



Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 9 September 2021¹

Case C-296/20

Commerzbank AG

v

E.O.

(Request for a preliminary ruling from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Reference for a preliminary ruling – Judicial cooperation in civil matters – Lugano II Convention – Jurisdiction, recognition and enforcement in civil and commercial matters – Jurisdiction over consumer contracts – Consumer who transfers his domicile, after the contract has been concluded, to another State bound by the Convention – Pursuit of commercial or professional activities in the State bound by the Convention and in which the consumer is domiciled)

1. This reference for a preliminary ruling seeks an interpretation of Article 15(1)(c) of the 2007 Lugano Convention² in order to determine which court has jurisdiction to settle a dispute in which a banking institution is seeking to recover from a customer payment of the debit balance on his current account.
2. The distinguishing feature of this case lies in the fact that, at the time when the contract was concluded, both parties were domiciled in the same State (Germany), whereas, when recovery was sought through the courts, the customer was domiciled in Switzerland.³ The *international* nature of the situation therefore came about subsequently rather than being present at the outset.

¹ Original language: Spanish.

² Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed at Lugano on 30 October 2007, the conclusion of which was approved on behalf of the European Community by Council Decision 2009/430/EC of 27 November 2008 (OJ 2009 L 147, p. 1; 'the Lugano II Convention' or 'the Convention'). The Court has jurisdiction to interpret the Convention under Protocol No 2 annexed thereto.

³ Both States are bound by the Convention. In this Opinion, references to 'State' are to States bound by the Convention, with the exception of third States.

3. Unless I am mistaken, the Court has not yet ruled on Article 15(1)(c) of the Convention.⁴ It *has* ruled on the equivalent provision in Regulation (EC) No 44/2001,⁵ which was in turn reproduced in Regulation (EU) No 1215/2012,⁶ currently in force.

4. A combined reading of the relevant judgments of the Court does not, to my mind, throw sufficient light on an issue the impact of which on the economic activity of any party entering into a contract with a consumer is not negligible.

I. Legal framework. Lugano II Convention

5. Title II, Section 1 ('General provisions'), includes Articles 2 and 3, which are worded as follows:

- Article 2(1): 'Subject to the provisions of this Convention, persons domiciled in a State bound by this Convention shall, whatever their nationality, be sued in the courts of that State.'
- Article 3(1): 'Persons domiciled in a State bound by this Convention may be sued in the courts of another Member State bound by this Convention only by virtue of the rules set out in Sections 2 to 7 of this Title.'

6. Title II, Section 4 ('Jurisdiction over consumer contracts'), includes Articles 15, 16 and 17, which read as follows:

– Article 15(1)(c):

'1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Articles 4 and 5(5), if:

...

(c) in all other cases, 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.'

– Article 16(2):

'2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the State bound by this Convention in which the consumer is domiciled.'

⁴ In the judgment of 2 May 2019, *Pillar Securitisation* (C-694/17, EU:C:2019:345), the Court addressed the meaning of 'consumer' in Article 15 of the Convention.

⁵ Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

⁶ Regulation of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (O) 2012 L 351, p. 1). The equivalent provision in this regulation is Article 17(1)(c).

– Article 17(3):

‘The provisions of this Section may be departed from only by an agreement [conferring jurisdiction]:

3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same State bound by this Convention, and which confers jurisdiction on the courts of that State, provided that such an agreement is not contrary to the law of that State.’

II. Facts, dispute and questions referred

7. Commerzbank AG, whose head office is in Frankfurt am Main (Germany), has in Dresden (Germany) a branch through which, in 2009, it opened for a customer then also domiciled in Dresden an account which was managed as a current account.

8. The customer received from the bank a credit card the charges to which were paid from that account. The bank allowed the account to be overdrawn when the customer used his credit card to conclude transactions which he charged to that account even though the funds in it were insufficient to cover them.

9. The customer relocated to Switzerland in 2014. In January 2015, he sought to close his account with Commerzbank AG. At that time, the balance of the account was in debit, owing to an amount charged to it in September 2013 which the customer refused to pay on the ground that it was the result of fraudulent third-party use of the credit card without his consent.

10. In April 2015, Commerzbank terminated the contractual relationship with immediate effect and issued a closing statement of account showing a debit balance in its favour. The customer still failed to pay that balance.

11. Commerzbank brought an action for the recovery of that sum before the Amtsgericht Dresden (Local Court, Dresden, Germany), which declared the action inadmissible on the ground that it lacked jurisdiction.

12. Its appeal having been unsuccessful, Commerzbank brought an appeal on a point of law (*Revision*) before the Bundesgerichtshof (Federal Court of Justice, Germany), which has submitted to the Court of Justice a request for a preliminary ruling on the following questions:

‘(1) Is Article 15(1)(c) of the Lugano [II] Convention to be interpreted as meaning that the “pursuit” of a professional or commercial activity in the State bound by the Convention and in which the consumer is domiciled presupposes that the other party was already engaged in cross-border activity at the time when the contract was initiated and concluded or does that provision also apply for the purpose of determining the court having jurisdiction to hear proceedings where the parties were domiciled within the meaning of Articles 59 and 60 of the Lugano [II] Convention 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?’

- (2) If cross-border activity at the time when the contract was concluded is not necessary, does Article 15(1)(c) of the Lugano [II] Convention, read in conjunction with Article 16(2) thereof, generally preclude determination of the court having jurisdiction in accordance with Article 5(1) of the Lugano [II] Convention in the case where the consumer relocated to another State bound by the Convention between the time when the contract was concluded and the time when the proceedings were brought, or is it also necessary for the professional or commercial activities of the other party to be pursued in or directed to the new State of domicile and for the contract to come within the scope of such activities?

