

Case 1*

Choice of Court Agreements and Consumers

Scenario I

John, an **Austrian** salesman domiciled in **Rome (Italy)**, was a Face user.

Face is a social network.

John was banned from the social media site for posting a photo of “My Birth” (Frida Kahlo’s painting of a woman giving birth) on his publicly-available Face wall, together with a link to a television program aired on “Arte” (a European channel, promoting programs in the areas of culture and the arts) about the history of Frida Kahlo.

According to the explanation given by Face, John was banned from the social media because, pursuant to the site’s community standards, nudity and other explicit content are prohibited from Face.

John decides to file a complaint against Face before the **Court of first instance of Rome**, arguing that the social media was not able to distinguish pornography from art. The European head of Face, whose office is located in **Berlin (Germany)**, is served with the claim form.

John is seeking the reactivation of his Face account as well as € 40,000 in damages.

At the hearing, Face’s lawyer argues that the Court of first instance of Rome has no jurisdiction over the case because, in activating his account, John had agreed to the site’s terms of service, which specify that:

“You will resolve any claim, cause of action or dispute you have with us arising out of or relating to Face exclusively in the U.S. District Court for the Northern District of California, and you agree to submit to the personal jurisdiction of such Courts for the purpose of litigating all such claims”.

1. Is John a consumer?

2. Has the Court of Rome international jurisdiction to adjudicate the claim on the merits?

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Answer 1:

A. Find the relevant EU legal sources

Regulation (EU) No. 1215/2012 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 (hereinafter the “**Brussels I Recast Regulation**”) is the relevant instrument to determine whether John is a consumer and which Court has jurisdiction over the case.

Material scope of application: the Brussels I Recast Regulation applies “in civil and commercial matters whatever” (Article 1), **including consumer matters**.

Territorial scope of application: the Brussels I Recast Regulation applies **between all Member States of the European Union including Italy and Germany**.

Temporal scope of application: the Brussels I Recast Regulation applies to **legal proceedings instituted on or after 10 January 2015** (Article 66.1).



FOR FURTHER READING on the Brussels I recast Regulation:

https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do

B. Find the correct provision

I. The notion of consumer in the Brussels I Recast Regulation

Article 17.1 Brussels I Recast Regulation, clarifies that a “consumer” is a person concluding a contract “for a purpose which can be regarded as being outside his trade or profession”.

The CJEU, 3 July 1997, C-269/95, *Francesco Benincasa v Dentalkit Srl*, ECLI:EU:C:1997:337, para 16 and CJEU, 20 January 2005, C-464/01, *Johann Gruber v Bay Wa AG*, ECLI:EU:C:2005:32, has made clear that:

CJEU, 20 January 2005, C-464/01, *Johann Gruber v Bay Wa AG*, ECLI:EU:C:2005:32

36. The **concept of “consumer”** must be **strictly construed**, reference being made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract and not to the subjective situation of the person concerned, since the same person may be regarded as a consumer in relation to certain supplies and as an economic operator in relation to others.



FOR FURTHER READING on consumer protection under EU Law:

https://ec.europa.eu/info/policies/consumers/consumer-protection_en

John is a salesman domiciled in a Member State. Nevertheless, being a salesman in one's professional life does not mean that one will be considered as professional in all life situations.

In the case at hand, John opened and was using his Face account solely for private purposes.

Hence, as clarified by the CJEU, 25 January 2018, C-498/16, *Maximilian Schrems v Facebook Ireland Limited*, ECLI:EU:C:2018:37 (concerning Articles 15-17 Brussels I Regulation), he is a private Face account user and not a professional.

CJEU, 25 January 2018, C-498/16, *Maximilian Schrems v Facebook Ireland Limited*, ECLI:EU:C:2018:37

31. [...] the special rules of jurisdiction in Articles 15 to 17 of Regulation No 44/2001 apply, in principle, only where the contract has been concluded between the parties for the purpose of a use of the relevant goods or services that is other than a trade or professional use [...].

32. As regards, more particularly, a person who concludes a contract for a purpose which is partly concerned with his trade or profession and is therefore only partly outside it, the Court has held that he could rely on those provisions 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.

[...]

40. An interpretation of the notion of "consumer" which excluded such activities would have the effect of preventing an effective defence of the rights that consumers enjoy in relation to their contractual partners who are traders or professionals, including those rights which relate to the protection of their personal data. Such an interpretation would disregard the objective set out in Article 169.1. TFEU of promoting the right of consumers to organize themselves in order to safeguard their interests.

41. In the light of all of the foregoing considerations, the answer to the first question is that Article 15 of Regulation No 44/2001 must be interpreted as meaning that the activities of publishing books, lecturing, operating websites, fundraising and being assigned the claims of numerous consumers for the purpose of their enforcement do not entail the loss of a **private Face account user's status** as a "consumer" within the meaning of that Article.



John is a consumer for the purposes of the Brussels I Recast Regulation.

C. Conclusion



John is a consumer.

Answer 2:

A. Find the relevant EU legal sources

See Answer 1, A

B. Find the correct provision

I. General jurisdiction (Article 4 Brussels I Recast Regulation)

In civil matters for actions against companies domiciled in a EU Member State general jurisdiction lies in **any Court of the Member State in which the defendant is domiciled** (cf. Article 4.1 Brussels I Recast Regulation). Face is not domiciled within the EU, as it only has an office in Berlin (cf. Article 63.1(a)(b) Brussels I Recast Regulation), therefore **Article 4 Brussels I Recast Regulation cannot apply**.

