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In recent years there has been a substantial body of case law – both at European and domestic level – on the proper scope of Chapter II, Section 4 of recast Brussels I (No 1215/2012): the consumer contracts ground of jurisdiction. The trend, discernible at a European level in cases like ***Emrek*** Case C-218/12, has been towards qualified expansion (qualified because the protection of the jurisdictional rights of the weaker party and the need to avoid parallel proceedings in more than one EU Member State have been used to justify the width given to Section 4). In the English Courts, enterprising Claimant lawyers have long made use of the consumer contracts ground to avoid the limitations found elsewhere in the Regulation and, in cases where insurance indemnity is lacking, this ground of jurisdiction has proved a more reliable basis on which to bring the tortfeasor before the English Court than section 3 of the recast Regulation: see, ***Lackey*** [2019] EWHC 1028 (QB); ***Cole & Martin v IVI*** [2019] WLUK 373 (QB); and, ***Hutchinson*** [2020] EWHC 178 (QB). The jurisprudence in this field has very recently been supplemented by important decisions at a domestic and European level. ***Ang v ReliantCo Investments Ltd*** [2019] EWHC 879 (Comm) was swiftly followed by ***AU v ReliantCo Investments Ltd*** Case C-500/18. ***AU***, decided on 2 April 2020, builds on previous decisions like ***Ilsinger*** Case C-180/06 in considering the degree of linkage or association with the contract which is required before section 4 of recast Brussels I can be deployed. In this case, referred by a Romanian Court, the Court of Justice asked itself what it means to be a *"consumer"* in this context and also, *"whether Regulation No 1215/2012 must be interpreted as meaning that, for the purposes of determining the courts having jurisdiction, an action in tort brought by a consumer against the other contracting party comes under Chapter II, Section 4, of that regulation."* The Court's answer to this question may be surprising to those used to a more literal approach to the construction of legislation. It is hoped that the following Case Note will provide a useful guide to this new contribution by the Luxembourg Court (together with a pointer towards some background reading for those who are interested).

Introduction

Romanian Specialist Court referred a number of questions to the CJEU concerning the interpretation of Article 4(1) of Directive 2004/39/EC. Guidance was given on the meaning of "consumer", the jurisdictional issues associated with this status, and the effect on non-contractual obligations (e.g. tort) arising out of dealings prior to the conclusion of a contract. The issues were examined in the context of financial instruments, specifically so-called 'financial contracts for differences' ("CFDs").

The Facts

CFDs are a fiddly and controversial form of agreement in derivatives trading. In layman's terms, they're a sort of betting financial instrument, where investors speculate on trading platforms on price changes in things like – as in this case – petrol.

In November 2016 the Claimant, AU, created an account on the online UFX platform which is owned by the Defendant Reliantco Investments. For his account he used a domain name of a trading company and had exchanges with the Defendant as director of development for that company. In January 2017 he concluded a contract with the Defendant, relating to the profits from the trades on the platform, indicating he had read and understood the terms and conditions. The contract featured a Cypriot law and exclusive jurisdiction clause.

In short, AU lost nearly €2,000,000, and in April 2017 sued the Defendant in the courts of his domicile, Romania, claiming he was the victim of a manipulation and that, in those circumstances, the Defendant was liable in tort for non-compliance with consumer protection provisions.

The Law

Article 2 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) provides:

"For the purposes of this directive:

…

(b) "consumer" means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;

(c) "seller or supplier" means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned."

Article 4(1) of Directive 2004/39, concerning protections afforded to financial investors, draws a distinction between "client", "professional client" and "retail client".

The effect of Articles 17 to 19 of Regulation (EC) No 1215/2012 (well known to regular readers as 'recast Brussels') is that a contract between a consumer and a seller/supplier is deemed to be formed in the consumer's Member State, giving the courts of that Member State jurisdiction over litigation pursuant to the contract. This is sometimes referred to as the 'consumer gateway'. There is a distinction, however, between a consumer and a "professional client"; the latter is not afforded the same jurisdictional privileges and protection. Pursuant to Article 25, of course, is also possible, provided certain conditions are satisfied, for the parties to reach an agreement specifying jurisdiction.

