Jurisdiction and choice of law rules over electronic consumer contracts: The nexus between the concluded contract and the targeting activity

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Abstract
A foreign business is subject to the jurisdiction of a consumer’s domiciled country and the law of the consumer’s habitual residence, provided that the business has targeted at the consumer’s home country and the consumer contract falls within the scope of such targeting activities under Brussels Ibis and Rome I Regulations. However, it is unclear whether the contract must be concluded from a distance and has a causal link with the targeting activity. The CJEU concludes that the contract does not have to be concluded at a distance or have a causal connection with the targeting activity. This is also the case in China in which consumer choice of law rules, while not requiring a causal link, adopt a lower threshold by examining the dis-targeting test. By contrast, American jurisdiction rules over consumer contracts adopt a higher threshold, which requires a casual connection between the consumer’s claim and the business’s contact with the consumer’s state. Although the EU, USA and China have different private international law rules over consumer contracts, commonalities do exist in certain aspects. Based on a comparative study, this article argues that the fact that a contract is concluded at a distance or has a nexus with the targeting activity is a relevant factor, among other factors, to determine the targeting test. In this regard, Brussels Ibis and Rome I need a minor amendment.

Keywords
Brussels Ibis Regulation, Rome I Regulation, jurisdiction grounds, distance contract, fall within the scope of, causal connection, specific personal jurisdiction, Chinese Conflicts Act, dis-targeting test

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I. Introduction

Under Articles 17–19 Brussels Ibis Regulation and Article 6 Rome I Regulation, consumers are granted favorable jurisdiction and choice of law rules in cross-border litigation. The application of such private international law rules is subject to three conditions. First, one party to the contract is a consumer who is acting outside his trade or profession. Second, the professional has targeted at, by pursuing commercial activities in or directing such activities to, the country of the consumer’s domicile and a contract has actually been concluded. Third, the contract falls with the scope of targeting activities. If one condition is not fulfilled, consumer jurisdiction rules shall not apply.

By contrast, there is no specific consumer jurisdiction and applicable law rules in the USA. Consumer contracts are subject to general jurisdiction rules, such as personal jurisdiction rules and specific jurisdiction rules. China also has no specific jurisdiction rules over consumer contracts, thus foreign-related consumer contracts are subject to general contract jurisdiction rules in Article 265 of the Chinese Civil Procedure Law. However, a specific consumer conflicts rule is put in place since 2010. Article 42 of Chinese Conflicts Act expressly states that consumer contracts are governed by the law of the place of the consumer’s habitual residence. Such favorable rule is subject to two exceptions. Namely, provided that the consumer chooses to apply the law of the place of the provision of goods or services, or the business does not engage in relevant commercial activities in the consumer’s home country, the law of the place of the provision of goods or services shall apply. Comparing to the targeting test in Article 6 Rome I Regulation which sets a positive condition by requiring the business conducting a certain activity for the application of consumer conflict rules (targeting test), Article 42 Chinese Conflicts Act provides a negative condition by examining the non-engagement of a business in commercial activities for the non-application of consumer conflict rules (the dis-targeting test). Therefore, the EU has both consumer jurisdiction and choice of law rules and the USA has neither of them, whilst China only has consumer choice of law rules.

Although these three legal systems have different approaches towards consumer contracts, their conflicts of law rules are not totally isolated. Instead, American law influences European law, and European law influences Chinese law. However, the European law adopted a slightly different approach from the American law, while having considered the conflicts of law rules in America. Specifically, the concepts of interactive websites, passive websites and active websites were first introduced in the USA, which influenced the EU legislation with regard to the targeting test or directing test provided in the Brussels Ibis and Rome I Regulations. However, the EU legislator did not use the same concepts of interactive, passive and active websites, but created the targeting

1. Case C-774/19 B.B. v. Personal Exchange International, EU:C:2020:1015, para. 25; Case C-208/18 Jana Petruchová v. FIBO, EU:C:2019:825, para. 39; citing C-297/14 Hobohm, EU:C:2015:844, para. 24.
2. The criteria of targeting test is discussed in Z. Chen, ‘Internet, Consumer Contracts and Private International Law: What Constitutes Targeting Activity Test?’, Information and Communications Technology Law (2021), p. 8.
3. International Shoe Co. v. Washington, 326 U.S. 310 (1945); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).
4. Bensusan Rest. Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996); Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328 (E.D. Mo.1996); CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996); Zippo Manufacturing Co. v Zippo Dot Com, Inc., 952 F.Supp.1119(W.D. Pa.1997).
5. The concepts of interactive and passive websites were repeatedly mentioned in the preparatory works of Brussels I Regulation. J. Øren, ‘International Jurisdiction over Consumer Contracts in e-Europe’, 52 International and Comparative Law Quarterly (2003), p. 684.
test, which is more flexible than the mere examination of the nature of the website. Likewise, the draft proposal of Article 42 Chinese Conflicts Act was based on Article 5 Rome Convention. Yet the final text does not adopt the ‘targeting test’. Instead, the dis-targeting test is established for not applying the consumer’s home law.

Under European private international law, as to the ‘targeting test’, it is unclear with what degree of precision it must target the consumer’s country. Moreover, Article 17(1)(c) Brussels Ibis and Article 6(1) Rome I fail to clarify whether consumer jurisdiction and applicable law rules are limited to contracts concluded at a distance and whether a causal link is required between the targeting activity and the conclusion of the contract. This article will first examine the European approach and then conduct a comparative study with the American and Chinese approaches. Such legal comparison aims to answer whether one is the better approach in terms of the coverage of distance contracts and the need, or not, of a causal link between the concluded contract and the targeting activity. A suggestion for a minor amendment of European consumer conflict of law rules is tentatively given based on a comparative study of these three legal systems.

2. Whether consumer jurisdiction and applicable law rules are limited to distance contracts

The ‘directing… to’ test is intended to cover more distance contracts than its predecessor and include contracts that are concluded via the Internet. The conclusion of a contract at a distance is mentioned in the Joint Declaration and Recital 24 of Rome I Regulation, although Article 6 Rome I and Article 17(1)(c) Brussels Ibis as such do not lay down such a condition. A distance contract can be concluded by any technical means that facilitates the conclusion of such a contract. Article 2(4) Distance Contracts Directive states that distance communication means refer to ‘any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties’, such as telephone, electronic mail or facsimile machine (fax).

A. Consumer jurisdiction over distance contracts

The requirement of the conclusion of a contract raises the question whether consumer jurisdiction rule applies only if a contract is concluded at a distance. In Daniela Mühlleitner v. Yusufi and Lokman Emrek v. Vlado Sabranovic, the question raised was: ‘Does the application of Article 15(1)(c) Brussels I Regulation presuppose that the contract between the consumer and the undertaking has been concluded at a distance?’

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6. M. Wilderspin, ‘Consumer Contracts’, in J. Basedow et al. (eds.), Encyclopedia of Private International Law (Edward Elgar Publishing, 2017), p. 467.
7. Ibid., p. 466.
8. Opinion of Advocate General Trstenjak in Joined Cases C-585/08 and C-144/09 Pammer and Hotel Alpenhof, EU:C:2010:273, para. 55.
9. Ibid., para. 65.
10. Ibid.
11. Ibid., para. 55.
12. Case C-190/11 Mühlleitner v. Yusufi, EU:C:2012:542, para. 24.
13. Case C-218/12 Lokman Emrek v. Vlado Sabranovic, EU:C:2013:666, para. 18.
In Mühlleitner v. Yusufi, Ms Mühlleitner, domiciled in Austria, searched on the internet to buy a German-made car for private use. After entering vehicle type she wanted on the German search platform www.mobile.de, a list of vehicles corresponding to the characteristics showed up.\textsuperscript{14} She was directed to an offer, which corresponded best to her search criteria. It was provided by Mr A. Yusufi and Mr W. Yusufi who operated a motor vehicle retail business, a partnership established in Hamburg, Germany.\textsuperscript{15} Mühlleitner contacted the defendants to obtain more information about the vehicle, using the telephone number stated on the website, which included an international dialing code. Since the vehicle was no longer available, she was offered another vehicle, details of which were subsequently sent by email. She was also informed that her Austrian nationality would not prevent her from acquiring a vehicle from the defendants.\textsuperscript{16} Mühlleitner went to Germany, signed a sale contract in Hamburg, bought the vehicle from Yusufi and took immediate delivery of it.\textsuperscript{17} Mühlleitner found the vehicle was defective later. She brought proceedings in the court of her state of domicile, claiming that she concluded the contract as a consumer with an undertaking directing its commercial or professional activities to Austria, which fell within the scope of Article 15(1)(c) Brussels I.\textsuperscript{18} The defendants contested the status of Mühlleitner as a ‘consumer’ and the international jurisdiction of the Austrian courts, arguing that they did not direct their activities to Austria and that Mühlleitner concluded the contract at the seat of their undertaking in Germany.\textsuperscript{19}

