

CONSUMER DISPUTES IN A CROSS BORDER E-COMMERCE CONTEXT

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I. Introduction

1. One of the goals of the EU is the creation of an internal consumer market, being an area where the free movement of goods and services is assured. The promotion of cross-border consumer transactions is hereby seen as the final completion of the internal market.⁵ For apparent reasons, a growing number of these transactions take place through the internet.⁶ Shopping over the internet makes it easier for consumer to compare prices, thereby saving money, which in turn has a beneficial effect on competition. This process equals more choice and better quality products and services for consumers that are willing to venture across national borders.⁷

2. In an e-commerce context, the consumer is undoubtedly “the weaker party”, as in most cases he will be asked to pay in advance of delivery. As a consequence, when a problem or conflict arises, the consumer will be more likely forced to take action than the seller or service provider. After all, the consumer will already have fulfilled his contractual obligations in full.⁸ The expectation that such a cross-border dispute will not be resolved in a simple and inexpensive manner, can make consumers hesitant to engage in e-commerce transactions, thus frustrating the smooth operation of the European e-commerce market.

3. The European legislator was well aware of this problem and strove to make the judicial and extra-judicial proceedings more suitable to tackle consumer e-commerce disputes. Indeed, rules were adopted on different levels. Specific jurisdictional rules were drafted to reduce the risk consumers run of having to sue the seller of service provider abroad. These protective rules, combined with rules on a rapid and simple recognition and enforcement of judgments, have been recently revised in the Brussels I Recast Regulation.⁹ In parallel, European procedures were created with uniform and simplified rules for uncontested¹⁰ or small claims,¹¹ with the aim of reducing the costs of going to court. Recently, two instruments¹² dealing with Alternative Dispute Resolution (“ADR”) have entered into force, providing alternative ways for consumers to find judicial redress.

⁵ Recital 3 of Directive 97/7/ on the protection of consumers in respect of distance contracts, *OJ* L 144/19.

⁶ http://ec.europa.eu/eurostat/statistics-explained/index.php/E-commerce_statistics.

⁷ Y. FARAH, “Allocation of jurisdiction and the internet in EU law”, *E. L. Rev.* 2008, 33 (2), 258.

⁸ M. MANKOWSKI, *ECPII: European Commentaries on Private International Law*, Vol I. Brussels Ibis Regulation, Sellier European Law Publishers, 2016, introduction to Articles 17-19, nr. 17.

⁹ Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and the enforcement of judgments in civil and commercial matters, *OJ* 2012, L351/1.

¹⁰ Regulation 1896/2006 of 12 December 2006 creating a European order for payment procedure, *OJ* 2006, L 399/1.

¹¹ Regulation 861/2007 of 11 July 2007 establishing a European Small Claims Procedure, *OJ* 2007, L 199/1.

¹² Directive 2013/11 on Alternative Dispute Resolution for Consumer Disputes, *OJ* 2013, L 165/63; Regulation 524/2013 on Dispute Resolution for Consumer Disputes, *OJ* 2013, L 165/1.

4. In this paper, the abovementioned European instruments will be analysed and compared in an attempt to advise a consumer, when confronted with a cross border e-commerce dispute, on the best path to follow. The scope is further restricted to online sales or service contracts, concluded between a consumer and a trader. The notion “consumer” is hereby defined as “*a natural person concluding a contract online for private purposes in another Member State of the European Union.*”¹³

II. Judicial solutions

5. A consumer will naturally think of a traditional court solution for any problem arising from the interpretation or execution of the contract, signed with a professional seller of goods or provider of services. Therefore, the questions which arise are: a) to which court can or must the consumer turn, regarding the issue at hand, and b) if a favourable judgement is rendered, what hurdles must he overcome to get this decision executed? A solution can be found in the Brussel I Recast with European rules on jurisdiction and enforcement of judgments (A), or in the instruments that unify certain rules of civil procedure on a European level, and are tailored to the specific needs of a consumer dealing with specific types of disputes (B).