Article 12(1) of Regulation (EC) No 864/2007 ('Rome II') provides the following:

"The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into."

The Questions

Faced with a jurisdictional challenge to the claim made by AU against ReliantCo, the Specialist Court of Cluj, Romania stayed proceedings and referred the following questions to the CJEU:

(1) When interpreting the concept of "retail client" in Article 4(1) point 12 of Directive 2004/39, can or must the national court use the same interpretive criteria as those which define the concept of "consumer" within the meaning of Article 2(b) of Directive 93/13?

(2) If the answer to the first question is in the negative, under what conditions may a "retail client" within the meaning of Directive 2004/39 claim consumer status in a dispute such as that in the main proceedings?

(3) In particular, do the facts that a "retail client", within the meaning of Directive 2004/39, carries out a high volume of transactions within a relatively short period of time and that he invests very large sums of money in financial instruments such as those defined in Article 4(1) point 17 of Directive 2004/39, constitute relevant criteria for the purpose of assessing whether a "retail client" has consumer status under that directive?

(4) When attempting to establish its own jurisdiction, since it has the obligation to determine the impact of Article 17(1)(c) or Article 7(2) of Regulation No 1215/2012, whichever is applicable, can and/or must the national court take into consideration the legal basis relied on by the applicant (namely non-contractual liability alone) as a remedy for the conclusion of terms alleged to be unfair within the meaning of Directive 93/13, for which the substantive law applicable has been established pursuant to Regulation No 864/2007, or does the possible consumer status of the applicant make the substantive legal basis of his request irrelevant?'

The Answers

Questions 1-3 were taken together. The Court framed the issue, and the legal context, in
this way:

"44 By its first to third questions, which should be examined together, the referring court asks in essence whether Article 17(1) of Regulation No 1215/2012 must be interpreted as meaning that a natural person who, under a contract such as a CFD concluded with a financial company, carries out financial transactions through that company may be classified as a 'consumer' for the purposes of that provision and whether it is appropriate, for the purposes of that classification, to take into consideration factors such as the fact that that person carried out a high volume of transactions within a relatively short period or that he or she invested significant sums in those transactions, or that that person is a 'retail client' within the meaning of Article 4(1) point 12 of Directive 2004/39.

45 In accordance with the case-law of the Court, Article 17(1) of Regulation No 1215/2012 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; second, the contract between such a consumer and a professional has actually been concluded; and, third, such a contract falls within one of the categories referred to in Article 17(1)(a) to (c). All of those conditions must be fulfilled, with the result that, if one of those three conditions is not met, jurisdiction cannot be determined under the rules relating to consumer contracts (judgment of 3 October 2019, Petruchová, C-208/18, EU:C:2019:825, paragraph 39 and the case-law cited)."

The Court went on to explain that the status of 'consumer' must be interpreted restrictively, by referring to the (objective) position of that person in a given contract and not the subjective situation of that person. Only contracts concluded outside and independently of any trade or professional activity or purpose, solely for the purpose of satisfying an individual's own needs in terms of private consumption, are covered by the special rules under the regulation designed to protect the weaker party to the contract.

In the case of CFDs, where these are concluded between a natural person and a financial company, they will fall within the scope of Articles 17 to 19 of recast Brussels. Factors such as the value of transactions carried out under contracts such as CFDs, the extent of the risks of financial loss associated with the conclusion of such contracts, any knowledge or expertise that person has in the field of financial instruments, or his or her active conduct in the context of such transactions are in principle irrelevant. The same is true of a situation in which the consumer carried out a high volume of transactions within a

relatively short period or invested significant sums in those transactions.

Significantly, for the purposes of classifying a person as a 'consumer' under Article 17 of recast Brussels the fact that the person is a 'retail client' within the meaning of Article 4 of Directive 2004/39 is irrelevant.