The Appeal Court classified Mühlleitner as a ‘consumer’, but referred to the joint statement by the Council and the Commission on Articles 15 and 73 of the Brussels I Regulation, according to which a purely ‘passive’ internet site is not sufficient.\textsuperscript{20} The contract must be concluded at a distance to justify that an activity is directed to the consumer’s State, whereas the website at issue had the characteristics of a ‘passive’ site.\textsuperscript{21} The Supreme Court considered that the defendants directed their activities to Austria, having regard to the possibility of consulting the website in Austria and the existence of contacts at a distance between the parties to the contract, by telephone and email.\textsuperscript{22} The question was whether Article 15(1)(c) Brussels I (current Article 17(1)(c) Brussels Ibis) applies solely to distance contracts.\textsuperscript{23}

The CJEU admitted that the need for the consumer contracts to be concluded at a distance is mentioned in the joint statement and Recital 24 Rome I Regulation.\textsuperscript{24} Yet Article 15(1)(c) Brussels I does not expressly make its application conditional on the fact that the contracts falling within its scope have been concluded at a distance.\textsuperscript{25} Instead, this provision applies

\textsuperscript{14} Case C-190/11 Mühlleitner v. Yusufi, para. 11.
\textsuperscript{15} Ibid., para. 12.
\textsuperscript{16} Ibid., para. 13.
\textsuperscript{17} Ibid., para. 14.
\textsuperscript{18} Ibid., para. 15–16.
\textsuperscript{19} Ibid., para. 17.
\textsuperscript{20} As to the distinction between active, passive and interactive websites, as well as what constitutes lowest level, middle level or highest level of interactivity of interactive websites, see T.A. Dickerson et al., ‘Personal Jurisdiction and the Marketing of Goods and Services on the Internet’, 41 Hofstra Law Review (2012), p. 40.
\textsuperscript{21} Case C-190/11 Mühlleitner v. Yusufi, para. 19.
\textsuperscript{22} Ibid.
\textsuperscript{23} Ibid.
\textsuperscript{24} Ibid., para. 33. Recital 24 of the Rome I Regulation: The joint declaration also states that ‘the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means.’
\textsuperscript{25} Case C-190/11 Mühlleitner v. Yusufi, para. 35.
where two specific conditions are satisfied: first, the trader’s activities have targeted at the consumer’s home country, and second, the concluded contract falls within the scope of such targeting activities. Moreover, the explanatory memorandum of the Brussels I Regulation indicates that Article 15(1)(c) Brussels I applies to contracts which were concluded in a State other than that of the consumer’s domicile, as it has removed the condition in Article 13 Brussels Convention which requires the consumer to take necessary steps in his State. Whilst Article 13 Brussels Convention required both the trader and the consumer to fulfill certain requirements, Article 15(1)(c) Brussels I merely confines the behavior of the trader. So does Article 6 Rome I, since the predecessor merely covers passive consumer and may deprive the protection of active and mobile consumers. The conditions are worded more generally than they were, in order to ensure better protection for consumers in the context of the development of electronic commerce and new means of communication. This means that a consumer who has been solicited by a business online and concludes a contract offline in the business’s State of domicile may also be protected. A teleological interpretation of Article 15(1)(c) Brussels I implies that the requirement of the conclusion of consumer contracts online or at a distance would be against the objective of that provision.

Although the defendant argued that Article 15(1)(c) Brussels I could not apply because the contract with the consumer had been concluded on the spot and not at a distance, the CJEU asserted that both the conclusion of a contract and the reservation of goods or services at a distance are indications that the contract is connected with directing activities. The Joint Declaration on Articles 15 and 73 also mentions that contracts concluded at a distance among other marketing methods, which cannot be equivalent to the requirement that the contracts must be concluded at a distance. Although it seems that the Joint Declaration, Recital 21 Rome I Regulation and the Brussels Ibis Regulation overly focus on websites and online selling, it would be a backward in terms of consumer protection comparing to Article 13(1) Brussels Convention if the contract has to be concluded at a distance. Thus, the application of Article 17(1)(c) Brussels Ibis does not depend on the way a contract was concluded.

B. The conclusion of the contract at a distance as a relevant factor

A teleological interpretation of Brussels Ibis Regulation would indicate that the manner in which a contract is concluded, by distance selling or in person, should not play a crucial role, as long as the

26. Ibid., para. 36.
27. Ibid., para. 37; COM(1999) 348 final.
28. Ibid., para. 39; Joined Cases C-585/08 and C-144/09 Pammer and Hotel Alpenhof, EU:C:2010:740, para. 60.
29. F. Ragno, ‘The Law Applicable to Consumer Contracts under the Rome I Regulation’, in F. Ferrari and S. Leible (eds.), Rome I Regulation (Sellier European Law Publishers, 2009), p. 149.
30. Case C-190/11 Mühleitner v. Yusufi, para. 38; Joined Cases C-585/08 and C-144/09 Pammer and Hotel Alpenhof, para. 59.
31. Ibid., para. 42.
32. Ibid., para. 43-44.
33. Ibid., para. 45; P. Mankowski and P. Nielsen, ‘Jurisdiction Over Consumer Contract’, in U. Magnus and P. Mankowski (eds.), Brussels Ibis Regulation (Otto Schmidt, 2016), p. 485.
34. Ibid., p. 497.
35. Ibid., p. 485.
36. Opinion of Advocate General Trstenjak in Joined Cases C-585/08 and C-144/09 Pammer and Hotel Alpenhof, para. 25.
business has expected and solicited to do business with consumers with that particular State. Accordingly, the conclusion of a consumer contract at a distance is simply an indication that the contract is connected with a business’s targeting activity. Article 17(1)(c) Brussels Ibis must be interpreted ‘as not requiring the contract between the consumer and the trader to be concluded at a distance’.37 First, it is questionable that a consumer who accesses a website that solicits the conclusion of a contract via fax at a distance is more worthy of protection than a consumer who accesses the website that invites him to go abroad to conclude a contract in person, and vice versa.38 In both cases, consumer jurisdiction rules shall apply, irrespective of where the contract was concluded in the end.39 Otherwise, a consumer who books hotels or tourist services from a distance and concludes the contract at the place where the services are provided will not be protected.40

In *Pammer and Hotel Alpenhof*, Hotel Alpenhof contended that Article 15(1)(c) Brussels I cannot apply, because the consumer contract was concluded on the spot and not at a distance, as the room keys were handed over and the payment was made on the spot.41 The CJEU held that Article 15(1)(c) Brussels I was applicable, since the hotel reservation was made and confirmed at a distance by email and the consumer became contractually bound at a distance, despite the fact that the place where the keys were handed over to the consumer and the payment was in the State of the business’s domicile.42 The reference to a distance contract intended to underline the importance of the requirement of preparatory and prior pre-contractual activity through the Internet, which directed to the territory of the consumer’s domicile.43 The lack of both a distance contract and any preparatory or prior activity can be offset by the existence of another factor.44

Second, the condition of the existence of targeting activities before the conclusion of a consumer contract does not, explicitly or implicitly, require that the consumer contract should be concluded at a distance. The report on the proposal for the Brussels I Regulation45 mentions the advisability of adding the condition that consumer contracts must be concluded at a distance, which eventually was not adopted.46 It is irrelevant whether a consumer contract is concluded at a distance, as long as there are targeting activities preceding the conclusion of the contract, since the location of the conclusion of a consumer contract could be anywhere or nowhere in the context of e-commerce and digital economy. It is wrong to suggest that a website can never constitute a targeted activity unless it solicits the conclusion of a distance contract and that contract has indeed been concluded at a distance.47 In order to strengthen consumer protection, Article 15(1)(c) Brussels I Regulation lowered the threshold and covered, in principle, all types of contracts and all modes of contracting.48

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37. Case C-218/12 Lokman Emrek v. Vlado Sabranovic, para. 19.
38. F. Ragno, in F. Ferrari and S. Leible (eds.), *Rome I Regulation*, p. 148.
39. Ibid.
40. Opinion of Advocate General Trstenjak in *Pammer and Hotel Alpenhof*, para. 55.
41. Joined Cases C-585/08 and C-144/09 *Pammer and Hotel Alpenhof*, para. 86.
42. Ibid., para. 87.
43. Opinion of Advocate General in Case C-218/12 Lokman Emrek v. Vlado Sabranovic, EU:C:2013:494, para. 28; Case C-190/11 Mühlleitner v. Yusufi, para. 38.
44. Opinion of Advocate General in Case C-218/12 Lokman Emrek v. Vlado Sabranovic, para. 33.
45. Final document A5-0253/2000, amendment 23 and explanatory statement.
46. Case C-190/11 Mühlleitner v. Yusufi, para. 40.
47. R. Plender and M. Wilderspin, *The European Private International Law of Obligations* (5th edn, Sweet & Maxwell, 2020), p. 273, para. 9-055.
48. P. Mankowski and P. Nielsen, in U. Magnus and P. Mankowski (eds.), *Brussels Ibis Regulation*, p. 485.
C. Technology-neutral jurisdiction rules

Consumer jurisdiction and choice of law rules have existed in the EU before the advent of Internet and e-commerce. Article 5 Rome Convention had been increasingly criticized with the development of e-commerce. The concept of ‘directed activity’ was originally introduced in the Brussels I Regulation in order to adjust the law to the growth of communication technologies and distance selling technologies in accordance with Recital 24 Rome I. Articles 17–19 Brussels Ibis and Article 6 Rome I aim to regulate jurisdiction and choice of law issues for especially, but not only, international electronic consumer contracts.