A. National court procedures under the Brussels I Recast

6. The Brussels I Recast, applicable in all Member States (including Denmark),¹⁴ contains jurisdiction rules that are very advantageous to the consumer (Arts. 18-19), provided that the contract falls within the restrictive scope of its Art. 17. If not, the general jurisdictional rule of Art. 4 or the special rules in the Arts. 7 to 9 of the Recast, will apply.

1. Which consumers are protected?

7. The application of the Brussels I Recast rules in general, and more specifically of the Arts. 17 to 19, presupposes a cross-border element.¹⁵ Even though this concept is interpreted broadly by the CJEU – it suffices that “*the situation at issue in the proceedings is such as to*

¹³ As will be explained, this definition is not the same in all the EU-legislation.

¹⁴ Denmark was, as such, not bound by the Brussels I Regulation, but signed an Agreement with the European Union on 19 October 2005 that it will apply the Brussels I Regulation. Later, the Danish government issued a Notification on 20 December 2012 in which it declared to apply the Brussels I Recast.

¹⁵ Case C-327/10, *Hypoteczni banka a.s. v. Udo Mike Lindner* [2011] ECR I-11543, para. 29; Case C-478/12, *Armin Maletic and Marianne Maletic v. lastminute.com GmbH and TUI Österreich GmbH*, ECLI:EU:C:2013:735, para. 25.

raise questions relating to the determination of international jurisdiction”¹⁶ – the burden of proof lies with the party (*ex hypothesis* the consumer) invoking the rule. Furthermore, the consumer has to prove the existence of an individual contractual claim,¹⁷ even if that contract turns out to be null and void and even if the breach of rights and obligations set out in the contract would be characterised as non-contractual under national law. The fact that the claim is contract-related suffices.¹⁸

8. As indicated above, Arts. 17 to 19 of the Brussels I Recast only apply to a consumer contract, defined as “*a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession,*”¹⁹ whereby the capacity in which a person acts at the time when then contract is concluded is decisive.²⁰ In this regard, the purpose and nature of the contract at the time of its conclusion is key, and not the subjective circumstances of the party having signed the contract. In other words, if the contract was concluded for the purpose of trade, the contracting party cannot benefit from the application of the protective jurisdictional rules, even if this trade has not yet commenced or is never actually started.²¹

9. Finally, Art. 17 mentions three types of consumer contracts that may trigger the application of the Arts. 18 and 19. In the context of e-commerce specifically, Art. 17 (c) is of relevance as it applies “*in all other cases*”²² [where] *the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities*”. Since no textual distinction is made, it stands to reason that contracts for the sale

¹⁶ Case C-327/10, *Hypotecni banka a.s. v. Udo Mike Lindner* [2011] ECR I-11543, para. 30; Case C-281/02 *Owusu* [2005] ECR I-1383, para. 26; I. OVCHINNIKOV, “Owusu, Lis Pendens and the recent Recast of the Brussels I Regulation”, *Trinity C.L. Rev.* 2016, vol. 19, 40.

¹⁷ Case C-96/00, *Rudolf Gabriel* [2002] ECR I-6367, I-6403, para. 36-38; Case C-180/06, *Renate Ilsinger v. Martin Dreschers* [2009] ECR I-3961, I-3998, para. 54; Case C-375/13, *Harald Kolassa v. Barclays Bank plc*, ECLI:EU:C:2015:37, para. 38; *cf.* also Case C-27/02, *Petra Engler v. Janus Versand GmbH* [2005] ECR I-481, para. 34-38; *cf.* also Case C-167/00, *Verein für Konsumenteninformation v. Karl-Heinz Henkel* [2002] ECR I-8111, para. 33, which expressly excludes collective redress from the scope of application of the Arts. 17-19 of the Brussels I Regulation.

¹⁸ Case C-548/12, *Marc Brogsitter v. Fabrication de Montres Normandes EURL and Karsten Fräßdorf*, ECLI:EU:C:2014 :148, para. 21-27.

