

VKI v Amazon EU (C-191/15)

Conflict of laws

Introduction

- I will discuss the VKI v Amazon case where the Court of Justice of the European Union addressed among other things the question of applicable law to the examination of the unfairness of terms in an action for an injunction.

Facts

- Amazon **established in Luxembourg** concludes online sales contracts with consumers resident in Austria via a German-language website.
- The contracts concluded with those consumers **included general terms and conditions**. In particular, clause 12 was worded as follows:
„Luxembourg law shall apply“
- A Consumer protection association established in Austria (VKI), **brought before the Austrian courts an action for an injunction** under Article 3 of Directive 2009/22 **seeking to prohibit the use by Amazon, of allegedly unfair terms** contained in its general terms and conditions in respect of consumers resident in Austria.

Question referred for a preliminary ruling

- Lower courts in Austria applied EU law differently/the Supreme Court was in doubt.
- The referring court, in essence, asked the Court of Justice to **rule on the law applicable 'to an action for an injunction' brought by a consumer protection association under a national law transposing Directive 2009/22 and seeking to prohibit a professional from using unfair terms.**

Opinion of the AG

- It's not necessary to identify the law applicable **'to the action for an injunction'** but rather **to the specific legal issue giving rise to the conflict of laws** which the national court seeks to resolve. As is clear from the order for reference, **that issue concerns the examination of the unfairness of the terms which the action for an injunction seeks to have prohibited.**
- In order to answer the question, it must first be determined whether the PIL rules applicable are those laid down in the **Rome I or Rome II Regulation**. That assessment depends on whether the obligations in respect of which the conflict of laws arises **are of a contractual or non-contractual nature.**

PIL rules applicable are those laid down in the Rome II Regulation

- Regarding the classification of an action of an injunction **for the purposes of determining jurisdiction**, the Court of Justice held in *Henkel*, that it is not a ‘matter relating to a contract’.
- According to the concept of contractual obligations, also to the wording of Article 6(1) and 10(1) of the Rome I Regulation, the **VKI and the Amazon are not in fact connected by any contractual obligation**.
- It is apparent from Article 2(2) of Directive 2009/22 that the obligations to which this action relates arise not from a contract, **but from an infringement of the law**.
- Conflict of laws established by the Rome I Regulation **seem to be suited only to individual actions**.

Determination of the law applicable on the basis of the Rome II Regulation

- Article 6(1) of Rome II Regulation provides, as a special rule relating to non-contractual obligations arising out of an **'act of unfair competition'**, for application of the law of the 'country where competitive relations **or the collective interests of consumers are, or are likely to be, affected**'.
- According to that autonomous definition of 'unfair competition' within the meaning of that provision, **that concept covers the use of unfair terms inserted into general terms and conditions**, in so far as this is likely to affect the collective interests of consumers as a category and, **therefore, to influence the conditions of competition on the market**.
- **Inapplicability of Article 4(3) and Article 12 of the Rome II Regulation.** There is no pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict. *Culpa in contrahendo* assumes the existence of actual and specific pre-contractual dealings.

AG: Practical consequences

- Accordingly, the assessment of the unfairness of the terms which are the subject matter of the action for an injunction would, under Article 6(1) of the Rome II Regulation, **be governed by Austrian law** — including, in particular, the Austrian legislation transposing Directive 93/13 (namely the KSchG).
- In the context of individual actions, that question would be governed, under Article 6(2) of the Rome I Regulation.

Judgment of the Court of Justice

- Rome I and II Regulations should be applied **consistently** with each other and with the Brussels regime (*Henkel*). Therefore, an action for an injunction falls under Rome II Regulation, specifically Article 6(1).
- However, the law applicable to the examination of the unfairness of terms in consumer contracts which are the subject of an action for an injunction **must be determined independently in accordance with the nature of those terms**. Thus, where the action for an injunction aims to prevent such terms from being included in consumer contracts in order to create contractual obligations, **the law applicable to the assessment of the terms must be determined in accordance with the Rome I Regulation**.
- *Justification*: **The applicable law must not vary according to the kind of action chosen (whether collective or individual)**. Level of consumer protection still varies from one Member State to another. Objectives pursued by Directives 2009/22 and 93/13 would be otherwise jeopardised (*Invitel*).

Relevance and implications of the judgment

- As a consequence the law applicable to an action for an injunction and to the lawfulness of contract terms **are determined by different legal bases (Rome II and Rome I respectively)**, which **may** lead to a different applicable law.
- The Court of Justice reminded us that choice of law clause in consumer contract is permissible but its **without prejudice to the application of the mandatory provisions** laid down by the law of the country where the consumer has its **habitual residence** (Rome I Art. 6(2)).
- It logically follows from the judgment that the law applicable to an action of an injunction and to any other remedy it seeks are determined by different legal bases.
- As the New Deal for Consumers builds on the approach of the current Directive 2009/22 which enables 'qualified entities' designated by the Member States to bring representative actions, the case is and continues 'good' in this aspect.