By contrast, consumer contracts are subject to general jurisdiction rules in the USA and China, the fact that a contract is concluded online or offline is irrelevant. For instance, consumer contracts concluded online and offline are subject to general jurisdiction rules set forth in Article 23 or Article 265 Chinese Civil Procedure Law in China. In the USA, the courts need to examine whether exercising jurisdiction over a non-resident defendant complies with the due process clause in the US Constitution’s 14th Amendment. Therefore, there is no requirement of the conclusion of contract at a distance for the exercise of jurisdiction of the consumer’s home State. The drawback of applying general jurisdiction rules to consumer contracts is that consumers, as the weaker party, are not granted with more favorable jurisdiction rules. However, the merit is that such technology-neutral rule may easily adapt to new emerging technology by a further interpretation of traditional rules without establishing new rules. For instance, the purposeful availment test or the Zippo Sliding Scale test has derived from the personal jurisdiction rules in the USA. The demerit is that such general jurisdiction rule is less consumer-friendly.

3. The contract falls within the scope of pursuing or directing activities

A. Condition for applying consumer jurisdiction rules

The fact that a professional has targeted at the country of the consumer’s domicile does not necessarily lead to the application of consumer jurisdiction rules. Under Article 17(1)(c) Brussels Ibis, the conclusion of the contract must fall within the scope of such targeting activities. Thus, there must be a connection between the professional’s business and the concluded contract. Neither Article 17(1)(c) Brussels Ibis nor Article 6(1) Rome I clarify whether there must be merely a temporal relationship between the contract and the professional’s directing activity or there must also be a causal link between these two. The statement of ‘the contract falls within the scope of such activities’ is ambiguous and might either be interpreted as ‘the contract is as a result of such activities’ or be equated with ‘the contract is related to such activities’. Thus, it remains a question whether the targeting activity and the concluded contract must have a causal link.

49. O. Lando and P.A. Nielsen, ‘The Rome I Regulation’, 45 Common Market Law Review (2008), p. 1708.
50. F. Ragno, in F. Ferrari and S. Leible (eds.), Rome I Regulation, p. 147.
51. O. Lando and P. A. Nielsen, 45 Common Market Law Review (2008), p. 1708.
52. Shang Haifeng v. Youth Tour International Travel Service Group, Liaoning Shenyang Municipality Intermediate People’s Court, (2020) Liao 01 Min Xia Zhong No 325; Liu Chengqin v. Shenzhen Jiuzhou International Travel Agency, Guangdong Shenzhen Qianhai Cooperation Zone People’s Court, (2020) Yue 0391 Min Chu No 1620-1633.
53. F. Ferrari, Concise Commentary on the Rome I Regulation (Cambridge University Press, 2020), p. 174, para. 34. doi:10.1017/9781108596633.003.
54. Ibid; F. Ragno, in F. Ferrari and S. Leible (eds.), Rome I Regulation, p. 146.
1. ‘As a result of’. In *Pammer and Hotel Alpenhof*, the conclusion of a consumer contract which fell within the scope of the business’s commercial or professional activities was mentioned by the Advocate General but was not addressed specifically by the CJEU.\(^{55}\) Recital 25 Rome I Regulation seems to suggest a causality between the targeting activity and the concluded contract.\(^{56}\) It prescribes that consumers are protected by mandatory provisions of the country of their habitual residence, only if the consumer contract has been concluded as a result of the professional pursuing his commercial or professional activities in, or targeting such activities to, that particular country. The use of the wording ‘as a result of’ twice in Recital 25 implies that the contract must be concluded as a direct result of targeting activities. Thus, a causal link or causal connection is required for the application of consumer choice of law rules.

2. ‘Within the frame of’. By contrast, Recital 24 Rome I Regulation construes the phrase ‘the contract falls within the scope of such activities’ as ‘the contract is concluded within the framework of such activities’. The Joint Declaration on the Brussels I Regulation states that ‘for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer’s residence, or at a number of Member States including that Member State; a contract must also be concluded *within the framework of* its activities’.\(^{57}\) The expression ‘the contract falls within the scope of such activities’ indicates a close connection, not necessarily a causal link, between the targeting activity and the concluded contract. Since the requirement of a close connection is less stricter than the casual connection, Recital 25 Rome I Regulation sets a higher threshold for the application of consumer choice of law rules than Recital 24. It is unclear which interpretation should prevail, as there is no implicit nor explicit requirement of a causal link in Article 6(1) Rome I Regulation as such.\(^{58}\)

**B. A hidden or unwritten condition?**

In *Lokman Emrek v. Vlado Sabranovic*, the raised question was: ‘in cases in which a trader’s Internet presence satisfies the “directing” requirement, does Article 15(1)(c) Brussels I Regulation require, as a further unwritten condition, that the consumer was induced to enter into the contract by the website operated by the trader and, consequently, that the Internet presence must be a causal factor in regard to the conclusion of the contract?’\(^{59}\) The CJEU needs to address whether Article 15(1)(c) Brussels I requires a causal link between the activity ‘directed’ to the consumer’s domicile and the consumer’s decision to enter into the contract.\(^{60}\)

In this case, Mr Emrek, domiciled in Saarbrücken, Germany, was looking for a second-hand motor vehicle.\(^{61}\) Mr Sabranovic operated a business selling second-hand motor vehicles in Spicheren, France, a town close to the German border and 7.9 km away from Saarbrücken. He had an Internet site which contained the contact details, including French telephone numbers and

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55. Opinion of Advocate General Trstenjak in Joined Cases C-585/08 and C-144/09 *Pammer and Hotel Alpenhof*, para. 57-58.
56. F. Ferrari, *Concise Commentary on the Rome I Regulation*, p. 174, para. 34.
57. Recital 24 of the Rome I Regulation.
58. Case C-218/12 *Lokman Emrek v. Vlado Sabranovic*, para. 21.
59. Opinion of Advocate General in Case C-218/12 *Lokman Emrek v. Vlado Sabranovic* para. 25.
60. Ibid., para. 1.
61. Case C-218/12 *Lokman Emrek v. Vlado Sabranovic*, para. 9.
a German mobile telephone number with international codes respectively, for his business. Mr Emrek learned from his acquaintances, instead of the Internet site, of Mr Sabranovic’s business and went to the business premises in Spicheren, France. Mr Emrek concluded a written sale contract with Mr Sabranovic at his establishment or premises in France.

Emrek sued Sabranovic under a warranty before a court in Germany, claiming Sabranovic’s website had directed commercial activity to Germany and Article 15(1)(c) Brussels I does not require a causal link between the commercial activity directed to the consumer’s Member State and the conclusion of the contract. The Regional Court took the view that Sabranovic’s commercial activity was directed to Germany on the ground that the mention of the French international dialing code and a German mobile telephone number on the website gave the impression that the trader intended to canvass clients outside of France, in particular clients in the border area of Germany. Meanwhile, to avoid an extension of the scope of Article 15(1)(c) Brussels I, the Regional Court held that the trader’s Internet site should, at least, form the basis of the actual conclusion of the contract with the consumer. Where a consumer ‘fortuitously’ concludes a contract with a ‘trader’, which was the case at issue, Article 15(1)(c) Brussels I should not be applicable.

C. Causality between the means of targeting and the conclusion of the contract

It is noticeable that the trader did target at the country where the consumer was domiciled, although the website did not form the basis of the conclusion of the contract. As to whether Article 15(1)(c) Brussels I requires that ‘the consumer was induced to conclude the contract by the website operated by the trader and, consequently, that the Internet site has a causal link with the conclusion of the contract’, the CJEU held that it does not expressly presuppose the existence of a causal link.

1. The absence of one causation factor offset by another factor or factors. Article 15(1)(c) Brussels I applies if two conditions are satisfied: first, the trader has directed commercial or professional activities to the consumer’s home country, and, second, the concluded contract falls within the scope of such activities. It is unclear whether the lack of a causal link will be sufficient to deprive the special jurisdiction conferred by the Brussels Ibis Regulation from the courts of the consumer’s State of domicile. It is held that as long as the absence of such factor can be offset by another factor or factors that demonstrate equally well that the activity was directed to the consumer’s State of domicile, the courts of the consumer’s home country can still be granted with special jurisdiction. The absence of a causal link ‘must generally be offset by the existence of at least one item of evidence of comparable strength’.