¹⁹ Article 17(1) Brussels I Recast; Case 150/77, *Société Bertrand v. Paul Ott KG* [1978] ECR 1431; A. S. DE SOUSA GONÇALVES, “The e-commerce international consumer contract in the European Union”, *Masaryk U. J.L. & Tech.* 2015, vol. 9, 5.

²⁰ M. MANKOWSKI, *ECPIL: European Commentaries on Private International Law*, Vol I. Brussels Ibis Regulation, Sellier european law publishers, 2016, Article 17, nr. 19.

²¹ Case C-269/95, *Francesco Benincasa v. Dentalkit SrL* [1997] ECR I-3767 I-3795, para. 15-17.

²² Art. 17(a) Brussels I Recast mentions contracts for the sale of goods on instalment credit terms and Art. 17 (b) contracts for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods.

of goods and those for the provision of services are covered. In this sense, license agreements for the use of software, contracts now almost exclusively carried out over the internet, might well be covered by Article 17(c).

10. All that is required is that the conclusion of the contract was preceded by some form of solicitation or invitation directed towards the consumer.²³ As MANKOWSKI puts it: “[the application] *is related solely and exclusively to the entrepreneur’s activities and does not depend on anything the consumer might do.*”²⁴ A connection between the professional activities of the professional and the Member State of domicile of the consumer is thus required, meaning that consumer protection is not unlimited, *i.e.* not all consumer contracts will make the cut.²⁵ Although according to Art. 17(c) the contract does not necessarily have to be concluded at a distance,²⁶ it will logically follow that contracts concluded over the internet will more likely encompass the cross-border element required to kick-start the Brussels I jurisdiction rules.

Consequently, for e-commerce consumer contracts, guidelines must be put forward to determine whether these contracts are the result of a professional directing sale or service activities towards or pursuing activities in the Member State of the consumer’s domicile. The case law of the CJEU provides a non-exhaustive list of indications which will determine the commercial intentions of the professional and thus whether the contract falls within the scope of Art. 17(c).²⁷ Relevant criteria are: “*the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, [...] mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader’s site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States.*”²⁸.

²³ Report *Schlosser*, para. 158. As the CJEU ruled in *Gabriel*, all forms of advertising, whether communicated by mass media in general or individually targeting certain consumers are covered. (Case C-96/00, *Rudolf Gabriel* [2002] ECR I-6367, I-6401, para. 44.).

²⁴ M. MANKOWSKI, *ECPIL: European Commentaries on Private International Law*, Vol I. Brussels Ibis Regulation, Sellier european law publishers, 2016, Article 17, nr. 67.

²⁵ Case C-190/11, *Daniela Mühleitner v. Ahmad Yusufi*, ECLI:EU:C:2012:542, para. 33.

²⁶ *Idem*, para. 44; Opinion AG Cruz Villalon of 18 July 2013 in case C-218/12, ECLI:EU:C:2013:494, para. 12. This in contrast to e.g. Directive 97/7/EC of the European Parliament and the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ 1997 L 144/19 that requires the contract to be concluded at a distance (*cf.* Art. 2).

²⁷ Joined cases C-585/08 and C-144/09, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co KG and Hotel Alpenhof GmbH v. Oliver Heller* [2010] ECR I-12527, para. 81 *et seq.*

²⁸ Joined cases C-585/08 and C-144/09, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co KG and Hotel Alpenhof GmbH v. Oliver Heller* [2010] ECR I-12527, para. 93; M. DECHAMPS and E. ALVARES ARMAS, “Arrêt

Language and currency are only relevant if they are different from the language and currency generally used in the professional's Member State.²⁹

Some authors³⁰ argue that modalities of delivery and pricing (e.g. additional costs for deliveries abroad), reference to rules of national law of certain Member States,³¹ the size and location of the enterprise (e.g. close to a national border), and the actual content of an advertisement may equally provide an indication as to the commercial intentions of the professional to direct his activities towards the consumer's Member State.³² At the end of the day, it will be for the national courts to ascertain whether such evidence exists and whether it amounts to the application of section 4 of the Brussels I Recast.

