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# International Litigation News

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media plays a central role in a democratic society and represents the core area of freedom of expression, it follows that they should have the widest freedom to operate.

According to the Finnish legislature, the applicability of the new rule also requires that the matter be of a wider significance. The article or picture must be created as some kind of wider contribution to a handling of a matter of general significance and should not merely be satisfying the curiosity of the readers. The matter does not, however, have to be of significance for society. Matters other than those which are significant for society

can be of general significance. However, merely providing entertainment to the reader is not sufficient.

It remains to be seen what effect the adding of the new evaluation rule to the Penal Code has in practice.

#### Notes

- 1 Constitution of Finland, 11.6.1999/731; Articles 10 and 12.
- 2 Convention for the Protection of Human Rights and Fundamental Freedoms; Rome, 4.XI.1950.
- 3 KKO:2013:69.
- 4 KKO:2013:70.
- 5 KKO:2013:100.
- 6 Act 879/2013.
- 7 Government Bill HE 19/2013 vp.

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# Is your client a 'consumer' under the Lugano Convention? The uncertain enforceability of forum selection clauses in attorney-client agreements

**D**etermining the applicable forum is essential in the context of international business. Who better than lawyers can ensure that this issue is adequately addressed not only when advising their clients in contract negotiations but also in respect of their own contractual relationship with their clients?

A recent decision by the Zurich Court of First Instance based on the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007 (the 'Lugano Convention') has shed a new light on how lawyers should approach their relationship with their clients, who may now be regarded as 'consumers' and thus benefit from various procedural protections, including in relation to forum selection issues.

The Lugano Convention serves as a parallel agreement to Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the 'Brussels I Regulation'). To ensure

consistency in the interpretation of these two agreements, the courts of each Contracting Party, ie, the EU, Denmark, Iceland, Norway and Switzerland, must pay due consideration to their respective case law.<sup>1</sup> Accordingly, decisions of Swiss courts regarding the Lugano Convention should also be taken into consideration when interpreting the Brussels I Regulation and vice versa. Therefore, the decision by the Zurich Court will likely make an impact beyond Switzerland and extend to all countries covered by the Lugano/Brussels Regime.

#### The facts

The Court had to examine whether it had jurisdiction to entertain a claim brought by a Swiss law firm against one of its clients, a private person domiciled in Germany, in relation to unpaid fees.<sup>2</sup> The client held accounts with a Swiss bank and had lost substantial amounts of money following the collapse of Lehman Brothers. In this context, the client had engaged the Swiss law

firm upon recommendation of his lawyer in Germany who was a correspondent of the Swiss law firm. The law firm's engagement letter contained a forum selection clause in favour of the Zurich courts.

The Court held that the law firm had directed its activities at its German client thus characterising their agreement as a cross-border consumer contract within the meaning of Section 4 of the Lugano Convention, which was applicable given that the defendant was domiciled in Germany. The Court therefore concluded that it did not have jurisdiction and that the claim should have been filed in the state where the client was domiciled, ie, in Germany.

### Jurisdiction in cross-border consumer matters

Under the Lugano/Brussels Regime, consumers are afforded specific protection. Where a contract qualifies as a cross-border consumer contract, the consumer can sue the other party either in the courts of the state in which the other party is domiciled or, alternatively, in the courts of the consumer's domicile. Conversely, the other party can only sue its consumer before the courts of the state of the latter's domicile. The rules on consumer jurisdiction are mandatory and the consumer cannot waive his or her right to be sued before the courts of his or her domicile before the start of a dispute.

As a result, in relation to consumer matters, the usual contractual clauses contained in lawyers' or law firms' engagement letters or powers of attorney providing for a forum other than the client's domicile should have no legal effect. The law firm concerned in the case mentioned above learnt the lesson the hard way.

In order to fall under the consumer protection rules of the Lugano/Brussels Regime, a contract must qualify as (i) a 'consumer contract' and (ii) a 'cross-border contract' under Article 15(1)(c) of the Lugano Convention.

### Legal services as a consumer contract

According to the Lugano Convention and the Brussels I Regulation,<sup>3</sup> a consumer contract is defined as a contract between an individual, ie, the consumer, on the one hand, and a person pursuing commercial or professional activities on the other hand, the purpose of which can be regarded as being

outside the individual's trade or profession. Consumer contracts are not limited to goods and services covering basic needs and there are no upper limits for the value of the goods or services on the basis of the contract. By contrast, a company or any other legal entity cannot qualify as a consumer.

Therefore, within the scope of the Lugano/Brussels regime, services offered by law firms to private individuals domiciled abroad may qualify as consumer matters. This was considered to be the case in this matter as the client engaged the Swiss law firm in relation to his private accounts held with a Swiss bank.

When does a law firm 'direct' its activity to the state of a client domiciled abroad?

