Brussels I: A Race to the Top

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On November 30, 2000, the European Union passed a law mandating that online sellers be subject to suit in all fifteen EU states when they sell over the Internet. The new law is an amendment to the 1968 Brussels Convention. Called Brussels I, it is scheduled to go into effect on March 1, 2002.

The new law states that when there is a dispute between a consumer in one EU country and an online seller in another country, the consumer will be able to sue in her own country. The regulation states that when a merchant “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,” the country in which the consumer resides will have jurisdiction over the dispute.1

The idea for Brussels I sprang from a concern by European justice ministers that e-commerce was lagging in Europe. The European Commission attributed the dearth of online purchases to consumer fear, an opinion about which they have been very forthright in press statements as well as at the debates over the law.2 Given that consumer groups in Europe have been pushing for the right to sue companies in the consumer’s home country, the EU ministers hope that the elasticity of the new jurisdictional regulation will spur e-commerce by bolstering consumer confidence.

Many business owners, however, see Brussels I as a direct attack on small- to medium-sized companies. Spokespeople for this business community argue that large corporations are already subject to suit in each of the fifteen countries that constitute the EU, because they maintain offices in each country. Therefore, those affected by the law will be fledgling startups and small stores that are trying to establish a presence throughout the EU or are simply trying to grow their businesses. These small companies may be driven offline by the possibility of the high insurance and litigation costs that Brussels I will produce.

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The main argument against the new law is that its effects will be counterproductive. Harris Miller, President of the Technology Association of America, argues that the EU's belief that Europeans don't buy online because of a lack of consumer confidence is nonsense: "The reason that e-commerce is not taking off in Europe is not because of consumer confidence. The reason is ... because it's too expensive for consumers to get online." If Miller is correct, Brussels I will only exacerbate the problem by raising the costs for small businesses to operate—costs which those companies will then have to pass along to consumers.

Brussels I creates fifteen separate legal markets in which a company can be sued. This contradicts what many thought was the purpose of the EU: "[It] means we will still have fifteen separate markets in the EU, rather than one unified internal market, which I thought was the aim," says Mike Pullen, a lawyer based in Brussels.

The matter is further complicated because it preempts the Hague Convention discussions on the subject of a global charter, which is meant to address cross-border disputes. The proactive measures taken by the EU essentially pull the rug out from under the Hague Convention's planners, who want narrower protections such as granting jurisdiction only when a web site specifically targets a country. Representatives negotiating the new Hague Convention stalled on these points and met again in June 2001 to work further on a solution. In the meantime, the European Commission has been considering the Rome II Green Paper ("Rome II"), a document similar to Brussels I, but which affects more than jurisdiction. Rome II directly contradicts several pieces of legislation, including the EU's e-commerce directive which dictates that the substantive law of the country of origin should apply. Rome II would take precedence over this "country of origin" principle, which currently governs e-commerce within the EU.

The effect of the new EU regulations will be that e-tailers will have to comply with the laws in all fifteen EU member states—even if an e-tailer has not specifically targeted a country. The only way for companies to avoid being subject to suit in each member country is to specify on their website that they will only sell in certain countries. An open question is whether the website must specifically advertise that it is available only to consumers in a certain country, or whether the trappings of purposeful direction, such as language, prices denominated in a certain currency, or a statement that physical products will be sent only to one country, meet this requirement. An even more complicated problem arises when the sale involves software or some other downloadable commodity, so that the company selling the product may never know—and may have no method of determining—where the consumer actually resides.

To ease the burden on e-tailers, the European Commission envisions setting up a system of alternative dispute resolution procedures in each EU country, to which the commissioners hope consumers will resort rather than using expensive court litigation procedures. One reading of Brussels I is that e-tailers who agree to this form of dispute resolution will not be liable to suit in each country, but rather will have a choice of removing the consumer's suit to the dispute resolution system.

When it was president of the EU, France brokered a deal to add a review requirement to the new rules. Due mostly to the lobbying of pro-business groups, the clause requires that Brussels I be reviewed within five years. Within that time, it may be possible to see whether Brussels I has had the effect of creating a "race to the top" in which the EU member nation with the strictest laws in effect makes the law for all of the EU.

This kind of result seems unlikely at this point because of the difficulty and expense involved in bringing suit in a foreign country simply to take advantage of marginally stricter consumer-protection laws. But as e-commerce becomes more common within the EU—and as consumers begin to buy larger and more expensive items over the internet—a move toward homogeneity may become much more likely. Legislators, anxious to attract businesses and promote e-commerce, will likely promote homogeneous laws in an effort to assure consumers that their transactions are safe and reliable.

The success or failure of Brussels I will be closely monitored by countries around the world because its results will greatly impact ongoing negotiations over the Hague Convention. Those talks were promulgated at the request of the United States, but they have been stalled because the United States is balking at the idea of allowing jurisdiction over commercial disputes in the country of the consumer's residence, rather than determining jurisdiction through the more complicated and nuanced

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conflicts of law method that American courts use. The current state of draft negotiations over the Hague Convention allows jurisdiction by determining the place of injury. This system would allow a mom-and-pop shop in Vermont to be sued in the Ukraine if a worldwide treaty determining tort by place of injury is promulgated.

One possible solution—albeit a long-term one—is that technology itself will solve the problems presented by the Brussels, Rome, and Hague regulations. While it is generally assumed that the World Wide Web provides a certain degree of anonymity, a few judges have recently ruled that companies can be held liable for not using "best efforts" to determine the location of their consumers and to follow the laws of the countries in which those consumers reside. Most notably, French Judge Jean-Jacques Gomez held last fall that Yahoo! must make good-faith attempts to keep French viewers from purchasing Nazi memorabilia from their auction website, in accordance with a French law which prohibits the display of Nazi insignia. Judges in Germany and Italy also have recently upheld national laws in the face of "borderless" Internet defenses.

According to the prosecution in the Yahoo! case, it is possible to keep a great majority (approximately 90 percent) of French viewers out of a company's website. After time, and especially now that companies have begun to realize that they must focus on developing this area, it is likely that routing programs and advancing technology will allow companies to filter out viewers based on their geography. When this happens, many of the disputes governed by treaties such as Brussels I and the Rome paper may be reduced to mere conflicts of law cases that differ little from a typical torts case.


10. Thomas P. Vartanian and James J. Muchmore, It is a Brave New World of On-line Liabilities, NY LJ 5 (May 1, 2001).