11. Furthermore, the application of Art. 17(c) requires that the contract must “*fall within the scope of such activities*” targeted at the consumer's Member State. In other words, each product sold and each service contract signed must be one for which the professional directed its efforts towards the Member State of the consumer's domicile. The same consumer buying two products from the same professional may thus, considering the specific circumstances, be able to rely on Article 17(c) for one product, whereas he is not for the other product.³³

2. Protection by the European jurisdiction rules

12. According to Art. 18(1) of the Brussels I Recast, the consumer has the option to bring proceedings before the courts³⁴ of the Member State of his domicile or that of the domicile of

Pammer et Hotel Alpenhof: l'équilibre entre consommateurs et professionnels dans l'e-commerce”, *JDE* 2011, 73-74.

²⁹ *Idem*, para. 84. If other languages and currencies are available, these might indicate the professional's intention to direct his trade efforts towards other Member State, such as the one in which the consumer has his domicile.

³⁰ V. LAZIĆ, “Procedural Justice for ‘Weaker Parties’ in Cross-Border Litigation under the EU Regulatory Scheme”, *Utrecht Law Review* 2014, vol. 10(4), 100-117; Y. FARAH, “Allocation of jurisdiction and the internet in EU law”, *European Law Review* 2008, vol. 33, 257 - 270.

³¹ According to MANKOWSKI, mandatory information, however, would not be a positive indicator, as this might simply comply with the requirements of the E-Commerce or the Consumer Rights Directive (see M. MANKOWSKI, *ECPIL: European Commentaries on Private International Law*, Vol I. Brussels Ibis Regulation, Sellier european law publishers, 2016, Article 17, nr. 90. On the other hand, if these legal requirements stem solely from the legislation applicable in a particular Member State, these requirements may well provide an indication as to the application of Art. 17(c). In addition, standardisation of certain goods may differ from one Member State to another, e.g. plugs and sockets in the UK differ from those in Belgium and those in Germany. In this respect, the composition of certain goods and their compatibility with the standards in place in a certain Member State may indeed provide very clear indications.

³² M. MANKOWSKI, *ECPIL: European Commentaries on Private International Law*, Vol I. Brussels Ibis Regulation, Sellier european law publishers, 2016, Article 17, nr. 94.

³³ M. MANKOWSKI, *ECPIL: European Commentaries on Private International Law*, Vol I. Brussels Ibis Regulation, Sellier european law publishers, 2016, Articles 17, nr. 104; *Cf.* also: Recital 25 of the Rome I Regulation (Regulation 593/2008 on the law applicable to contractual obligations, *OJ* 2008, L 177/6).

³⁴ Which national court is competent within this Member State will be determined according to the national procedural law of that Member State.

the professional he is suing. The latter option is basically a reiteration of the general rule in Art. 4.³⁵

However, when determining jurisdiction, the internal logic of the Brussels I Recast Regulation needs to be followed. Art. 24, concerning exclusive jurisdiction, takes precedence and applies regardless of the domicile of the parties. Only a few e-commerce consumer contracts (e.g. some tenancies),³⁶ will fall under the scope of this provision. If none of the exclusive grounds of jurisdiction apply, the application of Art. 26 needs to be verified: if the professional appears voluntarily before the court without contesting *in limine litis*, he is deemed to accept this jurisdiction.

