sup>59</sup> Rome II Gets "Thumbs Down" From Business, ICC (International Chamber of Commerce): The World Business Organization, July 25, 200.

<sup>60</sup> Id.

Rome II would be a horrible nightmare for several businesses that render online services," says Jonas Astrup, the ICC's policy manager in charge of Commercial Law and Practice.<sup>61</sup>

### **The Clauses of Choice of Court**

An all-round contract that is drafted, and which has had accurate connections having more than one country, and contains a decision concerning jurisdiction or clauses by a court is frequently alluded to as an "exclusive" clause, giving all disagreements amongst the concerned parties emerging from the agreement.<sup>62</sup>

Under the Brussels I Regulation, it is clear under Article 23 that it approves a party to go into an understanding assigning a court or courts when deciding such disputes. In any case, Article 23(1) will apply in the event that one of the parties is domiciled in a state that is a member. This has concurred that law courts of one of the member states need to have jurisdiction over disagreements emerging regarding a specific legitimate affiliation. One of the participants can choose the court or any other particular courts of any country.

Take, for instance, Company A, located in France and a second Company B, located in Belgium, have agreed on a jurisdictional clause that states "disputes are to be alluded to the French courts" in their automated sales contracts. Under such conditions, the courts in France will be assigned jurisdiction throughout company A and company B's dispute. In any case, if at a later date company, A and company B enter into a different legally binding agreement with no jurisdictional clauses at that point the first jurisdictional clause for the contract of sale does not award jurisdiction as to any disagreement emerging in a new contract.<sup>63</sup>

In such an event that the clause on jurisdiction incorporates decisions concerning a specific court of law, Article 23 gives that court proper jurisdiction, however, not in a different court that is in a similar country. Nevertheless, Country A and Country B will be able to alternatively pick a different court, for example, the German court, rather than the France or Belgium legal system to adjudicate the matter. Article 23 did not "need to target a link amid any of the parties or any underlying topic that concerned the legal disputes and the region of the court that is picked."<sup>64</sup> Besides, Country A and Country B may also be able to accomplish that there is an additional agreement on jurisdiction which differ from the prior arrangement since Article 23 depends upon standards of the parties self-sufficiency which does not keep any of the party from altering their choices.<sup>65</sup>

Nonetheless, Article 23(3) incorporates an exclusion towards the parties, that is, none of the parties has domicile in a member state. In such a circumstance, the court that is chosen to make the

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<sup>61</sup> Id.

<sup>62</sup> Morris, McClean & Beevers (2005), p.87.

<sup>63</sup> WH Martin Ltd v. Feldbinder Spezialfahrzeugwerke GmbH [1998] ILPr 794, cited from Hill (2005), p.103.

<sup>64</sup> Castelletti v. Trumppy [1999] ECR I-1597

<sup>65</sup> Sinochem v. Mobil [2000] 1 Lloyd's Rep 670.

decision of presence and implementation of jurisdiction as per the law is their own.<sup>66</sup> The alternative individuals' courts should, therefore, have no kind of jurisdiction concerning such disputes reserved for the chosen legal court or courts that have refused jurisdiction. When it comes to E-contracting cases, embedding an option concerning a jurisdictional clause in ordinary online terms and conditions can be able to maintain a strategic distance from vagueness on the court that has the proper jurisdiction in the event that such disagreements emerge. For instance, the proprietor of the website is entitled to fuse an option of a jurisdictional clause hooked on a collaborative click-wrap agreement that should be clicked by the purchaser, often an "I concur" button in order to issue an order of consent.<sup>67</sup>

### **The shortcoming of The EU Approach**

Even though the Brussels I regulation and Rome II regulation by the EU together accentuate rules that are bright-line per se in order to facilitate the exchange of goods and services, there are still some shortcomings with such a supervisory approach.

To begin with, the acts, as they are composed, remain equivocal during elucidation with regards to the world-wide-web. Secondly, the principle of a country of goal, that was adopted in Brussels I and the draft proposition of Rome II comes with significant shortcomings. Since this approach renders vendors to increase disputes resolution costs, vendors might be enticed to carry on these expenses to buyers by a method of higher costs. Vendors may likewise diminish the quantity of decisions accessible to buyers by restricting the utilization of their websites to specific customers through restricted computerized frameworks, or through basically shutting down the websites from being active.

The EU approach fundamentally influences small and mid-sized organizations that may not necessarily see online business being the ideal medium to develop their organizations. The substantial conglomerate that works all through the EU or on a worldwide premise would more be able to effortlessly afford the cost of legitimate legal skill to maintain a strategic distance from the different legal entanglements involved with global custom. Small and medium-sized organizations cannot afford similar opportunity at extravagance and consequently might opt to close down their websites even though the budding opportunity for expanded legal suit wherever the price associated with just one suit in an extraterritorial jurisdiction may make them close down the business. Amusingly, measures intended for advancing buyer trust in online transaction at that point really diminishes consumer decisions.

### **CONCLUSION**

E-commerce is transforming how business is done in a lot of organizations and, it is believed to have a lot of sociotechnical suggestions<sup>68, 69</sup> This is a direct result of the way different scholars think about how internet business has a good outcome on commercial activities. The ability for

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<sup>66</sup> Ibid.

<sup>67</sup> Fawcett, Harris & Bridge (2005), p.511

<sup>68</sup> Al-Qirim, N. A. Y. (2003) pp. 67-92.

<sup>69</sup> John Wiley by Currie, W. (2000).

disputes in E-commerce contract is clearly, considerably more noteworthy than in a traditional contract. Organizations and countries expect the ultimate assurance of jurisdiction in E-commerce disputes adjudication could be questionable in light of the fact that not all contracts are traditional in nature. The Internet-based transaction is not carried out in a single specific jurisdiction so countries and parties to E-contract need to have the capacity to guarantee the insurance of local organizations.

The EU's attempt at setting up jurisdiction in E-Commerce disputes adjudication has been recognized as being not quite the same as other countries. The EU, especially countries with civil law administrations, have constantly favored more formal principles.<sup>70</sup> It has embraced a well-established “general” and “special” jurisdiction principles in the Brussels I Regulation. The “pursuing and directing activities” approach under Article 15 of the Brussels I Regulation leaves open the likelihood that a targeting structure could be used without a major change to the language of the Regulation itself.<sup>71</sup> However, the EC approach is still questionable without the exact definition or clarification of “pursuing and directing” in the Brussels I Regulation.

A modern regulation could be adopted in Article 5 (1)(b) of the Brussels I Regulation that could serve as a guiding principle on how to categorize the performance place for digitized items. Some authors have contended that this is a threat to electronic transactions, which conflicts with the underlying rationality of Article 5(1).<sup>72</sup> Personally, in a more extensive regard, this will not contradict the underlying rule that contract agreements can be established by electronic means.

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<sup>70</sup> Boone (Spring 2006), p. 241, p.273.

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<sup>72</sup>Fawcett, Harris & Bridge (2005), p.594.

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