62. Ibid., para. 10.
63. Opinion of Advocate General in Case C-218/12 Lokman Emrek v. Vlado Sabranovic para. 4.
64. Ibid., para. 5.
65. Case C-218/12 Lokman Emrek v. Vlado Sabranovic, para. 11–12.
66. Ibid., para. 13, 15.
67. Ibid., para. 16.
68. Ibid., para. 17.
69. Ibid., para. 18, 20.
70. Ibid., para. 22.
71. Opinion of Advocate General in Case C-218/12 Lokman Emrek v. Vlado Sabranovic, para. 31.
72. Ibid., para. 40.
For instance, the absence of a causal link can be offset by indicative factors elaborated in *Pammer and Hotel Alpenhof* in order to determine whether an activity was directed to the State of a consumer’s domicile. The non-exhaustive list of factors which constitutes evidence to determine the existence of a targeting activity was prescribed in paragraph 93 of *Pammer and Hotel Alpenhof* judgment. The CJEU has emphasized, in that case and in *Mühlleitner*, the importance of these factors as ‘evidence’ to show that the activity was directed to the consumer’s domiciled State, but never as essential conditions. Such interpretation is supported by the intention behind Articles 15–16 Brussels I and the related preparatory acts. The CJEU tends to interpret the expression ‘the contract falls within the scope of such activities’ as the concluded contract relates to directed activities.

In *Lokman Emrek v. Vlado Sabranovic*, the trader was established in France, close to the border of Germany, an urban area extending on both sides of the border. The French trader used a telephone number allocated by Germany to save the cost of an international call for his potential clients domiciled in Germany, thus his activity was ‘directed to’ Germany. In the absence of a causal factor, the geographical context acts as a strong evidence of an activity directed to the consumer’s country and its relation to the conclusion of the contract. Specifically, the defendant’s business and the plaintiff’s domicile were in a virtually communal space, where the urban development has caused these two municipalities to become intertwined. In a geographical area where one is virtually unaware of having crossed a border, it is difficult to claim that the activities of a trader in that area are not directed to consumers whose domicile is in the neighbouring State. Moreover, the language difference does not appear to have prevented the French trader from soliciting customers with German mobile telephone numbers by his website. The geographical factor offset the lack of a causality factor. As mentioned above, the conclusion of a contract at a distance is also an indication that the contract is connected with the directing activity. Similarly, the existence of a causal link also acts as an evidence of demonstrating a targeted activity. The application of consumer jurisdictional rules only presupposes that the concluded consumer contract falls within the scope of targeting activities conducted by a foreign business in general.

2. Evidential difficulty on burden of proof. The requirement of a causal link might also give rise to certain evidential issues. If a consumer asserts his or her decision to conclude a contract was taken on the basis of consulting a website, together with a telephone call, is it enough for the consumer simply to make a statement or must they provide evidence of having undertaken such consultations? It is unreliable to rely on a one-sided statement from the consumer’s side in the former

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73. Ibid., para. 16.
74. Case C-218/12 Lokman Emrek v. Vlado Sabranovic, para. 27.
75. Opinion of Advocate General in Case C-218/12 Lokman Emrek v. Vlado Sabranovic, para. 16.
76. Ibid., para. 16.
77. Case C-218/12 Lokman Emrek v. Vlado Sabranovic, para. 28.
78. Ibid., para. 30.
79. Opinion of Advocate General in Case C-218/12 Lokman Emrek v. Vlado Sabranovic, para. 34.
80. Ibid., para. 35.
81. Ibid., para. 36.
82. Case C-190/11 Mühlleitner v. Yusufi, para. 44.
83. Opinion of Advocate General in Case C-218/12 Lokman Emrek v. Vlado Sabranovic, para. 25.
84. Ibid., para. 25.
case, whereas in the latter case it might be virtually impossible to prove. This evidential requirement may, in the end, turn out to be a probatio diabolica for the consumer because of the difficulties in proving the existence of such a causality between the business’s targeting activities and the concluded contract. Problems of proof also occur in cases where the contract was not concluded at a distance. The consumer is unable to prove that there is a causal link even when advertisements are conducted via traditional means, such as print, radio and television, let alone in the context of e-commerce and digital economy where advertising is conducted via internet. Thus, the difficulties related to proof of the existence of a causal link might tend to dissuade consumers from bringing actions before the national courts under Articles 17–19 Brussels Ibis Regulation and weaken the protection of consumers which those provisions seek to achieve.

Regardless of the degree of difficulty in proving it, once there is an activity directed to a consumer’s State, one would expect that there is a causal link, the problem in Lokman Emrek v. Vlado Sabranovic is that it had been proved that the causal link did not exist. It may lead to an unsatisfactory result where a consumer who concludes a contract after visiting a website of a company will be protected, whereas his friend, domiciled in the same region, who learns from him and enters into a contract with the company, will not be protected. The consumer in Lokman Emrek v. Vlado Sabranovic would be obliged to go to the business’s domicile to file a lawsuit. Therefore, the requirement laid down in Article 17(1)(c) Brussels Ibis and Article 6(1) Rome I Regulation should not be overstretched and the consumer is not obliged to prove a causal link. The CJEU held that, in the case of a contract between a trader and a given consumer, it is necessary to examine whether there was evidence demonstrating that the trader was envisaging doing business with consumers domiciled in that country in the sense that it was minded to conclude a contract with those consumers.

Having considered the evidential difficulties a consumer might encounter does not mean that such difficulties a business might confront should be neglected. The activity conducted by a consumer is the basis for the determination of whether a person is an active or passive consumer, which in return is relevant, if not decisive, for determining whether a business should be subject to the jurisdiction of consumer’s home state. It is not easy for a business to prove a contract is concluded as a result of a consumer’s actively pursuing activities, rather than as a result of being passively targeted by the business’s commercial activities. In the absence of a causality condition, a disproportionate burden would be placed on traders and service providers, who would be open to being sued in any EU Member State simply by virtue of having a website and contracting with consumers resident in other Member States. Moreover, an interpretation excessively favourable to the consumer would have negative impacts on small and medium-sized enterprises in those Member States. A causal link is not required does not mean there is no connection between the targeting activities and the conclusion of the contract. Rather, a general relation to the type of business

86. Ibid.
87. F. Ferrari, Concise Commentary on the Rome I Regulation, p. 174, para. 34.
88. G.P. Calliess and M. Renner (eds.), Rome Regulations (3rd edn, Wolters Kluwer, 2020), p. 125, para. 56.
89. F. Ferrari, Concise Commentary on the Rome I Regulation, p. 174, para. 35.
90. Opinion of Advocate General in Case C-218/12 Lokman Emrek v. Vlado Sabranovic, para. 27.
91. G.P. Calliess and M. Renner (eds.), Rome Regulations, p. 125, para. 56.
92. Case C-585/08 Peter Pammer v. Reedere Karl Schluter GmbH & Co KG, EU:C:2010:740, para. 76.
93. P. Mankowski and P. Nielsen, in U. Magnus and P. Mankowski (eds.), Brussels Ibis Regulation, p. 502.
94. Opinion of Advocate General in Case C-218/12 Lokman Emrek v. Vlado Sabranovic, para. 15.
95. Ibid., para. 15.
conducted by the professional will suffice\textsuperscript{96} and it is not necessary that the professional did advertise the specific product acquired by the consumer.\textsuperscript{97}

3. **Legal certainty and legal predictability.** The Brussels I Regulation and the CJEU case law have emphasized the importance of predictability of linking factors vis-à-vis jurisdiction.\textsuperscript{98} Recital 11 of the Brussels I Regulation\textsuperscript{99} states that ‘the rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile’. When exceptions are made, the factors must provide a high level of legal certainty.\textsuperscript{100} Neither the wording of Article 15(1)(c) Brussels I nor its objectives or related preparatory acts suggest a causality condition.\textsuperscript{101} The objective of Article 17(1)(c) Brussels Ibis is to protect the consumer as the weaker party with favorable consumer jurisdiction rules.\textsuperscript{102} The addition of an unwritten condition of the existence of a causal link would be contrary to such objective and dissuade consumers from bringing actions and weaken the protection of consumers.\textsuperscript{103} The lack of a causation condition does not necessarily derogate legal certainty and predictability. For instance, the geographical factor in *Lokman Emrek v. Vlado Sabranovic* serves as a strong evidence to offset the lack of causality and justifies the exercise of jurisdiction by the courts of the consumer’s domicile. In a single urban space where two Member States coexist, the activities of all operators in that area are, naturally and without any deliberate intention, directed not only to residents of the State where the trader or service provider is located, but also to the residents of the neighbouring State.\textsuperscript{104} Adding the condition of a causal link would break the already delicate balance put in place by the EU legislature and is not a sound basis given the objectives pursued by the EU legislature.\textsuperscript{105}

4. **Ring-fence mechanism.** A business should have expected to sue and being sued in a State it directs to unless it expressly declares that it will not conclude contracts with consumers domiciled in that State.\textsuperscript{106} In the situation of a conurbation in *Lokman Emrek v. Vlado Sabranovic*, the risk of being sued in the courts of the neighbouring State does not seem to be an excessive burden which might

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\textsuperscript{96} A contrary view asserted that the contract must fall not merely within the general trade of the professional but also within the scope of the directed activities. For instance, if a German firm sells both bicycles and cars but only advertises cars in its French version of website, a French consumer who buys a bicycle would not fall within the scope of the directed activity. M. Wilderspin, in J. Basedow et al. (eds.), *Encyclopedia of Private International Law*, p. 467.