If neither Art. 24, nor Art. 26 apply, the consumer can safely rely on Art. 18, giving him the advantage to sue before the courts of his Member State (the so-called *forum actoris*). The professional cannot deprive the consumer of this protection by inserting a forum clause in the contract. According to Art. 19 such a clause is only valid in limited number of circumstances.³⁷ So the consumer whose case falls under Section 4 of the Brussels I Recast need not worry about general terms and conditions or agreements with clauses attributing exclusive jurisdiction to the courts of the country in which the professional is established.³⁸

13. Important to emphasize is that the Brussels I Recast has made a considerable consumer friendly alteration. Under the Brussels I Regulation a consumer could only bring proceedings before the courts of the Member State of his domicile if the professional was either domiciled or established within the European Union.³⁹ If the professional was domiciled or established outside of the European Union, and had no branch, agency or other

³⁵ The notion 'domicile' is defined in Art. 62 Brussels I Recast for natural persons and in Art. 63 *juncto* Art. 17(2) Brussels I Recast for companies. See also the case law of the ECJ in the *Lindner* case. (Case C-327/10, *Hypotecni banka a.s. v. Udo Mike Lindner* [2011] ECR I-11543, para. 40-41).

³⁶ According to Art. 24 (1) Brussels I Recast in proceedings which have as their object rights *in rem* in movable property or tenancies of immovable property, the courts of Member State in which the property is situated. *Cf.* Case C-605/14, *Virpi Komu and Others v Pekka Komu and Jelena Komu*, ECLI:EU:C:2015:833.

³⁷ This is the case if the clause or agreement is entered into after the dispute has arisen, (Joined cases C-240/98 to C-244/98, *Oceano Grupo Editorial SA v. Rocio Murciano Quintero and Salvat Editores SA v. Jose M. Sanchez Alcon Prades, José Luis Copano Badillo, Mohammed Berroane and Emilio Vinas Feliu* [2000] ECR I-4941, para. 24-26.) if the clause merely adds to the options the consumer has by adding fora to the already existing ones (Case C-112/03, *Société financière et industrielle du Peloux v. Axa Belgium* [2005] ECR I-3707, para.42; Case C-154/11, *Ahmed Mahamdia v. People's Republic of Algeria*, ECLI:EU:C:2012:491, para. 61-66.), or if the chosen forum is actually the Member State of domicile of both the consumer and the professional. *Cf.* also Council Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts, *OJ* 1993 L95/29.

³⁸ This of course follows the internal logic of substantive EU law, as such clauses are deemed unfair under the Council Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts. Logically, the choice of court clause will not bind the consumer unless he agrees to these terms after the dispute has arisen (Art. 19(1)).

³⁹ Arts. 16(1) and 15(2) of the Brussels I Regulation; Case C-318/93, *Wolfgang Brenner and Peter Noller v. Dean Witter Reynolds Inc.* [1994] ECR I-4275.

establishment⁴⁰ in one of the Member States,⁴¹ the rules of national private international law would apply.

Under the Brussels I Recast a consumer may bring proceedings against the professional in the courts of the Member State where the consumer is domiciled regardless of the domicile of the other party. Basically, this implies that a consumer domiciled in a Member State of the European Union, who buys a product via a US website, may bring proceedings before the courts of his Member State, which will be competent to hear the case.

14. Finally, the new *lis pendens* rule in Art. 31(2) and Art. 31(3) Brussels I Recast, which was inserted to provide a solution for the so-called “torpedo actions” – whereby under the new rules the court assigned jurisdiction by a choice of court clause must first rule whether it has jurisdiction under the agreement even if it was not the first court seized – is not applicable to consumer contract as defined in Section 4 of the Brussels I recast.⁴² This implies that consumers bringing an action against the professional seller or provider of services cannot be hampered by a dilatory counter attack.⁴³

3. Protection by the free movement of judgments

15. The Brussels I Recast abolishes the *exequatur* for all judgments⁴⁴ rendered in proceedings instituted after 10 January 2015, thus creating a judicial area where judgments that fall under its scope, can circulate freely within the European Union. According to Art. 39, a judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required.⁴⁵ This abolition is justified by the principle of mutual trust in the administration of justice within the Union, being the principle that judgments given in a Member State should be recognised in the other Member States of the European Union as if they had been given in

⁴⁰ For an in depth analysis of the concept “establishment” cf. Case C-33/78, *Somafer SA v. Saar-Ferngas AG* [1978] ECR 2183, para. 12; Case C-439/93, *Lloyd’s Register of Shipping v. Société Campenon Bernard* [1995] ECR I-961, I-980, para. 18-19.