III. Procedure before the Court of Justice

13. The request for a preliminary ruling was registered at the Court of Justice on 3 July 2020.
14. Following publication of the order of the Court of Justice in *mBank*,⁷ and because of the connection between that case and the matters at issue in this reference, the referring court was asked on 3 September 2020 whether it wished to maintain the questions it had referred for a preliminary ruling.
15. On 6 October 2020, the Bundesgerichtshof (Federal Court of Justice) informed the Court that it was withdrawing the second question and maintaining the first.
16. Written observations have been submitted by Commerzbank, the Swiss Government and the Commission. It was not considered essential to hold a hearing.

IV. Analysis

A. Preliminary considerations

17. The referring court wishes to ascertain whether, in order for Article 15(1)(c) of the Convention to be applicable:
- it is necessary for the relationship between the professional and the consumer already to include a foreign ‘element’ – in this case, the banking institution’s cross-border activity – at the time when the contract was initiated and concluded;
 - or whether, conversely, it would be sufficient for an international element to arise subsequently, as a result of the relocation of the consumer’s domicile to another State bound by the Convention.
18. The Commission, the Swiss Government and Commerzbank express different views in their replies to that twofold question, and in their arguments. In the light of one of those arguments,⁸ I think it appropriate for me to recall certain aspects of Title II, Section 4, of the Convention, concerning jurisdiction over consumer contracts, before looking at the interpretation of Article 15(1)(c) thereof.

⁷ Order of 3 September 2020, *mBank* (C-98/20, EU:C:2020:672; ‘the order in *mBank*’). This concerned the interpretation of Article 18(2) of Regulation No 1215/2012, the wording of which is the same as that of Article 16(2) of the Convention.

⁸ The Commission, in particular, sacrifices the foreseeability of the forum from the point of view of a professional entering into a contract with a consumer (written observations, paragraph 51 et seq.).

19. Given that the provision at issue here and the corresponding articles of Regulations No 44/2001 and No 1215/2012 are virtually identical, a converging interpretation of all of them must be ensured.⁹

20. As with those two regulations, the concepts referred to in Article 15(1)(c) of the Convention must be interpreted autonomously in order to ensure their uniform application in all of the States bound by it.¹⁰

1. Ratio legis of Title II, Section 4, of the Convention. Consumer protection

21. A priority objective of Title II, Section 4, of the Convention is to ensure adequate protection for the consumer, as the party deemed to be economically weaker and less experienced in legal matters than the other,¹¹ commercial, party.¹²

22. That proposition is not absolute: the legislature did not intend consumer protection to be unlimited and the Court has not construed it as such.¹³

23. The international element of the situation at issue is a *sine qua non* of the application of the Convention. In establishing the grounds of jurisdiction in respect of consumer contracts, Title II, Section 4, is no exception to that rule.¹⁴ The protection which it affords seeks to redress the balance between the contracting parties in the field of international jurisdiction.¹⁵

24. The provisions which concentrate any legal proceedings brought by or against the consumer in the State of his or her domicile eliminate the disadvantages for him or her of being compelled to litigate in another State. They assume that, as the ‘weaker party’, the consumer is not always in a position to foresee *ex ante* whether any future legal proceedings will have an international element or to calculate the risks and costs associated with such proceedings.¹⁶ They also ensure that the consumer will not be deterred from exercising his or her rights before the courts by the prospect of having to defend them outside the State of his or her domicile.¹⁷

⁹ Judgment of 2 May 2019, *Pillar Securitisation* (C-694/17, EU:C:2019:345, paragraph 27).

¹⁰ Which does not mean that account cannot be taken of concepts from other provisions of EU law, particularly if they have informed the rules on jurisdiction: see point 47 of this Opinion, below.

¹¹ I use the term ‘other party’ because this is the term employed in the Convention.

¹² Recital 18 of Regulation No 1215/2012. See, inter alia, judgments of 11 July 2002, *Gabriel* (C-96/00, EU:C:2002:436; ‘the judgment in *Gabriel*’; paragraph 39); of 14 March 2013, *Česká spořitelna* (C-419/11, EU:C:2013:165, paragraph 33); and of 7 December 2010, *Pammer and Hotel Alpenhof* (C-585/08 and C-144/09, EU:C:2010:740; ‘the judgment in *Pammer and Hotel Alpenhof*’; paragraph 58).

¹³ As regards, in particular, Article 15(1)(c) of Regulation No 44/2001, see the judgments in *Pammer and Hotel Alpenhof*, paragraph 70; of 6 September 2012, *Mühlleitner* (C-190/11, EU:C:2012:542; ‘the judgment in *Mühlleitner*’; paragraph 33); and of 23 December 2015, *Hobohm* (C-297/14, EU:C:2015:844; ‘the judgment in *Hobohm*’; paragraph 32).

¹⁴ In this case, the question is whether, in accordance with Article 15(1)(c) of the Convention, the international element must have a particular profile.

¹⁵ See, to the same effect, Opinion of Advocate General Cruz Villalón in *Emrek* (C-218/12, EU:C:2013:494, point 23).

¹⁶ It is for this reason that a choice-of-forum clause agreed after the dispute has arisen is considered valid, even if it departs from the rule that jurisdiction lies with the courts of the State where the consumer is domiciled (Article 17(1) of the Convention). It is also permissible for the consumer to be tacitly subject to courts other than those of his or her domicile, as follows from Article 26(2) of Regulation No 1215/2012.