\textsuperscript{97} Opinion of Advocate General in Case C-464/01 Gruber v BayWa, EU:C:2004:529, para. 53. Mr Gruber became aware of BayWa’s activities through advertising material sent to him in Austria, that material did not mention the tiles which he purchased in the end. The AG concluded that the conclusion of a contract must be regarded as preceded by advertising in the consumer’s home country under Article 13(3)(a) Brussels Convention where the supplier previously advertised goods or services in that country, even if he did not mention the specific products acquired by the consumer.

\textsuperscript{98} Ibid., para. 20.

\textsuperscript{99} Recital 15 of Brussels Ibis Regulation.

\textsuperscript{100} Opinion of Advocate General in Case C-218/12 Lokman Emrek v. Vlado Sabranovic, para. 20; Case C-144/10 BYG, EU:C:2011:300, para. 33; Joined Cases C-509/09 and C-161/10 eDate and Martinez and Martinez, EU:C:2011:685, para. 50.

\textsuperscript{101} Opinion of Advocate General in Case C-218/12 Lokman Emrek v. Vlado Sabranovic, para. 21.

\textsuperscript{102} Case C-190/11 Mühleitner v. Yusufi, para. 29, citing Case C-180/06 Ilsinger, EU:C:2009:303, para. 41.

\textsuperscript{103} Case C-218/12 Lokman Emrek v. Vlado Sabranovic, para. 24, 25.

\textsuperscript{104} Ibid., para. 35.

\textsuperscript{105} Ibid., para. 22, 24.

\textsuperscript{106} Opinion of Advocate General Trstenjak in Joined Cases C-585/08 and C-144/09 Pammer and Hotel Alpenhof, para. 25.
act as a disincentive to the defendant’s commercial activity. Rather, the trader or service provider must be fully aware that a significant proportion, or even the majority, of his clientele will have their domiciles in the neighbouring State. However, the French trader did not take any measures to exclude or dis-target consumers from Germany. As a result, the jurisdictional outcome should be an entirely foreseeable scenario for the trader or provider.

Once the professional’s commercial activities have directed towards a country other than the professional’s country, the professional needs to prove that he has excluded countries with whose consumers he does not wish to trade. This means consumer jurisdiction and choice of law rules apply unless the professional has expressly stated that it does not intend to conclude contracts with consumers from certain countries. Such dis-targeting test may cover ring-fence mechanisms, such as using a specific disclaimer on the website, or geolocation and geo-blocking technologies to identify consumer’s location. Moreover, the business’s following conduct should correspond to its ring-fencing method.

D. Dis-targeting test in Chinese consumer choice of law rules

The ring-fence mechanism in the EU is quite similar to the dis-targeting test adopted in Chinese consumer choice of law rules. In fact, the legislative documents indicate that current Article 42 Chinese Conflicts Act is inspired by Article 6 Rome I Regulation. The draft proposal for Article 42 Chinese Conflicts Act in fact adopts almost the same provision set out in Article 5 Rome Convention, the predecessor of Article 6 Rome I Regulation. However, the final version of Article 42 Chinese Conflicts Act indicates that China adopts a different approach towards consumer protection. The expression of the targeting test is quite different in China and the EU. Whereas Articles 6(1)(a)–(b) Rome I Regulation emphasizes the positive notion of targeting test on whether the business pursues commercial or professional activities in the country of the consumer’s habitual residence or directs such activities to that country, Article 42 Chinese Conflicts Act focuses on the negative notion of targeting test on what if the business does not engage in relevant commercial activities in the consumer’s country of habitual residence. The targeting test is crucial to determining whether a business is an active business, whilst the dis-targeting test allows to determine whether a business is a passive business. From the consumer’s perspective, the targeting test ensures that only passive consumers targeted by the active business is protected. By contrast, the dis-targeting test makes sure that active consumers not targeted by passive businesses are not protected by favorable consumer choice of law rule.

107. Opinion of Advocate General in Case C-218/12 Lokman Emrek v. Vlado Sabranovic, para. 37.
108. Ibid., para. 38.
109. Ibid., para. 38.
110. M. Wilderspin, in J. Basedow et al. (eds), Encyclopedia of Private International Law, p. 467.
111. F. Ragno, in F. Ferrari and S. Leible (eds), Rome I Regulation, p. 148.
112. D. Svantesson, ‘Time for the Law to Take Internet Geolocation Technologies Seriously’, 8 Journal of Private International Law (2012), p. 474; Z. Chen, Information and Communications Technology Law (2021), p. 19.
113. P. Mankowski and P. Nielsen, in U. Magnus and P. Mankowski (eds.), Brussels Ibis Regulation, p. 496.
114. Z. Chen, Electronic Consumer Contracts and Private International Law: Combining Targeting Test with Dis-targeting Test, https://eapil.org/2022/01/24/electronic-consumer-contracts-and-private-international-law-combining-targeting-test-with-dis-targeting-test/.
115. Ibid. In the context of globalization and digitalization, it is insufficient to rely on merely targeting test or dis-targeting test in order to protect electronic consumers. Rather, the targeting test in Article 6(1) of the Rome I Regulation should be supplemented by the dis-targeting test, while the dis-targeting test in Article 42 of the Chinese Conflicts Act should be complemented by the targeting test.
targeting test can be regarded as two sides of a coin, which can be used to decide whether a business’ commercial activities have a close connection with the consumer’s country of habitual residence. One benefit of adopting the dis-targeting test in China is that the courts do not have to examine whether there is a causal link between the targeting test and the conclusion of the consumer contract. Instead, as long as the business, with which a consumer concludes a contract, has engaged in relevant commercial activities in China, this business is subject to Chinese law pursuant to Article 42 Chinese Conflicts Act. In this sense, the dis-targeting test in Chinese Conflicts Act is more consumer-friendly.

However, in judicial practice, no specific criteria is provided as to what constitutes dis-targeting test. In Suzhou Youth Travel Agency v. Boss Egerhard and Akpuaka, the Chinese plaintiff Suzhou Youth Travel Agency, domiciled in China, sued the defendants Boss Egerhard from German and Akpuaka from Nigeria, who were husband and wife. The plaintiff claimed that it had fulfilled contract obligations of the package travel contracts, but the two defendants still did not pay service fees of 9,409 RMB. The Chinese court applied Chinese law based on the characteristic performance doctrine without considering whether the Chinese travel agency had engaged in commercial activities in the consumer’s habitual residence. Likewise, in Börsch v. Xi’an Xindaya International Travel Agency and Zhang Li, the two American claimants sued the Chinese defendants for the return of travel fee 77319.43 RMB. The two plaintiffs, after they were introduced by acquaintances, contacted the travel agent Zhang Li (English name Simon) through email for arranging travel in Tibet. After paying the travel fee to Zhang Li and several rounds of negotiation, the trip was cancelled. Zhang Li agreed to refund the travel fee fully to the two plaintiffs within three months, but the defendant had not do so. The travel company Simon Tour, Inc., which undertook foreign tourism business under Zhang Li’s English name Simon, had not obtained the qualification and business licence for foreign tourism business in China; the website www.simontour.com was registered by Zhang Li in 2005, and the domain name holder was Zhang Li himself. It was also found that Zhang Li initially contacted the two plaintiffs to promote the travel business in China in the name of Simon Tour, Inc, which he claimed to be registered in the United States; the website http://www.simontour on the last page of the itinerary was registered by Zhang Li and deregistered before 2013 according to the statement of Zhang Li. It seems that the Chinese trader has engaged in commercial activities in the consumers’ habitual residence, the USA. However, the Chinese court did not examine whether a targeted activity exist, since it invoked general contract choice of law rules laid down in Article 41 Chinese Conflicts Act, rather than Article 42 on consumer choice of law rules. Package travel contracts are expressly protected as consumer contracts in the EU under Article 6(4)(b) Rome I Regulation, but not explicitly included in the material scope of consumer choice of law rules under Article 42 Chinese Conflicts Act. Such practice is doubtful.

116. Ibid.
117. Suzhou Youth Travel Agency v. Boss Egerhard and Akpuaka, Suzhou Industrial Park District People’s Court, (2014) Yuan Shang Wai Chu Zi No 00040.
118. Börsch v Xi’an Xindaya International Travel Agency and Zhang Li, Shaanxi High People’s Court, (2016) Shaan Min Zhong No 511.
119. Package travel contracts are not protected as consumer contracts, but as general contracts in China. Z. Chen, ‘Jurisdiction and Choice of Law in Foreign-related Tourist-Consumer Disputes in China Under the One Belt One Road Initiative’, in D. Wei et al. (eds.), Innovation and the Transformation of Consumer Law (Springer, 2020), p.191.
120. Z. Chen, ‘The Tango Between Art. 17(3) Brussels Ibis and Art. 6(4)(b) Rome I under the Beat of Package Travel Directive’, 28 Maastricht Journal of European and Comparative Law (2021), p. 4.
In Li Xiangqun v. Jiang Weifang, the claimant Li Xiangqun, domiciled in Taiwan, purchased wooden board from a shop owned by the defendant Jiang Weifang, domiciled in Mainland China, for renovating her house. The claimant later found out that the product was defective and launched a lawsuit in a court in Mainland China. The court held that although the habitual residence of the consumer in this case was in Taiwan, the provider of the product had not conducted relevant commercial activities in Taiwan. Since the plaintiff brought legal proceedings in the court where the product provider was domiciled and relied on the law of mainland China to support her compensation claims, the court held that the law of the provision of the product (the law of mainland China) shall apply under Article 42 Chinese Confl icts Act. This case shows that mobile consumers who travel to the business’s domicile to buy goods or services are not protected under protective consumer choice of law rules. In such case, the application of the consumer’s habitual residence is unpredictable for the business. The requirement of the business engaging in relevant commercial activities aims to provide legal certainty to businesses and reduce commercial risk.