⁴¹ Art. 17(2) Brussels I Recast provides: “When a consumer enters into a contract with a party who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, that party shall in disputes arising out of the operation of the branch, agency [...] be deemed to be domiciled in that State.”

⁴² R.-A. NIELSEN, “The end of torpedo Actions?” in: F. FERRARI and F. RAGNO, *Cross Border Litigation in Europe: The Brussels I Recast Regulation as a panacea?*, Wolters, 2016, 153; V. LAZIC, “The revised Lis Pendens rule in the Brussels Jurisdiction Regulation”, *Rev. Eur. L.* 2013, vol. 15(5); I. OVCHINNIKOV, “Owusu, Lis Pendens and the recent Recast of the Brussels I Regulation”, *Trinity C.L. Rev.* 2016, vol. 19, 40.

⁴³ Art. 31 (4) of the Brussels I Recast.

⁴⁴ The concept “judgment” is defined in Art. 2(a) of the Brussels I Recast.

⁴⁵ T. PFEIFFER, “The abolition of *exequatur* and the free circulation of judgments” in: F. FERRARI and F. RAGNO, *Cross Border Litigation in Europe: The Brussels I Recast Regulation as a panacea?*, Wolters, 2016, 187.

the latter Member State.⁴⁶ The certificate delivered by the courts of the Member State issuing the judgment is a functional substitute for the former declaration of enforceability.⁴⁷

16. The abolition of *exequatur* is one of the great accomplishments of the Brussels I Recast. Indeed, consumers will no longer need to initiate this additional (often costly and in some Member States lengthy) procedure in order to enforce the judgment they obtained in their Member State of domicile, which will save time and money. This burden is effectively shifted to the professional seller or provider of services who, in case he wishes to contest the enforcement of a judgment, will have to apply for the refusal of enforcement of that judgement,⁴⁸ applying the national procedure of the Member State addressed. The grounds for refusal are listed in a restrictive way in Art. 45.

4. Is the protection under the Brussel I Recast adequate?

17. The advantages of a judicial procedure within the framework of the Brussels I Recast has become apparent by the above analysis. Firstly, the framework is well known, and has been ‘tested and approved’ over time, due to case law of the CJEU and the legislative amendments. Secondly, the Brussels I Recast offers the consumer the possibility to sue the professional before the courts of his Member State of domicile, which implies that the consumer can fall back on all the guarantees the EU substantive legal order offers to consumers.⁴⁹ Thirdly, once the judgment has been rendered, it can easily be enforced in other Member States, meaning that the only tricky bit will be the determination of the location of the professional’s assets.

18. The disadvantages of the Brussels I Recast framework, on the other hand, have also been touched upon. Firstly, the concept ‘consumer’ might, in some cases, be a little too restrictive. Nowadays, only natural persons can be consumers.⁵⁰ Non-profit organisations, for instance, will not often use the products bought from the professional seller within the professional sphere, and may well be acting in a private capacity. Due to the fact that these organisations are often in a weaker position, and less well informed than some private investors, it is unclear why the former should not be protected as a consumer, while the latter

⁴⁶ Recital 26 of the Brussels I Recast; Case 148/84, *Deutsche Genossenschaftsbank* [1985] ECR 1981, para. 18; Case 119/84, *Capelloni and Aquilini* [1985] ECR 3147, para. 16; Case C-456/11, *Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH*, ECLI:EU:C:2012:719.

⁴⁷ Art. 53 of the Brussels I Recast.

⁴⁸ Arts. 45 *et seq.* of the Brussels I Recast.

⁴⁹ G. PANOPOULOS, “The influence of the E-Commerce Directive on conflict of law and jurisdiction rules regarding the protection of tort victims and consumers”, *Collection Papers Fac. L. Nis*, 2015, vol. 70, 823.

