

The Classification of Dual Purpose Contracts in European Private International Law

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Who is a Consumer

- > **Article 6(1) Rome I Regulation**
- > A contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional).
- > **Article 17(1) Brussels Ibis Regulation**
- > A contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession.

Private International Law Rules over Consumer Contracts

(1) Jurisdiction (which court is competent)

Home court—Articles 18(1)-(2) Brussels Ibis Regulation

A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.

Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.

(2) Applicable Law (which law applies)

Home law—Article 6(1) Rome I Regulation

A consumer contract shall be governed by the law of the country where the consumer has his habitual residence

Dual Purpose Contracts

- If a contract is concluded by a person who is acting partly for private purpose and partly for professional purpose, whether this person can be regarded as a consumer?
 - If yes, special consumer jurisdiction and applicable law rules apply
 - If no, general jurisdiction and applicable law rules apply
- The classification of dual purpose contracts determines which private international law rules apply

Johann Gruber v. BayWa AG

Case C-464/01, ECLI:EU:C:2005:32

- > A farmer who bought tiles to replace the roof tiles of his farm building, in which the area for residential purpose was slightly over 60% of the whole building
- > The questions referred to the CJEU (i) in a contract whose purposes are partly private, does the status of ‘consumer’ under Article 13 Brussels Convention (current Article 17 Brussels Ibis Regulation) depend on the predominant purpose; (ii) what criteria are to be applied to determine which of the private and the trade or professional purposes predominates

Johann Gruber v. BayWa AG

- **Marginal Professional Purpose**

Only if the link between the contract and **the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role** in the context of the supply in respect of which the contract was concluded, considered in its entirety, can the contract classified as a consumer contract. (para. 39)

- **Irrelevance of Predominant Private Purpose**

A 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 13 to 15 of the Convention, **unless the trade or professional purpose is so limited as to be negligible** in the overall context of the supply, **the fact that the private element is predominant being irrelevant in that respect.** (para. 54)

Milivojević v. Raiffeisenbank

Case C-630/17, ECLI:EU:C:2019:123

Ms Milivojević concluded the credit agreement via an intermediary with a view to extending, renovating her house, as well as creating apartments to be let, and she also stated that she intended to repay the loan using the profits from that activity.

Article 17(1) of Regulation No 1215/2012 must be interpreted as meaning that a debtor who has entered into a credit agreement in order to have renovation work carried out in an immovable property which is his domicile with the intention, in particular, of providing tourist accommodation services cannot be regarded as a ‘consumer’ within the meaning of that provision, unless, in the light of the context of the transaction, regarded as a whole, for which the contract has been concluded, **that contract has such a tenuous link to that professional activity that it appears clear that the contract is essentially for private purposes**, which is a matter for the referring court to ascertain. (para. 94)

Schrems v. Facebook Ireland

Case C-498/16, ECLI:EU:C:2018:37

The Facebook user Schrems claimed that Facebook Ireland has infringed his rights of privacy and data protection. Mr Schrems has been using Facebook since 2008, initially only for personal purposes, but later changed to professional purpose.

The CJEU analysed that the usage of services of a digital social network should be considered over a long period of time and **subsequent changes** in the use should be taken into account. (para. 37)

This interpretation implies, in particular, that a user of such services may, in bringing an action, rely on his status as a consumer **only if the predominately non-professional use of those services, for which the applicant initially concluded a contract, has not subsequently become predominately professional.** (para. 38)

EU Consumer Directives

- > Recital 17 of the Directive on Consumer Rights:
- > *In the case of dual-purpose contracts, where the contract is concluded for purposes partly within and partly outside the person's trade and **the trade purpose is so limited as not to be predominant** in the overall context of the contract, that person should also be considered as a consumer'*
- > Recital 18 of the Consumer ADR Directive and Recital 13 of the Consumer ODR Regulation:
- > *The definition of 'consumer' should cover natural persons who are acting outside their trade, business, craft or profession. However, if the contract is concluded for purposes partly within and partly outside the person's trade (dual purpose contracts) and **the trade purpose is so limited as not to be predominant** in the overall context of the supply, that person should also be considered as a consumer.*

EU Consumer Directives

- › Recital 22 of the recast Consumer Sales Directive (2019/770/EU)
- › *Member States should also remain free to determine in the case of dual purpose contracts, where the contract is concluded for purposes that are partly within and partly outside the person's trade, and where **the trade purpose is so limited as not to be predominant** in the overall context of the contract, whether, and under which conditions, that person should also be considered a consumer'.*
- › Such criterion is comparable to the *Schrems* test, since both **examine the predominant purpose of a contract**. The difference is that the *Schrems* test examines whether **private purpose** is predominant, whilst the test in Recital 22 focused on whether **professional purpose** is predominant.

IS and KS v. YYY. SA

- › Case C-570/21, ECLI:EU:C:2023:456
- › A credit contract concluded between a bank and two married debtors, in which the loan amount was devoted partly to the professional purposes (35%) and partly to the private purposes (65%)
- › The CJEU held that **Article 2(b) of the Unfair Contract Terms Directive** must be interpreted in the light of **Recital 17 of the Consumer Rights Directive**, which is confirmed by **Recital 18 of the Consumer ADR Directive** and **Recital 13 of the Consumer ODR Regulation** containing the same clarification regarding the definition of the term 'consumer' in case of **mixed contracts**. (para. 45)
- › The EU legislature was determined to give a **horizontal scope** to consumer definition. (para. 45)

IS and KS v. YYY. SA

- › Case C-570/21, ECLI:EU:C:2023:456
- › Article 2(b) of the Unfair Contract Terms Directive is not a provision requiring strict interpretation, the strict interpretation of the term 'consumer used in the *Gruber* judgment to determine the scope of consumer jurisdiction rules in the case of a mixed contract, is not extended by analogy to the concept of consumer in the meaning of the Unfair Contract Terms Directive. (para. 51)
- › Article 3(1) of the Unfair Contract Terms Directive: *'A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'*
- › An unfair choice-of-law term in a consumer contract might be considered as unfair under Article 6(1) of the Unfair Contract Terms Directive and thus not binding on the consumer.

International Conventions

- > Article 3 of the UN Guidelines for Consumer Protection stipulates that the term “consumer” generally refers to a natural person, regardless of nationality, **acting primarily for personal, family or household purposes.**
- > Both Article 5(2) of the 2019 HCCH Judgments Convention and Article 2(1)(a) of the 2005 Hague Convention on Choice of Court Agreements state that a consumer is a natural person **acting primarily for personal, family or household purposes.**
- > The HCCH 2019 Judgments Convention is of the utmost relevance for international judicial cooperation and international circulation of judgments. The ultimate goal of the Convention is to mitigate uncertainty in international private relations by ensuring that judgments rendered in a given country become enforceable where the judgment creditors need them to be.
- > If a contract, including a dual-purpose contract, is not qualified as a consumer contract, it will fall outside the scope of consumer protective rules and be subject to the general rules for a judgment's circulation.

Concluding remarks

- From the *Gruber* judgment, *Milivojević* judgment to *Schrems* judgment, is there a tendency to adopt a broader interpretation of dual purpose contract?
- Whether the difference on the classification of dual purpose contracts in EU private international law and EU consumer Directive will derogate consumer protection within the EU?
- Whether the difference on the classification of dual purpose contracts in EU private international law and the 2019 HCCH Judgments Convention will have a negative effect on the recognition and enforcement of a judgment issued by a EU Member State in a non-EU country?
- What is the nature of dual-purpose contracts in your country in substantive law and private international law?