¹⁷ Judgment of 20 January 2005, *Gruber* (C-464/01, EU:C:2005:32; ‘the judgment in *Gruber*’; paragraph 34).

25. The protection afforded to consumers domiciled in a State bound by the Convention thus consists in: (a) allowing them access, as applicants, to the same courts as would be available in the case of disputes arising from domestic contracts;¹⁸ and (b) restricting access for professionals wishing to sue consumers to those same courts.

26. A different approach might discourage consumers' inclination to consume beyond the borders of their own State, within the intra-European (or European Free Trade Association (EFTA)) market.

2. Focus on the economic operator and foreseeability of the forum

27. Consumer protection in the field of international jurisdiction is not, as I have already said, unconditional and is not separate from other common objectives pursued by the Convention.

28. For an economic operator, the rules of international jurisdiction over consumer contracts replace those laid down in Article 2 of the Convention (which confers jurisdiction on the courts of the State where the defendant is domiciled) and in Article 5(1) (concerning special jurisdiction in matters relating to a contract). They must therefore be interpreted strictly, and are not to be extended to situations other than those provided for in the Convention text.¹⁹

29. This is all the more important given that, for consumers seeking redress through the courts, the rules of Title II, Section 4, of the Convention effectively provide for a *forum actoris*.

30. In order for those rules to be applied to a factual situation, that situation must meet three cumulative conditions²⁰ which must also be interpreted strictly if not restrictively.²¹

31. As I have said, the rules of international jurisdiction over consumer contracts do not operate separately from the general principles of the Convention. Strengthening the legal protection of persons established in the European Union, ensuring that the ground of jurisdiction is foreseeable and preventing the pursuit of multiple sets of proceedings concerning the same subject matter are common objectives which have to be combined with the concern to protect the consumers.²²

32. The need for the economic operator to be able to foresee where he or she may sue and be sued is a key factor. It informs the interpretation of Title II, Section 4, of the Convention, acting as a counterbalance to the privileges enjoyed by the consumer. I shall explain below that this is the case with Article 15(1)(c).

¹⁸ As well as others.

¹⁹ See, in connection with the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32; consolidated text in OJ 1998 C 27, p. 1; 'the Brussels Convention'), the judgments of 3 July 1997, *Benincasa* (C-269/95, EU:C:1997:337, paragraph 14); in *Gabriel*, paragraph 36; and in *Gruber*, paragraphs 32 and 33. In relation to Regulation No 44/2001, see the judgment in *Mühlleitner*, paragraphs 26 and 27; and, as regards Regulation No 1215/2012, judgment of 10 December 2020, *Personal Exchange International* (C-774/19, EU:C:2020:1015, paragraph 24).

²⁰ Judgment of 10 December 2020, *Personal Exchange International* (C-774/19, EU:C:2020:1015, paragraph 25): '... Article 15(1) of Regulation No 44/2001 applies if three conditions are met: first, a party to a contract is a consumer who is acting in a context which can be regarded as being outside his or her trade or profession; secondly, the contract between such a consumer and a professional has actually been concluded; and, thirdly, such a contract falls within one of the categories referred to in Article 15(1)(a) to (c).'

²¹ On the restrictive interpretation of the concept of 'consumer', see, inter alia, judgments of 3 July 1997, *Benincasa* (C-269/95, EU:C:1997:337, paragraph 16), and of 3 October 2019, *Petruchová* (C-208/18, EU:C:2019:825, paragraph 41).

²² Judgment of 3 October 2019, *Petruchová* (C-208/18, EU:C:2019:825, paragraph 52), and the judgments cited in subsequent footnotes.

33. The Convention, as interpreted by the Court, includes other measures geared towards the same end. The following, which are not intended to be exhaustive, may be highlighted:

- The definition of ‘consumer’ increases legal certainty for the economic operator. That status is denied if the use of the goods or services forming the subject of the contract is closely linked to the trade or profession of the (alleged) consumer.²³
- The consumer and the professional must have concluded a contract. This condition is essential, inasmuch as it is the factor that enables the economic operator to foresee the exclusive jurisdiction of the courts of the consumer’s domicile.²⁴
- The professional must have clearly expressed its intention to be bound. Situations in which that intention is not apparent might, at most, be classified as precontractual or quasi-contractual, in which case they would be subject to the section on special jurisdiction.²⁵
- The contract must be between the parties to the dispute. The concept of ‘other party to the contract’ in Article 16(1) of Regulation No 44/2001 refers not only to the operator with which the consumer concluded the contract but also to the operator’s contracting partner, but only if the consumer was contractually linked, inseparably, to both contracting partners beforehand.²⁶

B. Article 15(1)(c) of the Convention: possible interpretations

34. Article 15(1)(c) of the Convention, the interpretation of which forms the subject of the only remaining question referred for a preliminary ruling, is in principle open to two readings each of which would support a different reply, one negative and one affirmative:

- The first reply (in the negative) would be based on the proposition that that provision applies in the case where a professional creates the *international element* of the contract voluntarily by extending or carrying out its economic activity beyond the borders of its own State in order to canvass customers in others. The same would not be true in the case where the foreign element of the legal relationship arises only after the contract has been concluded as a result of a change of domicile by the consumer.
- The second reply (in the affirmative) would be based on the greater relevance attached to the consumer’s domicile at the time when the dispute is initiated.

35. I should say here and now that the reasons in favour of the first reply seem to me to carry greater weight. It is nonetheless possible to envisage a compromise approach that strikes a balance between the positions of the consumer and the professional in relation to international jurisdiction in the case where the former transfers his or her domicile to another State after having concluded the contract.