As to what constitutes engagement in relevant commercial activities, Article 42 Chinese Confl icts Act per se does not provide specific criteria. It is suggested that if goods or services are tangible and require physical delivery, the supply of such goods or derives to the consumer can be regarded as ‘relevant commercial activities’ since the business should have knowledge of the place of the consumer. If goods or service are intangible, businesses should adopt reasonable steps to verify the habitual residence of the consumer. If not, the conclusion of the contract and the performance of the contract should be considered as ‘engaging in relevant commercial activities’ in the consumer’s habitual residence. Comparing to the targeting test in the EU, the dis-targeting test in China is more consumer-friendly, since the threshold of constituting the dis-targeting test is much lower than that of the targeting test. Nevertheless, the lack of criteria of the dis-targeting test, together with the unclear definition of consumer contract and its material scope has led to the underuse of consumer choice of law rules in judicial practice.

4. Jurisdiction based on a causal connection in American courts

Whereas the CJEU interpreted Article 17(1)(c) Brussels Ibis in a way that it does not require a causal link between the means used to target a consumer and the conclusion of a contract, the American courts seem to adopt a different approach by requiring a causal link. To start with, there are no favorable jurisdiction rules specifically drafted for consumer contracts in the USA. As to whether the courts of a consumer’s domicile is granted to exercise jurisdiction over a non-resident or foreign defendant, American courts need to examine (i) whether the forum law provides a statutory basis for exercising jurisdiction over the defendant; and (ii) whether the defendant has sufficient minimum contacts with the forum state in the light of the Due Process Clause of the Constitution. The ‘minimum contacts’ test has developed sub-tests such as purposeful availment.

121. Li Xiangqun v. Jiang Weifang, Guangxi Zhuangzu Autonomous Region High People’s Court, [2016] Gui Min Zhong No 34.
122. Z.S. Tang et al., Conflict of Laws in the People’s Republic of China (Edward Elgar Publishing, 2016), p. 232, para. 8.67.
123. Ibid., p. 233, para. 8.67.
124. Ibid.
125. Ibid.
126. Z. Chen, in D. Wei et al (eds.), Innovation and the Transformation of Consumer Law, p. 191.
127. Federal Rule of Civil Procedure 4(k)(1); Eurofins Pharma US Holdings v. BioAlliance Pharma SA, 623 F.3d 147, 155 (3d. Cir 2010).
through contracting and placing products into the stream of commerce,\textsuperscript{128} which is comparable to
the European targeting test.

\section*{A. Specific and general personal jurisdiction}

The ‘minimum contacts’ requirement for personal jurisdiction may be either ‘specific’ or
‘general’.\textsuperscript{129} Specific personal jurisdiction is confined to issues ‘deriving from, or connected
with, the very controversy that establishes jurisdiction’.\textsuperscript{130} General personal jurisdiction can exist
over matters unrelated to the defendant’s forum-based activities,\textsuperscript{131} provided that the defendant
has ‘continuous and systematic’ contacts with the forum state which ‘render them essentially at
home in the forum state’.\textsuperscript{132}

The exercise of specific personal jurisdiction is justified if the plaintiff’s claim arises from the
defendant’s jurisdictional contacts.\textsuperscript{133} A three-part analysis is developed to determine whether spe-
cific personal jurisdiction exists: first, whether the defendant has purposeful contact with the forum
or has purposefully availed itself of the privilege of conducting activities within the forum, although
physical entry into the forum is not required;\textsuperscript{134} second, whether the litigation arises out of or relates
to at least one of such contacts to indicate ‘a meaningful link’ between the claim and a legal obli-
gation arose in the forum;\textsuperscript{135} and third, whether the exercise of jurisdiction corresponds to ‘fair play
and substantial justice’.\textsuperscript{136} The first condition of ‘purposeful contact’ in essence is similar to the
‘targeting test’ in Article 17(1) Brussels Ibis Regulation, since the requirement that the professional
directs commercial activities in the consumer’s home country is comparable to the condition that the
defendant has purposefully availed itself of the privilege of conducting activities within the forum.
The common part in both legal systems is that physical presence is not required. The second con-
dition of ‘a meaningful link’ is comparable to the requirement that the consumer contract falls
within the scope of targeting activities, as both demonstrates a connection with the forum state.
The third condition of ‘fair play and substantial justice’ is similar to the consideration of legal cer-
tainty and predictability in the EU. Essentially, ‘fair play and substantial justice’ includes treating
similar cases similarly and different cases differently.

\section*{B. What constitutes a ‘meaningful link’?}

The second condition requires the litigation must arise out of or relate to at least one of the defen-
dant’s purposeful contacts with the forum state. Yet it is unclear what constitutes a ‘meaningful
link’ between the claim and a legal obligation arose in the forum state. In \textit{O’Connor v. Sandy Lane Hotel}, in which the plaintiff was injured after getting a massage at the hotel, the plaintiff

\begin{thebibliography}{48}
\bibitem{128} G.R. Dunham, ‘Zippo-ing the Wrong Way: How the Internet Has Misdirected the Federal Courts in Their Personal Jurisdiction Analysis’, 43 \textit{University of San Francisco Law Review} (2009), p. 565.
\bibitem{129} Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414, 414 nn. 8–9 (1984).
\bibitem{130} Goodyear Dunlop Tires Ops., S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011).
\bibitem{131} Metcalfe, 556 F.3d at 334.
\bibitem{132} Goodyear Dunlop, 131 S. Ct. at 2851. Such a concept is comparable to the concept of ‘establishment’ in the EU.
\bibitem{133} Helicopteros, 466 U.S. at 414.
\bibitem{134} \textit{O’Connor v. Sandy Lane Hotel}, 496 F.3d at 318, quoting \textit{Hanson v. Denckla}, 357 U.S. 235, 253 (1958).
\bibitem{135} \textit{O’Connor v. Sandy Lane Hotel}, 496 F.3d at 318, 324, quoting \textit{Helicopteros}, 466 U.S. at 414.
\bibitem{136} \textit{O’Connor v. Sandy Lane Hotel}, 496 F.3d at 324, quoting \textit{Burger King Corp. v. Rudzewicz}, 471 U.S. 462, 476 (1985); \textit{International Shoe Co. v. Washington}, 326 U.S. 310, 320 (1945).
\end{thebibliography}
concluded the contract with the hotel for spa services prior to his arrival.\textsuperscript{137} The conclusion of the contract was as a result of receiving a brochure featuring such services and engagement in a series of phone calls with the staff of the hotel.\textsuperscript{138} Hence, the court held that the plaintiff’s claim ‘directly and closely related to a contractual obligation that arose in Pennsylvania’, which justified the exercise of jurisdiction over the foreign hotel.\textsuperscript{139} Such strict interpretation implies that if the plaintiff only purchased spa services upon arrival, the plaintiff’s claim was indirectly related to the concluded hotel contract and thus does not justify specific personal jurisdiction.

By contrast, in \textit{Lingo v. Harrah’s Entertainment, Inc.}, the Pennsylvania plaintiff sued against a Las Vegas hotel after a slip and fall in the hotel shower.\textsuperscript{140} The plaintiff asserted that her claim arose from the defendant’s promotional mailings to her in Pennsylvania.\textsuperscript{141} Yet the court deemed that the plaintiff’s claim does not arise out of any contract concluded in Pennsylvania. The fact that the defendant sent an advertising mailer to the plaintiff does not justify specific personal jurisdiction over the defendants.\textsuperscript{142} The links in the chain of causation between the defendants’ contacts and the asserted injury were too remote to trigger specific personal jurisdiction.\textsuperscript{143}

Unlike the European approach which requires that the conclusion of a contract falls within the scope of pursuing or directing activities conducted by the business in order to grant jurisdiction of the courts of the consumer’s domicile, the wording ‘arise out of’, ‘as a result of’ or ‘the links in the chain of causation’ indicates that the means used by a foreign business must have a direct causal link with the conclusion of the contract to justify the jurisdiction of forum state targeted by the business. In this sense, American approach sets a higher threshold than the European approach. However, the terms ‘relates to’, ‘meaningful link’ and ‘directly and closely related to’ also seem to indicate that as long as the conclusion of the contract falls within the scope of the business’s targeting activities, the exercise of jurisdiction would be warranted. This is the argument made in \textit{Wilson v. RIU Hotels & Resorts}.