⁵⁰ 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, 129 *et seq.*

would deserve this protection.⁵¹ Moreover, dual purpose contracts often prove to be problematic. In the *Gruber* case, the CJEU ruled that the professional purpose of the contract must be negligible for the party to be considered as a consumer. The Consumer Rights Directive, on the other hand, uses a much broader concept of ‘consumer’, only requiring that the professional purpose not be dominant.⁵²

Secondly, the interpretation and application of the requirement in Art. 17 (c) is problematic.⁵³ After all, it is not always clear whether or not a professional directs its commercial activity towards the country of the consumer's domicile so that a contract can be considered as a consumer contract.⁵⁴ In this respect, the long list of relevant criteria provided by the CJEU to determine the professional's intentions in an e-commerce context seem to obscure rather than simplify matters for the national courts.

Thirdly, the jurisdictional scheme in Section 4 of the Brussels I Recast is exhaustive.⁵⁵ In other words, if a consumer domiciled e.g. in France wishes to sue the professional seller and the producer of the good, located in other and different Member States, in the same proceeding, he will not be able to rely on Art. 8(1) in order to sue both before the courts of his domicile⁵⁶ Vis-à-vis the producer, the consumer cannot rely on his status as consumer and will have to follow the general rule, meaning he must sue before the court of the Member State of the domicile of this producer (Art. 4) or before the courts for the place where the harmful occurred or may occur (Art. 7(2)). After all, the producer does not have a contractual relationship with the consumer, which is needed to trigger the application of the Arts 17-19 Brussels I Recast. Only if the latter place can be located in the Member State of his domicile (which it in most cases will), a concentration of claims before the same court is possible. So, in some liability cases, the protective regime put in place to protect consumers may well work to their disadvantage.

Fourthly, Art. 45 of the Brussels I Recast, dealing with the recognition and enforcement of judgments, allows a professional seller or provider of services to contest the enforcement

⁵¹ J. TORO, “Le règlement « Bruxelles I bis » et son impact (très limité) au plan des consommateurs”, *Rev. dr. eur. consom.* 2014, vol. 1, 81-95.

⁵² Such a divide between the substantive and procedural law regarding the same legal concept can be problematic.

⁵³ FARAH disagrees stating that the principle of fairness and the doctrine of good faith can and should play an important role in the interpretation of this Article (Y. FARAH, “Allocation of jurisdiction and the internet in EU law”, *European Law Review* 2008, vol. 33, 257-270.)

⁵⁴ V. LAZIĆ, “Procedural Justice for ‘Weaker Parties’ in Cross-Border Litigation under the EU Regulatory Scheme”, *Utrecht Law Review* 2014, vol. 10(4), 106.

⁵⁵ Case C-462/06, *SmithGlaxoKline v. Pierre Rouard* [2008] ECR I-3965.

⁵⁶ M. MANKOWSKI, *ECPIL: European Commentaries on Private International Law*, Vol I. Brussels Ibis Regulation, Sellier european law publishers, 2016, Article 17, nr. 5.

of a judgment on the basis of, for instance, incompatibility with public policy, leading to yet another proceeding. Therefore, in certain cases, where small amounts are at stake, using the European Order for Uncontested Claims, the European Payment Order, or the Small Claims Procedure may be more advantageous to the plaintiff consumer.

More in general, depending on the Member State, court proceedings can be very costly and quite time consuming. Considering court fees, representation costs and the costs to enforce a favourable judgment, consumers might be reluctant to pursue legal action before the courts of their Member State.

B. European court procedures

19. Being aware that having to engage in lengthy and costly national court proceedings might deter the average consumer from entering into cross border e-commerce transactions, the European legislator has created two uniform European procedures for small⁵⁷ and uncontested⁵⁸ claims. Both procedures aim to simplify and speed up the enforcement of these claims, thereby cutting costs. As it is likely that a professional seller or service provider will contest a claim made by a consumer, the focus of the analysis below will be on the small claims procedure.