Moving on to the fourth question, the CJEU succinctly explained: "*…. the referring court asks in essence whether Regulation No 1215/2012 must be interpreted as meaning that, for the purposes of determining the courts having jurisdiction, an action in tort brought by a consumer against the other contracting party comes under Chapter II, Section 4, of that regulation.*"

In essence, the question is whether consumers bringing tort claims still benefit from the 'consumer gateway' under Article 17, and if so, in what circumstances. The CJEU answered that Regulation No 1215/2012 must be interpreted as meaning that, for the purposes of determining the courts having jurisdiction, an action in tort brought by a consumer comes under Chapter II, Section 4, of that regulation if it is indissociably linked to a contract actually concluded between that consumer and the seller or supplier, which is a matter for the national court to verify.

Comment

Those readers sharp of eye and keen of memory will already have realised that the facts of this claim bear an uncanny resemblance to the jurisdictional challenge in a claim brought in the English courts, reported at *Ang v Reliantco Investments Limited [2019] 4 WLUK 234*, in which Ms Ang, who was domiciled in England, brought a claim against the Defendant after it blocked her from trading through her account with it, causing her to lose, so she alleged, over US$1,000,000 as a result of her open Bitcoin positions.

As in the Romanian case, Reliantco challenged jurisdiction on the basis of the exclusive jurisdiction clause in favour of Cyprus. Ms Ang countered that although she had been required to click a button to confirm that she had received and read the Defendant's terms and conditions, in fact the hyperlinks provided to her to enable her to do so had not been working, and merely took her to an error page. Furthermore, she said, her claim fell within Articles 17 to 19 of the recast Brussels regulation, and the English courts therefore had jurisdiction over it notwithstanding the exclusive jurisdiction clause.

Andrew Baker J, sitting in the Commercial Court, had no difficulty in rejecting the jurisdictional challenge. Not for him the agonising of the Romanian courts. He appears to have had no hesitation in finding that the investment by a private individual of their personal surplus wealth in the hope of generating good returns was not a business activity, generally speaking; it was a private consumption need. Naturally, it would be a fact-specific issue whether an individual was contracting either as a private individual to satisfy that need, or was doing so for the purpose of an investment business; but here there was nothing about the Claimant's particular investing activity that turned it into a business. A wealthy individual, able and willing to run the risks and more knowledgeable about cryptocurrencies than the average person, could still be a consumer while investing a portion of his or her wealth. Rich people are human beings too, you know, he might have said, but did not.

The decision in *Ang v Reliantco* is all the more interesting because at the time he handed down judgment Andrew Baker J was aware that the Greek courts had, in a series of decisions, taken a diametrically opposed view (and, in the process, said some very rude things about the judgment of Longmore J, as he then was, in *Standard Bank London Limited v Apostolakis (2002) CLC 933).* Notwithstanding this, and his awareness that the CJEU was considering its decision in *AU v Reliantco*, he came down very firmly in favour of Ms Ang in relation to the challenge to the jurisdictional consumer gateway, albeit he did not accept her assertions about the incorporation of the exclusive jurisdiction clause into the contract between the parties.

The decision of the CJEU in *AU v Reliantco* therefore has two main groups of beneficiaries. First and foremost, Longmore LJ and Andrew Baker J have been vindicated in their judgment, and the Greek courts

made to look injudicious in their unwarranted criticism of the former.

Secondly, though, persons with some greater knowledge, expertise and/or private means than the average consumer will be able to rely on the jurisdictional provisions within Articles 17 to 19 of recast Brussels to bring themselves within the consumer gateway, extending their choice of jurisdiction to the courts of their own domicile. With all due respect to the Greek judiciary, it seems to the authors that this must be right; there is no conceptual reason why a person who happens to be a millionaire should not be a consumer just as much as your humble servants, just because the things he or she chooses to purchase happen to be more expensive. Nor, as it seems to us, should a person who happens to have some knowledge of that in which he or she invests be penalised as a result.

As that great financial advisor Yogi Berra always said, you've got to be very careful if you don't know where you're going, because you might not get there.

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