\textbf{C. The ‘but-for’ test for the causal connection?}

In case \textit{Wilson v. RIU Hotels & Resorts}, the plaintiff Rita Wilson brought a suit against the defendant RIU before a court in Pennsylvania for the recovery of personal injury she sustained as the result of a ‘slip and fall’ on the defendant’s premises in Cabo San Lucas, Mexico.\textsuperscript{144} The plaintiff was a citizen of Pennsylvania, and the defendant was a foreign company with its headquarter in Mallorca, Spain. The defendant owned and managed the RIU Palace Hotel in Cabo San Lucas, Mexico, where the slip and fall accident took place.\textsuperscript{145} Wilson booked a holiday room at the hotel located in Mexico on the Internet through the website operated by the travel agency Apple Vacations, a Pennsylvania company. During her stay in Mexico, Wilson was injured because of slip and fall in the bathtub of the hotel, and decided to sue the Spanish defendant RIU when she was back to

\begin{itemize}
  \item \textsuperscript{137} \textit{O’Connor v. Sandy Lane Hotel}, 496 F.3d at 316.
  \item \textsuperscript{138} Ibid.
  \item \textsuperscript{139} Ibid., 496 F.3d at 323.
  \item \textsuperscript{140} \textit{Lingo v. Harrah’s Entertainment, Inc.}, No. 10-7032, 2011 WL 2621396, at 1 (E.D. Pa. July 1, 2011).
  \item \textsuperscript{141} Ibid., at 4.
  \item \textsuperscript{142} Ibid.
  \item \textsuperscript{143} Ibid.
  \item \textsuperscript{144} \textit{Wilson v. RIU Hotels & Resorts} (E.D.Pa., 2011), at 1.
  \item \textsuperscript{145} Ibid., at 2.
\end{itemize}
her home state, Pennsylvania. The plaintiff contended that the hotel was negligent in allowing a slippery and dangerous condition to exist in the bathtub.\textsuperscript{146} The court held that it had subject matter jurisdiction since the amount in dispute was within $75,000 and the parties were from different states.\textsuperscript{147} As to whether the court has personal jurisdiction, the parties held opposite opinions. The plaintiff claimed that the court had personal jurisdiction over the defendant because the defendant deliberately targeted Pennsylvania in marketing Riu Palace.\textsuperscript{148} The personal jurisdiction was established based on three jurisdictional contacts: the defendant’s distribution of brochures (including a toll-free telephone number) to travel agencies within Pennsylvania; the defendant’s provision of marketing materials to the travel agency Apple Vacations for use on its website; the accessibility of a website maintained by the defendant to Pennsylvania residents.\textsuperscript{149} These three jurisdiction contacts were a but-for cause of her injuries.\textsuperscript{150} To be specific, but for the brochures and marketing information that the defendant supplied to travel agencies within the state, she would never have stayed at the hotel nor injured from her slip and fall in the shower.\textsuperscript{151} Based on case \textit{O’Connor v. Sandy Lane Hotel}, specific personal jurisdiction was established, because her injuries and thus her claim arose out of the defendant’s marketing activities in Pennsylvania.\textsuperscript{152} By contrast, the defendant argued that there was no basis for specific jurisdiction because the plaintiff’s claim did not arise from any activities in Pennsylvania.\textsuperscript{153} The factor that the slip and fall accident took place in Mexico was not sufficient to grant specific jurisdiction.\textsuperscript{154} The court held that specific personal jurisdiction cannot be established on any contact that is a but-for cause of the claim.\textsuperscript{155} Instead, it requires a ‘closer and more direct causal connection than that provided by the but-for test’.\textsuperscript{156} The causal connection between the plaintiff’s claim and the defendant’s contact with the forum must be ‘intimate enough’ and render the exercise of personal jurisdiction ‘reasonably foreseeable’.\textsuperscript{157}

\textbf{D. A direct causal connection between the plaintiff’s claim and the defendant’s contact}

The court further explains why the three contacts alleged by the plaintiff in \textit{Wilson v. RIU Hotels & Resorts} does not justify the exercise of specific personal jurisdiction. First, as to the brochures provided by the defendant to travel agencies which list a toll-free telephone number, the court analysed that since the plaintiff did not assert she ever utilized it, the plaintiff’s claim cannot arise from the existence of the toll-free number.\textsuperscript{158} Thus, this contact cannot justify the exercise of specific personal jurisdiction.\textsuperscript{159} In addition, the plaintiff did not allege the defendant had any purposeful

\begin{itemize}
  \item \textsuperscript{146} Ibid.
  \item \textsuperscript{147} Ibid., at 3.
  \item \textsuperscript{148} Ibid.
  \item \textsuperscript{149} Ibid.
  \item \textsuperscript{150} Ibid.
  \item \textsuperscript{151} Ibid., at 11.
  \item \textsuperscript{152} Ibid.
  \item \textsuperscript{153} Ibid., at 3.
  \item \textsuperscript{154} Ibid.
  \item \textsuperscript{155} Ibid., at 11.
  \item \textsuperscript{156} \textit{O’Connor v. Sandy Lane Hotel}, 496 F.3d at 323.
  \item \textsuperscript{157} Ibid.
  \item \textsuperscript{158} \textit{Wilson v. RIU Hotels & Resorts} (E.D.Pa., 2011), at 8.
  \item \textsuperscript{159} \textit{Cody v. Tyler Place}, No. 05-CV-02271, 2007 WL 2022086, at 6 (E.D. Pa. July, 10, 2007) (Gardner, J. refused to justify specific jurisdiction based on newspaper advertisements which the plaintiff did not read or rely upon).
\end{itemize}
contact with Pennsylvania or that her claim was related to the defendant’s contact with Pennsylvania. The presence of the brochures at travel agencies within Pennsylvania per se did not establish specific personal jurisdiction over the defendant. The court held that advertisements must be directed to a particular forum in order to establish jurisdiction. Similarly, in Wims v. Beach Terrace Motor Inns, Inc., the court also held that the defendant’s advertising efforts were not clearly aimed at inducing Pennsylvania residents to travel to its facility, although the defendant directly mailed promotional brochures to over 1,000 Pennsylvania residents and the hotel sent brochures to potential customers along the east coast from Canada to Maryland. By contrast, in Busch v. Sea World of Ohio, the court exercised specific jurisdiction over the defendant on the basis of extensive print, television and radio ads, combined with the distribution of discount coupons in Pennsylvania.

Second, as to the marketing materials furnished by the defendant to travel agency Apple Vacations for the use on that company’s website, the plaintiff failed to specify what information the defendant provided to the travel agency and did not demonstrate that the defendant specifically targeted this forum. In addition, the Apple Vacations website is available beyond Pennsylvania to other U.S. citizens. The fact that the defendant gave information for use on the Apple Vacations is insufficient to support the exercise of specific jurisdiction.

Third, as regards the English-language website maintained by the defendant, which was accessible to Pennsylvania citizens, the court held that the plaintiff did not prove she ever visited this website. Instead, the plaintiff decided to stay at the defendant’s resort only as a result of viewing the defendant’s brochures and marketing materials on the Apple Vacations website. Therefore, it is not appropriate to exercise specific jurisdiction over the defendant based on the defendant’s website.

E. A comparative perspective on consumer jurisdiction and choice of law rules

1. Zippo test, targeting test and dis-targeting test. Whilst the EU and China have the ‘targeting test’ and ‘dis-targeting test’ respectively, the USA has the ‘Zippo test’ or ‘Sliding Scale test’ to examine the online activities of a business. The internal link is that American Zippo test influences the European targeting test, whilst the latter influences the Chinese dis-targeting test. Under American law, the requirement of the direct causal link between the targeting means and the conclusion of the contract may ensure that the exercise of jurisdiction over a foreign business is subject to the Due Process Clause of the Constitution. Nevertheless, such strict interpretation of jurisdiction

160. Wilson v. RIU Hotels & Resorts (E.D.Pa., 2011), at 7.
161. Ibid., at 8.
162. Ibid., at 9; Cody v. Tyler Place, No. 05-CV-02271, 2007 WL 2022086, at 6; Hlavac v. DGG Props., No. Civ. A. 04-6112, 2005 WL 839158, at 7 (E.D. Pa. Apr. 8, 2005); Zameska v. Seguros ING Commercial Am., No. Civ. A. 04-1895, 2005 WL 525561 (E.D. Pa. Mar. 3, 2005) (Bartle J held that advertisements in national newspapers and magazines are insufficient to establish jurisdiction).
163. Wims v. Beach Terrace Motor Inns, Inc., 759 F. Supp. 264, 269 (E.D. Pa 1991). Under the European targeting test, the conduct of such commercial activities may justify the exercise of jurisdiction of the consumer’s home country.
164. Busch v. Sea World of Ohio, 95 F.R.D. 336 (W.D. Pa 1982).
165. Wilson v. RIU Hotels & Resorts (E.D.Pa., 2011), at 10.
166. Ibid. Even if the plaintiff did visit the website, as the CJEU stated, it is difficult to prove that.
167. Ibid., at 11.
168. Ibid.
is not protective to consumers in international litigation. In particular, the plaintiff bears the burden of proving that jurisdiction is proper by competent evidence, and must respond with actual proofs, instead of mere allegations. It is not that easy for a consumer to prove a direct causal link between the claim and the business’s targeting activities. As the CJEU implied, a foreign business may easily abuse such requirement and escape from the jurisdiction of the consumer’s domicile by targeting the consumer in one way and concluding the contract in another way.