Article 63.1(a)(b) Brussels I Recast Regulation

1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its

(a) **statutory seat**;

(b) central administration.




Article 4 Brussels I Recast Regulation cannot apply.


II. General jurisdiction (*lex fori*)

According to Article **6.1 Brussels I Recast Regulation**, in order to determine whether a Court (in our case: the Court of Rome, Italy) has general jurisdiction over a defendant not domiciled in a Member State, the ***lex fori* applies**.

Article 6.1 Brussels I Recast Regulation

1. If the defendant **is not domiciled in a Member State**, the jurisdiction of the Courts of each Member State shall [...] be determined by the law of that Member State.

 Pursuant to Article 3.1 of Italian Private International Law Act (Law 31 May 1995, No. 218) Italian Courts have no jurisdiction over a defendant not domiciled or resident in Italy nor having a representative in Italy enabled to appear before an Italian Court.

 Therefore, according to the Italian *lex fori*, Italian Courts lacks general jurisdiction over Face.

III. Special jurisdiction in consumer contracts

John is a consumer domiciled in a Member State (Italy), who entered into a service contract with Face. Article 17 Brussels I Recast Regulation provides very protective rules on jurisdiction for consumers, as they are considered “weaker parties” in respect of professionals.

Such protective heads of jurisdiction are applicable even when the professional pursuing commercial and professional activities within the EU is not domiciled in a Member State.

Article 17 Brussels I Recast Regulation

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 4 [Articles 17-19], without prejudice to Article 6 and point 5 of Article 7, if:

[...]

(c) in all other cases, the contract has been concluded with a **person who pursues commercial or professional activities** in the **Member State** of the **consumer’s domicile** or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

2. Where a consumer enters into a contract with a **party** who is **not domiciled** in a Member State **but** has a **branch, agency** or other **establishment** in one of the **Member States**, that party shall, in disputes arising out of the operations of the branch, agency or establishment, **be deemed to be domiciled in that Member State**.

Face can be considered “domiciled in Germany” for the purposes of Section 4 of the Brussels I Recast Regulation, as it is a professional with a branch in Germany

pursuing activities directed to multiple States, including the Member State in which the consumer is domiciled (Italy). Therefore, the provisions of Section 4 Brussels I Recast Regulation apply.

In particular, according to Article 18.1 Brussels I Recast Regulation:

Article 18.1 Brussels I Recast Regulation

1. 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**.



According to Article 18.1 Brussels I Recast Regulation the Court of Rome has special jurisdiction over the claim.



However, in the case at hand, Face is challenging the jurisdiction of the Court of Rome, invoking an exclusive choice of Court agreement in favour of the Court of California, which would have the effect of depriving the Court of Rome (Italy) of its jurisdiction over the case.

GOOD TO KNOW: An exclusive choice of Court agreement confers jurisdiction to the Court selected by the parties, at the same time depriving any other Court of the power to adjudicate the case on the merits.



FOR FURTHER READING on the Choice of court agreements under the Brussels I Recast regime:

http://www.ejtn.eu/Documents/Themis%20Luxembourg/Written_paper_Spain1.pdf

GOOD TO KNOW: On the formal validity of a Brussels I Recast choice of Court agreement regulated agreed to via click wrapping.

CJEU, 21 May 2015, C-322/14, *Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH*, ECLI:EU:C:2015:334, held that:

36. The purpose [of Article 25.2 Brussels I Recast Regulation] [...], is to treat certain forms of electronic communications in the same way as written communications in order to simplify the conclusion of contracts by electronic means, since the information concerned is also communicated if it is accessible on screen. In order for electronic communication to offer the same guarantees, in particular as regards evidence, **it is sufficient that it is “possible” to save and print the information before the conclusion of the contract**. It follows that the prorogation of jurisdiction clause accepted by the professional who clicked on the contract’s general terms and conditions, that can be saved and printed prior to concluding the contract, must be considered formally valid pursuant to Article 25.2.

IV. Effectiveness of the choice of Court agreement in favor of California

Pursuant to Article 19 Brussels I Recast Regulation, the provisions of Article 18.1 may be departed from only by a choice of Court agreement:

Article 19 Brussels I Recast Regulation

(1) which is **entered into after the dispute has arisen**;

(2) which **allows the consumer to bring proceedings in Courts other than those indicated in this Section** [Section 4]; or

(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 Member State, and which confers jurisdiction on the Courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.



As none of this requirement has been fulfilled in the case hand, the **choice of Court agreement** in favour of the Court of California included in the site's terms of service is **not effective** and, therefore, it **not deprives the Court of Rome of its jurisdiction over the case** pursuant to Article 18.1 Brussels I Recast Regulation.

C. Conclusion



The **Court of Rome** (Italy) has **special jurisdiction** to adjudicate the claim on the merits according to **Article 18.1 Brussels I Recast Regulation**.



Watch the case on our YouTube Channel "*LAWTrain self-learning*"
<https://www.youtube.com/watch?v=hSuFuDsJBn8>