A contract qualifies as a cross-border contract if the consumer's counterparty carries out commercial or professional activities in the state of the consumer's domicile, or 'by any means, directs such activities to that state.'<sup>4</sup>

By contrast to the 1988 Lugano Convention and the Brussels Convention, both predecessors to the Lugano Convention and the Brussels I Regulation, the current Lugano/Brussels regime no longer refers to the place where the consumer acts or where the contract is signed as a point of reference. Instead, the focus is on the state where the counterparty *pursues* or at which it *directs* its commercial and professional activities. The latter criterion was introduced in the light of new technological means of communication such as the internet, emails, or newsgroups, used to reach consumers abroad. Actual physical presence of the commercial counterparty in the state of the consumer's domicile is not required.

In today's context of global legal services, law firms with an international clientele may often fall within the scope of application of the consumer protection provisions of the Lugano/Brussels regime.

To assess the validity of the forum selection clause contained in the law firm's engagement letter, the Court in particular examined the question whether a Swiss-based law firm with an international practice should be deemed to direct its activity to the state of the client's domicile abroad, in this case Germany. According to the Court, this question could not be answered *in abstracto* but had to be determined with regard to all the circumstances of the case.

Referring to the case law of the Court of Justice of the European Union (CJEU), the Zurich Court recalled that the operation of a

website that is accessible to clients abroad or a website that is interactive or passive is not decisive per se to conclude that a law firm is directing its services at clients abroad.<sup>5</sup> The real test is whether the provider, ie, the law firm in the relevant case, expressed its intention and made particular efforts to win clients abroad before a contract was entered into. The expression of such intent is not bound to any particular form, and may thus result from both the form and content of the website. The international orientation of a provider may result from various indicators, eg, providing telephone numbers with an international country code, using a top-level domain name other than that of the state in which the law firm is established (eg, 'com' instead of 'ch') and travel directions for foreign clients. The international character of the services provided is relevant too.

The Court further held that there is no requirement to establish a direct causal link between the efforts to win clients abroad and the conclusion of an agreement. It is sufficient that such efforts 'also played a role' in the client's decision to retain the law firm. This finding was confirmed in a subsequent decision of the CJEU, which held that the application of the rules on forum in relation to consumer contracts was not conditional upon the existence of a causal link between the means employed to direct the commercial or professional activity to the state of the consumer's domicile. However, the existence of such a causal link constitutes evidence of the connection between the contract and such activity.<sup>6</sup>

In this particular case, the Zurich Court considered the following points:

- the law firm's website was available in both English and German;
- the website highlighted that the firm represented clients from both Switzerland and abroad;
- several practice areas listed on the website were inherently related to cross-border matters and the firm's international practice was specifically emphasised;
- the website and the firm's letterhead mentioned the firm's cooperation with a German law firm; and

- the law firm held a bank account and accepted payments in euro.

For these reasons, the Court found that the law firm had directed its activities towards the state of the client's domicile, thus triggering the application of the protective jurisdictional provisions over consumer contract.<sup>7</sup> Accordingly, the forum selection clause provided in the letter of engagement was deemed null and void.

### Impact on EU and Swiss law firms' cross-border services

The decision of the Zurich Court may have a broad impact on legal services provided by law firms within the territory covered by the Lugano/Brussels regime. Such services to private individuals domiciled in a Contracting Party of the Lugano Convention may qualify as cross-border consumer matters within the meaning of the Lugano/Brussels regime. As a consequence, any choice of forum entered into prior to a dispute will be deemed invalid.

This decision may also have a significant impact on proceedings within the state of the consumer's domicile, also triggering the application of domestic provisions on consumer protections notwithstanding any choice of law clause.

In light of this decision, law firms with offices in the territory covered by the Lugano/Brussels regime should now be aware that their contractual relationships with their clients may not be litigated according to the terms initially agreed upon but rather within the protective framework afforded to consumers. As they say, the client is king.

#### Notes

- 1 Art. 1 Protocol 2 of the Lugano Convention.
- 2 Decision of the Zurich Court of First Instance of 8 July 2013, ZR 112/2013, pp 179 et seq.
- 3 Article 15 of the Lugano Convention; Article 15 of the Brussels I Regulation.
- 4 Article 15 of the Lugano Convention; Article 15 of the Brussels I Regulation.
- 5 CJEU Decision of 7 December 2010, *Pammer v Reederei Karl Schlüter GmbH & Co. KG* (C-585/08) and *Hotel Alpenhof GesmbH v Oliver Heller* (C-144/09).
- 6 CJEU Decision of 17 October 2013, *Lokman Emrek v Vlado Sabranovic* (C-218/12).
- 7 Section 4 of the Lugano Convention; Section 4 of the Brussels I Regulation.