²³ The judgment in *Gruber*, paragraph 45.

²⁴ Judgments of 28 January 2015, *Kolassa* (C-375/13, EU:C:2015:37, paragraph 29); of 25 January 2018, *Schrems* (C-498/16, EU:C:2018:37, paragraph 46); and of 26 March 2020, *Primera Air Scandinavia* (C-215/18, EU:C:2020:235, paragraphs 62 and 63).

²⁵ Judgments of 14 May 2009, *Ilseger* (C-180/06, EU:C:2009:303, paragraphs 56 and 57); of 20 January 2005, *Engler* (C-27/02, EU:C:2005:33, paragraph 35 et seq. and the operative part of the judgment); and of 28 January 2015, *Kolassa* (C-375/13, EU:C:2015:37).

²⁶ Judgments of 14 November 2013, *Maletic* (C-478/12, EU:C:2013:735, paragraph 32); of 28 January 2015, *Kolassa* (C-375/13, EU:C:2015:37, paragraph 33); of 26 March 2020, *Primera Air Scandinavia* (C-215/18, EU:C:2020:235, paragraph 64); and of 25 January 2018, *Schrems* (C-498/16, EU:C:2018:37, paragraph 46).

1. *Has this question been answered before?*

36. The Court has already ruled on Article 15(1)(c) of Regulation No 44/2001 and Article 17(1) of Regulation No 1215/2012. It is legitimate to ask, therefore, whether its judgments support the inference that the question concerning the same text in the Convention has been disposed of.

37. I do not rule out a line of reasoning which takes the judgment in *Pammer and Alpenhof* as a starting point and then, as a second step, focuses on establishing whether there are grounds for distinguishing between the activity which the professional *pursues* in a State and the activity which it *directs* to that State, in the context of Article 15(1)(c) of the Convention. I shall return to this point later.²⁷

38. I do not, however, believe that, of the judgments delivered to date, those listed in the arguments put forward in this case are of any decisive value in the settlement of this dispute.

39. I find it difficult to infer from those judgments that the Court intended to provide a tacit reply to a question of the purport of that raised here. The referring court, which gives the impression of being familiar with the Court's case-law, does not infer an unequivocal answer from that case-law. The weighty consequences which applying the consumer protection rules brings to bear upon a professional *surprised* by a change of domicile by the consumer which it was not expecting or could not have foreseen call for an explicit examination of this issue.

40. It is true that *mBank* concerned a situation similar to that in question in the present reference. However, the Court reformulated²⁸ the questions which had been put to it and replied that 'the concept of "consumer's domicile" referred to in Article 18(2) of Regulation ... No 1215/2012 ... must be interpreted as designating the consumer's domicile at the date on which the court action is brought'. The Court confined its line of argument to that detail.²⁹

41. The judgment in Case C-327/10³⁰ does not resolve the point of uncertainty raised here either. In that judgment, the Court did not deny that a contract between a professional and a consumer who were domiciled in the same Member State at the time when the contract was concluded could be caught by Article 15(1)(c) of Regulation No 44/2001. It did not, however, address the matter at issue here.³¹

²⁷ Points 54, 55 and 57 et seq. of this Opinion.

²⁸ It confined itself to determining 'whether Article 18(2) of Regulation No 1215/2012 must be interpreted as meaning that the concept of "consumer's domicile" referred to in that provision means the consumer's domicile on the date of conclusion of the contract at issue or the consumer's domicile on the date on which the action was brought' (paragraph 23 of the order in *mBank*).

²⁹ In the order in *mBank*, the reference to Article 17(1) of Regulation No 1215/2012 appears in paragraphs 24 and 25 (and, by extension, in paragraph 33 too) and has no bearing on the matter at issue here: '... the contract at issue ... was concluded by a natural persons who is a consumer and there is nothing ... to suggest that PA concluded that contract for a purpose connected with a trade or profession, within the meaning of Article 17(1) of Regulation No 1215/2012. It follows that, in accordance with Article 17(1), the contract at issue in the main proceedings may fall within the category of "consumer contracts", within the meaning of that provision.'

³⁰ Judgment of 17 November 2011, *Hypoteční banka* (C-327/10, EU:C:2011:745).

³¹ In that case, the referring court framed its question within the context of Article 16(2) of Regulation No 44/2001, without any further argument. The circumstances of that dispute were in any event exceptional and this makes it inadvisable to convert that dispute into a paradigm for an issue which does not appear to have been given any consideration at all. Neither the arguments of the parties nor the Opinion of Advocate General Trstenjak (C-327/10, EU:C:2011:561) touched on this matter. The judgment does not mention Article 15 of Regulation No 44/2001.

42. Much the same is true of the judgment in Case C-478/12,³² which, to my mind, does not resolve the issue under consideration here either:

- In that judgment, the Court rules on the international element as a condition for the application not of Article 15(1)(c) of Regulation No 44/2001 but of that instrument as a whole.³³
- In that connection, the Court states, ‘a distinction must be made between, on the one hand, the conditions under which the rules of jurisdiction pursuant to that regulation must apply and, on the other, the criteria by which international jurisdiction is determined under those rules’.³⁴
- Chapter II, Section 4 (in particular, Article 16(1)), of the regulation was applied to the professional domiciled in the consumer’s Member State in that case on account of the interest in avoiding a multiplicity of proceedings in connection with a ‘unitary transaction’ comprised of contracts which were ‘indissociable’ despite having been concluded with two different professionals.³⁵

2. Arguments in favour of the (need for an) international element at the outset

(a) Cross-border trade or profession

43. Article 15(1)(c) of the Lugano II Convention performs the function which previously fell to point 3 of the first paragraph of Article 13 of the 1988 Lugano Convention,³⁶ identical in this regard to the Brussels Convention.