In this regard, the reasoning in Wilson v. RIU Hotels & Resorts is also paradoxical to some extent. On the one hand, the court held that the plaintiff decided to stay at the defendant’s resort only as a result of viewing the defendant’s brochures and marketing materials on the Apple Vacations website to prove that the plaintiff did not visit the website to conclude the contract. This means at least the conclusion of the contract has a direct causal link with the defendant’s brochures and marketing materials provided on the Apple Vacations website. On the other hand, the court held that the marketing materials and the presence of the brochures at travel agencies within Pennsylvania per se did not establish specific personal jurisdiction. The plaintiff did not allege that the defendant had any purposeful contact with Pennsylvania and the plaintiff’s claim was not related to the defendant’s contact with Pennsylvania. Paradoxically, the plaintiff’s claims cannot be ‘as a result of’ and ‘not related to’ the defendant’s contact with the forum state at the same time.

2. Jurisdiction grounds and legal uncertainty. As to whether a causal link is required between the targeting activity and the conclusion of the contract to trigger jurisdiction, the difference between the American, European and Chinese approaches may increase legal uncertainty for both consumers and businesses from these three legal systems, as the application of different approaches would lead to different conclusions. For instance, the CJEU concluded that Article 17(1)(c) Brussels Ibis does not require the existence of a causal link between the means employed to direct commercial or professional activities to the State of the consumer’s domicile and the conclusion of the contract, albeit such a causal link constitutes evidence of the connection between a directing activity and a concluded contract. If the European approach is applied in Wilson v. RIU Hotels & Resorts, it is more likely that the foreign defendant is subject to the jurisdiction of the court where the plaintiff is domiciled, as the conclusion of the contract fell within the scope of targeting activities conducted by the defendant and the plaintiff’s claim was related to, if not as a result of, the defendant’s contact with the forum state. The same conclusion will be reached if Chinese law is applied, since the defendant did engage in relevant commercial activities in the plaintiff’s home State according to the dis-targeting test in Article 42 Chinese Conflicts Act.

In the context of digital economy and massive online marketing, American companies may easily target EU or Chinese consumers via websites, emails, social media and so forth. If the action was brought by an EU consumer against an American business before a member state in the EU, jurisdiction is justified under Article 17(1)(c) Brussels Ibis even if there is no causal link between the conclusion of the contract and the targeting activity conducted by the American business. However, such jurisdiction ground may not satisfy the higher threshold adopted in American

169. Metcalfe v. Renaissance Marine, Inc., 566 F.3d 324, 329 (3d Cir. 2009); quoting Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1285, 1302 (3d Cir. 1996).
170. Time Share Vacation Club v. Atl. Resorts, Ltd., 735 F.2d 61, 68 n.9 (3d Cir. 1984).
171. Case C-190/11 Mühleitner v. Yusufi.
172. Case C-218/12 Lokman Emrek v. Vlado Sabranovic, para. 26 and 32.
courts if a causal link is not established. Likewise, a Chinese consumer who sued an American or European business in China and invoked Chinese law under Article 42 Chinese Conflicts Act may not be justified to do so under American and European criteria. Such difference would increase legal uncertainty as to the recognition and enforcement of judgments made in one country by another country.173

3. The relevance of a causal link as an indicative factor. A comparative study with the American approach which adopts a higher threshold and the Chinese approach which adopts a lower threshold suggests that a minor amendment is needed in European private international law. The EU legislator had no intent to restrict the material scope of the consumer choice of law rules to the detriment of consumers, neither by requiring contracts to be concluded at a distance nor by burdening the consumer with the proof of a causal link between the conclusion of the contract and the targeted activities.174 A causal link is not required as an unwritten condition does not mean a causal link is totally irrelevant. Such factor, just like the geographical factor in Lokman Emrek v. Vlado Sabranovic, may still constitute a strong evidence for determining the existence of a directed activity.175 It is argued that the term ‘as a result of’ in Recital 25 Rome I Regulation implies that there is a need for some specific nexus between the concluded contract and the targeting activity.176 In order to determine whether the professional directed activity to a consumer’s country, it is necessary to make an overall assessment of the circumstances in which the consumer contract was concluded by examining the existence or absence of evidence mentioned on the non-exhaustive list.177 The value of a causal link as an evidence lies in the fact that without the existence of preceding targeted activities, a consumer contract could not have been concluded. A consumer contract can be concluded as a direct result or indirect result of targeted activities. This is similar to the American but-for test mentioned above. A consumer contract is either as a result of, or is related to the business’s marketing activities, and its relationship with the ‘targeting activity’ is more of correlation than causation. This means the result of an activity must not be equated with the very same activity.178

In order to eradicate the contradiction and inconsistency between the phrase ‘within the framework of such activities’ and ‘as a result of’ in Recital 24 and Recital 25 Rome I Regulation, it is more advisable to delete the phrase ‘as a result of’. Since the conclusion of a contract at a distance and the connection between a concluded contract and targeting activity both constitute relevant factors for determining the existence of a targeted activity, it seems not necessary to emphasize the conclusion of a distance contract and require that the contract falls within the scope of the targeting activity. The absence of these two factors can be offset by other factors in the non-exhaustive list. Therefore, the deletion of the phrase ‘a contract is concluded at a distance’ and ‘the contract falls within the scope of such activities’ will not create legal uncertainty and unpredictability. Instead, it will reduce confusion and avoid a strict interpretation conducted by American courts by requiring a causal link.

173. The Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the HCCH 2019 Judgments Convention), https://www.hcch.net/en/instruments/conventions/full-text/?cid=137. Article 5(2) explicitly state the exception of jurisdiction over consumer contracts.
174. G.P. Calliess and M. Renner (eds.), Rome Regulations, p.121, para. 41.
175. Ibid., p. 124, para. 53; Case C-218/12 Lokman Emrek v. Vlado Sabranovic, para. 26 and 29.
176. G.P. Calliess and M. Renner (eds.), Rome Regulations, p. 125, para. 56.
177. Ibid., para. 55.
178. P. Mankowski and P. Nielsen, in U. Magnus and P. Mankowski (eds.), Brussels Ibis Regulation, p. 503.
5. Conclusion

Articles 17–19 Brussels Ibis and Article 6 Rome I do not presuppose a consumer contract to be concluded at a distance nor a causal link between the conclusion of the contract and the targeting activities. In the USA, the jurisdiction and choice of law rules are more technology-neutral, thus a consumer contract does not have to be a distance contract. However, the American approach sets a higher threshold by requiring not only a causal link but also the direct causal connection between the consumer’s claims and the business’s specific contact with the consumer’s state. Such strict interpretation is not ideal for the purpose of consumer protection, especially considering the difficulty with regard to the burden of proof. Essentially, American personal jurisdiction is not built upon on weaker party protection doctrine. In this regard, it seems that Chinese consumer choice of law rules and the dis-targeting test is better in terms of consumer protection, since it provides a lower threshold by examining the non-engagement of a business in commercial activities in the consumer’s home country, which is comparable to the ring-fence mechanism in the EU. In comparison, American businesses targeting European and Chinese consumers should be aware of the lower threshold in the EU and China as well as the legal risk of being subject to the courts of these two legal systems.

However, unlike European rules, Article 42 Chinese Conflicts Act is underused or constantly overlooked in judicial practice mainly because of the lack of definition of consumer contracts and its unclear material scope. Moreover, the dis-targeting test in consumer choice of law rules lacks specific criteria and is not equally applicable to jurisdiction issues due to the lack of consumer jurisdiction rules. This gap would create more legal uncertainty for both consumers and businesses. In this regard, the European approach seems more advisable, since it provides a non-exhaustive list of targeting test and thus is operable in terms of the examination of the existence of a causal link or connection between concluded contract and targeting activity. In addition, it provides a specific definition of consumer contracts and aims to maintain a consistency between consumer jurisdiction and choice of law rules. A combination of the targeting test in the EU and dis-targeting test in China together with the technology-neutral criteria in the USA would be ideal. However, it seems too perfect to be realistic.

Still, a comparative study with the American and Chinese conflicts of law rules over consumer contract would suggest the deletion of the confusing term ‘distance contracts’ and ‘as a result of’ in Recital 24 and Recital 25 Rome I Regulation respectively. Moreover, it is questionable whether the phrase ‘and the contract falls within the scope of such activities’ in Article 17(1)(c) Brussels Ibis and Article 6(1) Rome I has more added value, as the absence of this factor can be offset by another factor. Since the phrase causes more confusion and uncertainty, it might be advisable to delete such condition to avoid a strict interpretation like that conducted in American courts. On another hand, comparing the favorable consumer choice of law rules in the Brussels Ibis and Rome I Regulations, it may be also advisable for American and Chinese legal systems to establish specific consumer jurisdiction and/or choice of law rules for the purpose of improving consumer protection globally. A harmonized private international law rule in the EU, the USA and China will provide legal predictability and enhance the protection of consumers, who are presumed to be weaker parties.

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