44. In order to understand that provision, we must go back to its inclusion, in 1978, in the Brussels Convention and track its subsequent evolution.

(1) First draft

45. In the original (1968) version of the Brussels Convention, consumer protection in the field of international jurisdiction was dealt with in Articles 13 to 15. That protection was confined to contracts for sales on instalment credit terms and the financing of such sales, and reflected the status quo of consumer law in the original Member States of the European Economic Community.

46. On the occasion the Convention of Accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention,³⁷ Article 13 was supplemented by a third paragraph which extended coverage to any other contract for the supply of services or goods, provided that two conditions were met:

- the conclusion of the contract had to have been preceded in the State of the consumer’s domicile by a specific invitation addressed to the consumer or by advertising; and

³² Judgment of 14 November 2013, *Maletic* (C-478/12, EU:C:2013:735).

³³ Cited above, paragraph 25.

³⁴ Judgment of 17 November 2011, *Hypoteční banka* (C-327/10, EU:C:2011:745, paragraph 31).

³⁵ Judgment of 14 November 2013, *Maletic* (C-478/12, EU:C:2013:735, paragraph 29 et seq).

³⁶ Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, done at Lugano on 16 September 1988 (OJ 1988 L 319, p. 9).

³⁷ OJ 1978 L 304, p. 1.

– the consumer had to have taken in that State the steps necessary for the conclusion of the contract.

47. Those cumulative conditions were based on the first indent of Article 5(2) of the Rome Convention on the law applicable to contractual obligations.³⁸ They envisaged a ‘passive’ consumer, that is to say one that the professional would canvass at home, and served to ensure the existence of a close relationship between the contract and the consumer’s State of domicile.

48. The typical scenario in both texts was that of an economic operator penetrating the market of another country through cross-border advertising,³⁹ or through individual commercial offers made, in particular, by agents or door-to-door salesmen.⁴⁰

49. The transnational nature of the contract came about on the initiative of the economic operator. The consumer’s response to the advertising or to the offer made by the professional was confined to his or her own State. It was therefore justifiable that the risk of the emergence of an international element and the costs of legal proceedings in that State should be borne exclusively by the professional.

50. The forum where any action against the consumer would have to be brought and where the consumer would be entitled to sue was therefore foreseeable by everyone.

(2) Amendments

51. Article 15(1)(c) of Regulation No 44/2001, reproduced in the Convention, extended Chapter II, Section 4, to any contract and amended the conditions required for reliance on protective jurisdiction. It did so in order to ensure protection for consumers ‘with regard to new means of communication and the development of electronic commerce’.⁴¹

52. The EU legislature replaced the conditions applicable to professionals and consumers respectively with others incumbent on professionals alone. The consumer’s actions and the place and manner of conclusion of the contract would be irrelevant.⁴²

53. The Pocar Report on the Convention explains the text’s new wording.⁴³ It states that ‘[the Convention] does not innovate with regard to the sale of goods on instalment credit terms or loans repayable by instalments, *where there is no need for proximity between the contract and the State in which the consumer is domiciled*’, whereas, ‘for other contracts, ... the extension of

³⁸ The judgment in *Gabriel*, paragraph 40 et seq., with reference to the Schlosser Report on the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (OJ 1979 C 59, p. 71; ‘the Schlosser Report’), paragraph 158.

³⁹ The Schlosser Report, paragraph 161, *in fine*.

⁴⁰ The judgment in *Gabriel*, paragraph 44. The concepts of ‘agent’ and ‘door-to-door salesman’ endorse the idea that the offerer is established in a State other than that of the consumer. Other typical activities at that time were mail order or telephone sales.

⁴¹ The judgments in *Pammer and Hotel Alpenhof*, paragraphs 59 and 60, and in *Mühlleitner*, paragraph 38.

⁴² In the judgment in *Mühlleitner*, the Court maintained that the conclusion of a distance contract was not a necessary condition for the application of that article. The consumer in that case, after consulting the professional’s website, relocated to the Member State where she was domiciled, and it was there that the sale was completed and executed. The facts are similar to those in the judgment of 17 October 2013, *Emrek* (C-218/12, EU:C:2013:666).

⁴³ As regards Regulation No 44/2001, see the preamble to the Proposal for a Council Regulation (EC) on jurisdiction and the enforcement of judgments in civil and commercial matters, COM(1999) 348 final, pp. 15 to 17, in particular p. 16: ‘The philosophy of new Article 15 is that the co-contractor creates the necessary link when directing his activities towards the consumer’s State.’

protection to all consumer contracts, and the extension of the *forum actoris* that that brings with it, *would not be justified without a factor connecting the other contracting party and the State of domicile of the consumer*.⁴⁴

54. In interpreting the phrase ‘directs such activities’ in Article 15(1)(c) of Regulation No 44/2001, the Court made the application of that provision subject to an intention on the part of the seller to establish commercial relations with consumers from one or more other Member States, and to conclude contracts with them.⁴⁵

55. The Court made it clear that the extension of consumer protection was premised on the same scenario as before, that is to say a professional established in one Member State trying to *win* consumers from other Member States.

56. It is only in those circumstances that a professional is able to foresee – as it must be able to do – that international jurisdiction will lie with the courts of those other Member States.

(b) Activity pursued in the consumer’s State of domicile

(1) ‘Pursuing’ or ‘directing’ the activity

57. The Court has clarified Article 15(1)(c) of Regulation No 44/2001 in terms of the expression ‘directs such activities’.

58. I see no reason to interpret that provision differently depending on whether the professional’s actions consist in *pursuing* an activity in the State where the consumer is domiciled or in *directing* it to that State.

59. In my view, an intention on the part of an economic operator domiciled in one State to establish commercial relations with consumers domiciled in another State, and to conclude contracts with them, is required in the same way in both cases.

60. The preparatory documents relating to Regulation No 44/2001 show that there is only one concept of activity (whether pursued in the State of the consumer’s domicile or directed towards that State) and confirm the application of that provision to a contract concluded ‘via an interactive website accessible in the State of the consumer’s domicile’.⁴⁶ Electronic contracts are thus treated in the same way as contracts concluded by telephone, fax or similar media, the applicability to which of the rule of jurisdiction laid down in Article 16 is not in dispute.⁴⁷

61. In the text, the words ‘pursues’ and ‘directs’ are positioned at the same level and are linked by the coordinating conjunction ‘and’, which, in its capacity as such, denotes the equivalence of the elements which it connects.⁴⁸

62. The consequence for the professional, from the point of view of international jurisdiction, is the same in both cases, and must therefore be subject to identical conditions.

⁴⁴ The Pocar Report on the Lugano II Convention (OJ 2009 C 319, p. 1), paragraphs 82 and 83. My emphasis.

⁴⁵ The judgment in *Pammer and Hotel Alpenhof*, paragraphs 75 and 76, and point 2 of the operative part of the judgment.

⁴⁶ See the explanatory memorandum to the Commission’s proposal (footnote 43 of this Opinion, above), p. 16.

⁴⁷ Cited above.

⁴⁸ There is no difference between them; indeed, ‘directing’ an activity could be a form of, or a stage in, pursuing that activity.

(2) Consumer's domicile in Article 15(1)(c) of the Convention

63. Article 15(1)(c) of the Convention defines the application of Title II, Section 4, on the basis of the professional's activities 'in the ... State of the consumer's domicile', because that domicile is determinative of the court that will have jurisdiction in the event of any dispute.

64. The Court has identified the consumer's domicile for the purposes of Article 18(2) of Regulation No 1215/2012 (equivalent to Article 16(2) of the Convention) as being that which he or she has on the date when the action is brought.⁴⁹

65. A contract to which a consumer is a party will be covered by that provision if, as an international element, the consumer's domicile, which is relevant⁵⁰ for the purposes of determining international jurisdiction, is located in the State in which the professional pursues, or to which it directs, its activity.

66. That interpretation is consistent with the account given of the history of Article 15(1)(c) of the Convention and with the purpose of ensuring international jurisdiction that is foreseeable by the economic operator.

(c) 'In all other cases'. Difference between types of contract

67. On a literal reading, Article 15(1)(c) of the Convention is residual, in the sense that it governs contracts not covered by points (a) and (b).

68. The application of those points – and of all of the Convention's provisions – is subject to the presence of an international element. It is not subject, however, to the existence of a particular link with the consumer's domicile as generated by the consumer's contracting partner.

69. The absence of a special condition was a feature of the first text of the Brussels Convention, which has been retained to this day.

70. The Court has explained the fact that the contracts provided for in points (a) and (b) are dealt with specifically by reference to the risks inherent in deferred payments. The sales now envisaged in Article 15(1)(a) of the Convention are confined to those whereby the seller has transferred possession of the goods to the purchaser before the purchaser has paid the full price.

71. In such a case, 'on the one hand, the purchaser may, when the contract is concluded, be misled as to the real amount which he owes, and, on the other, he will bear the risk of loss of those goods while remaining obliged to pay any outstanding instalments'.⁵¹

72. The seriousness of those risks is said to make up for the fact that there is no additional requirement of proximity between the contract and the consumer's State of domicile for the purposes of the application of Title II, Section 4, of the Convention.

⁴⁹ The order in *mBank*.

⁵⁰ Or, in practice, will be relevant, if and when a dispute should arise, as a criterion for conferring jurisdiction.

⁵¹ Judgment of 27 April 1999, *Mietz* (C-99/96, EU:C:1999:202, paragraph 31). It follows that a sale is not a sale on instalment credit terms if the price has to be paid in full before possession is transferred, even if the purchaser has been given the option of paying in instalments.

(d) Provisional conclusion

73. Thus, the history and purpose of the provision in question, the Court's case-law concerning that provision (or concerning its earlier equivalents) and a reading of that provision in conjunction with Article 16 appear to support the following interpretation of Article 15(1)(c) of the Convention: (a) in pursuing its activity or making its offer, the professional must voluntarily create a link with a contracting State other than the State of its domicile; and (b) that 'other State' must be the State where the consumer is domiciled, that is to say the State that serves (or will serve, when the time comes) to determine international jurisdiction.

74. Logically, it would necessarily follow from the foregoing that:

- Article 15(1)(c) does not cover contracts at the time of whose conclusion both parties were domiciled in a single Member State bound by the Convention.
- A later change of the consumer's domicile to another State before the commencement of legal proceedings is not sufficient to *open up* Title II, Section 4, of the Convention to contracts other than those for purchases of movable property on instalment credit terms or contracts concluded for the purpose of financing such purchases.

3. Arguments in favour of the (possible) subsequent emergence of an international element

75. The understanding of the provision at issue which I have just advocated could, however, come into conflict with Article 17 of the Convention, which governs the choice of forum in connection with the contracts provided for in Article 15.

76. Article 17(3) recognises the validity of choice-of-forum clauses agreed between parties which, 'at the time of conclusion of the contract', are domiciled or habitually resident in a single State (bound by the Convention), provided that such clauses confer jurisdiction on the courts of that State and are not prohibited by the law of that State.

77. The Convention itself would thus appear, on first impression, to support the proposition that the fact that the two parties (the professional and the consumer) are domiciled in a single State at the time when the contract is concluded does not preclude the presence of an international element or the determination of jurisdiction on that basis.

(a) Choice of forum prior to the change of domicile

78. A rule similar to Article 17(3) of the Lugano II Convention existed in the first (1968) version of the Brussels Convention, in Article 15(3) itself.

79. The Jenard Report explains that that rule was included for reasons of equity to benefit a seller or lender domiciled in the same State as the buyer or borrower in the case where the latter establish themselves abroad after the contract has been concluded.⁵²

⁵² Jenard Report on the 1968 Brussels Convention (OJ 1979 C 59, p. 1), p. 152.

80. In the version contained in the 1978 Brussels Convention, the wording of that provision was amended to make it clear that it has in mind domicile in the same State at the time when the contract is concluded, not at the time when legal proceedings are instituted.⁵³

81. The reference to sellers and lenders was replaced by the current terminology. There is no explanation for that change.

82. When dealing with cases involving a transfer of the consumer's domicile after the contract has been concluded, the Schlosser Report expressly mentioned that it was highly unlikely that the scenario provided for in Article 13(3), as the Convention was then drafted, would be affected.⁵⁴ For the same reason, Article 15(3), too, would only exceptionally be applicable to such cases.

(b) Relationship between Articles 15 and 17(3) of the Convention

83. The inclusion of Article 17(3) in the section devoted to consumer contracts bears no relation to the inclusion of Article 15(1)(c) of the Convention or to that of the corresponding articles of the previous versions thereof.

84. What is more, the starting point for Article 17(3) (that the contracting parties are domiciled in a single Member State bound by the Convention at the time when the contract is concluded) is, in fact, different from that for Article 15(1)(c).

85. However, the legislature does not appear to have wished to rule out any relationship between those two provisions, since, if it had, it would not have removed the original reference to agreements between a seller and a buyer or a lender and a borrower.

86. It is my view that this contradiction (which the legislature may not have noticed) is not to be resolved by including within Article 15(1)(c) situations for which that provision was not designed and which leave the professional at the mercy of the other party⁵⁵ without providing it with a secure remedy in return.

87. The possibility of entering into an agreement on jurisdiction in the circumstances provided for in Article 17(3) is not automatic, since it is ultimately contingent upon the decision of each State bound by the Convention.

88. Neither am I sure that, in practice, that possibility protects the professional against an unexpected change of circumstances brought about by the unilateral will of the consumer.

⁵³ The Schlosser Report, paragraph 161a.

⁵⁴ See point 46 of this Opinion. Paragraph 161 *in fine* of the Schlosser Report states that 'the new Section 4 will ... cease to be applicable if the consumer transfers his domicile to another State after conclusion of the contract. This is because the steps necessary for the conclusion of the contract will almost always not have been taken in the new State of domicile'.

⁵⁵ Under the scheme of the Convention, it is a common risk that a foreign element having consequences from the point of view of international jurisdiction may emerge after the contract has been concluded. However, in relationships in which there is no weaker party, the applicant has several 'fora of attack' available to him or her. The same is not true in the case of Title II, Section 4. A professional subject to that section has access, as applicant, only to the courts of the State where the consumer is domiciled. Article 17(3) does not afford the professional any further options: it simply changes the forum of the State where the consumer is currently domiciled for that of the State where he or she was domiciled when the contract was concluded.

89. The situation described in Article 17(3) of the Convention is, by definition, domestic: the natural intention of parties entering into an agreement on jurisdiction will be to select national jurisdiction. An *ex lege* extension of the scope of the original agreement in such a way as to make it an agreement conferring jurisdiction at international level⁵⁶ is not what the parties envisioned and I do not see why an agreement to that effect should be imposed on them.

90. The choice-of-forum clauses properly falling within the scope of Article 17(3) are those agreed prior to any dispute for the specific purpose of neutralising the future emergence of an international element created by a change of domicile by either of the parties.⁵⁷

91. The likelihood of such an agreement differs depending on the circumstances in which the contract is concluded: there is more likelihood if the situation already entails some foreign element at that time, less or none at all otherwise.

92. That likelihood will also depend to a large extent on the experience of the economic operator involved and on the national rules governing choice-of-forum clauses:

- A small trader who neither pursues his or her economic activity in, nor directs it towards, other countries will be ill-inclined to consider international jurisdiction in his or her day-to-day business.
- An informed professional will always be better off including a choice-of-forum clause in his or her contracts, if the applicable law permits this. The additional cost of doing so in accordance with the relevant legal provisions will fall to the consumer.⁵⁸
- A professional who is domiciled in a State whose law prohibits choice-of-forum agreements, or who has reservations about such clauses, will either prefer not to enter in such an agreement or will pre-emptively charge the costs of any legal proceedings abroad to every consumer by increasing the price of the contract.

93. In short, an interpretation which, in order to reconcile Articles 15(1)(c) and 17(3) of the Convention, compels the professional, whatever the circumstances, to carry the risk of the subsequent emergence of an international element as a result of a change of domicile by the consumer:

- disregards the scenario typically falling within the scope of the first of those provisions;
- offers a remedy that differs depending on the Contracting State where the contract is concluded; and
- is liable to produce undesirable consequences from the point of view of economic analysis and the interests of all the parties involved.

⁵⁶ Which would imply that the agreement meets the conditions required in order for it to be valid at that level too. The parties can of course give the clause a different scope in the light of the subsequent emergence of an international element. It is unlikely that they would do so prior to the occurrence of the dispute: it is often not until that point that the professional becomes aware of the transfer of the consumer's domicile. In that event, the applicable provision would be Article 17(1), not Article 17(3).

⁵⁷ This also follows from the Jenard Report, p. 152. The scenario there was a change of domicile by the consumer. In practice, the clause also reduces the options available to the consumer as applicant.

⁵⁸ Paragraph 161a of the Schlosser Report refers exclusively to the formal requirements governing such an agreement, which are to be taken from Article 17 (Article 23 of the Lugano II Convention). Other conditions will be laid down by the consumer protection legislation of the State whose law is applicable to the validity of the agreement.

94. I therefore take the view that that interpretation must be rejected.

C. Alternative proposal

95. If the Court does not accept my proposal, it might have to seek a way to salvage both the objective of protecting the consumer from the requirement of an international element (including one which the consumer him- or herself creates) and the objective of providing the economic operator with foreseeability as to the courts having international jurisdiction, which Article 15(1)(c) of the Convention determines by reference to the economic operator's own cross-border commercial activities.

96. In my view, the contradiction I described above is not entirely insurmountable. Article 15(1)(c) of the Convention could be interpreted as encompassing any situation in which the professional pursues its economic activity in, or directs it towards, States other than that where it is domiciled, including the State where the consumer is domiciled at the time when legal proceedings are instituted.

97. On that basis, the fact that, at the time of concluding the contract, both parties are domiciled in the same State bound by the Convention would not preclude the application of Article 15(1)(c), or, therefore, of Title II, Section 4, of the Convention, or any of the consequences arising therefrom.

98. On that same basis, a consumer who subsequently transfers his or her domicile to another State bound by the Convention may institute legal proceedings before the courts of the economic operator's domicile or before the courts of his or her own new domicile. The economic operator may bring proceedings only before the latter.

99. I am aware that, if, at the time of initiating and concluding the contract, the economic operator is domiciled in the same State as the consumer, and there is nothing to indicate that an international element might subsequently arise, that operator will in principle have no reason to foresee proceedings in another State in connection with that particular contract.

100. In such circumstances, foreseeability takes on a more abstract character. In pursuing a certain type of activity in another State, a reasonably diligent professional cannot fail to be aware that he or she may be sued in that State in connection with any contract capable, by virtue of its subject matter, of falling within the scope of that activity,⁵⁹ if the consumer transfers his or her domicile there.

101. In the face of that possibility, of which he or she is aware because it is the product of his or her own activity, the reasonably diligent economic operator may turn to the tool offered to him or her by Article 17(3), that is to say the signature of an agreement conferring jurisdiction on the courts of the State where both parties are domiciled at the time when the contract is concluded (provided that the law of that State does not prohibit this).

⁵⁹ The condition that the contract must relate to the professional's international activities is a textual requirement laid down in Article 15(1)(c) itself and intended to ensure foreseeability (the judgment in *Hobohm*, paragraph 39).

102. This approach, which is not ideal, draws to some extent on the Court’s case-law:

- In the judgment in *Emrek*, the Court severed the link between commercial activity in a State and the conclusion of a contract with consumers domiciled there, on the ground that Article 15(1)(c) of Regulation No 44/2001 does not call for a causal relationship between the means used to direct the commercial or professional activity to the Member State of the consumer’s domicile and the conclusion of the contract with that consumer.⁶⁰
- In the judgment in *Hobohm*, the Court accepted that the activity in connection with which the economic operator is sued may not be the same as that which the latter directs to the State where the consumer is domiciled. It made that position subject to the condition of there being a close link between the contracts arising from the professional’s various activities. The Court mentioned certain elements that would constitute that link and took the view that, where that link is present, ‘[the] professional may reasonably expect both contracts to be subject to the same rules of jurisdiction’.⁶¹

V. Conclusion

103. In the light of the foregoing, I suggest that Court’s answer to the Bundesgerichtshof (Federal Court of Justice, Germany) should be as follows:

‘Article 15(1)(c) of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed at Lugano on 30 October 2007, the conclusion of which was approved on behalf of the European Community by Council Decision 2009/430/EC of 27 November 2008, must be interpreted as meaning that it is not applicable in the case where, at the time when the contract is concluded, the parties to that contract are domiciled (within the meaning of Articles 59 and 60 of the Convention) in the same State bound by the Convention and the foreign component of the legal relationship arises only subsequently, when the consumer has transferred his or her domicile to another State also bound by the Convention.

In the alternative, Article 15(1)(c) of the Convention would be applicable in the case where the parties’ domicile at the time when the contract is concluded is situated in a single State bound by the Convention and the consumer subsequently relocates to another State also bound by the Convention, provided that the economic operator pursues in the State of the consumer’s new domicile a trade or profession such as that which gave rise to the conclusion of the contract.’

⁶⁰ Judgment of 17 October 2013, *Emrek* (C-218/12, EU:C:2013:666). In that case, the consumer had not learned about the seller’s business through the latter’s website but from his own acquaintances. In line with the stance taken by the referring court, the Court accepted that the professional had sought to canvass consumers in a country other than his own by means of his website.

⁶¹ The judgment in *Hobohm*, paragraphs 39 and 40 and operative part.