1. Consumer protection under the European Small Claims Procedure (“ESCP”)

20. The ESCP⁵⁹ is available as an alternative to the procedures existing under the laws of the Member States for claims up to 2000 Euros. This amount will increase as of 14 July 2017 to 5000 euros.⁶⁰ This European procedure applies to civil and commercial matters, as defined under the Brussels I Recast,⁶¹ and is thus applicable to online sales and service contracts. Art. 2 ESCP states explicitly that the procedure applies to cross border cases, further defined as a case in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seized.⁶² The ESCP may be applied in procedures implying non-EU claimant or defendant.

⁵⁷ Regulation 861/2007 establishing a European Small Claims Procedure, *OJ* 2007, L199/1.

⁵⁸ Regulation 1896/2006 creating a European order for payment procedure, *OJ* 2006, L399/1.

⁵⁹ Regulation 861/2007, is amended by Regulation N°2015/2421 *OJ* 2015, L341/1 that will enter into force on 14 July 2017.

⁶⁰ Art. 2.1. of the ESCP Regulation.

⁶¹ See Case C-420/07, *Apostolides v Orams* [2009] ECR I-3571, in particular in paragraphs 41 and 42, in which reference was made inter alia to case C-29/76, *LTU Lufttransportunternehmen GmbH & Co KG v. Eurocontrol*, [1976] ECR 1541, and the more recent case C-292/05, *Lechoritou v. Dimisiotis Omospondikis Dimokatiastis Germanias* [2007] ECR I-1519.

⁶² Art. 3 of the ESCP Regulation.

The Regulation does not contain specific (protective) rules for consumer contracts. Nevertheless, the standard A form (point 4) implicitly refers to the jurisdictional rules of the Brussels I Recast, thus implying that only the consumer as protected by the Brussels I Recast can use this European procedure before the court of his domicile.⁶³

21. The key features of this procedure, that will largely be a written procedure, are as follows:⁶⁴ a) the claim must be filed directly with the competent court by means of Form A – to be found in the annexes of the regulation – giving details of the claim, the identity of the parties, etc.; b) having received the completed claim, the court prepares a standard response form, *i.e.* Form C, sent to the defendant within 14 days, together with a copy of the claim and any supporting documents; c) the defendant has 30 days from the date of service of the answer form to respond. Within 14 days of receiving this response, the court forwards a copy to the claimant, with any relevant supporting documents; d) the court must render a judgment within 30 days of receipt of the response from the defendant. A hearing is held only if necessary or if requested by one of the parties. Important to note is that no representation by a lawyer is required, which considerably reduces the costs.

22. The judgment has to be enforced (*ex hypothesis* in the Member State of the seller/provider of services) as any other judgment would be enforced in this State. No additional requirement or intermediate procedures can be imposed, thus facilitating the free movement of these decision. The defendant can only rely on the limitative grounds of refusal of the enforcement, as listed under Art. 22 ESCP Regulation.

2. Is the consumer protection under the ESCP Regulation adequate?

23. At first, the advantages of the ESCP rely on an uniform and swift European procedure through the Member States. Moreover, it should be easy to apply with the forms that can be found on the E-Justice website⁶⁵. Finally, the outcome results in a judgment that can be enforced without an *exequatur* procedure. In sum, simplicity for the claimant to introduce his demand; swiftness for the parties to expose their arguments; and convenience to enforce the obtained judgement are the key features of ESCP.

On the other hand, several disadvantages remain and prevent ESCP from offering a suitable judicial resolution for all cross-border small claims. Due to the restricted consumer

⁶³ See Part II above; *Cf.* also T. KRUGER and L. SAMYN, “Als de Europese consument moet procederen”, *DCCR* 2012, 195.

⁶⁴ See for more ample information the Practice Guide, drafted by the EJM: file:///C:/Users/admin/Downloads/small_claims_citizens_EU_en.pdf.

⁶⁵ E-justice portal: <https://e-justice.europa.eu/home.do?action=home&plang=en&init=true>.

concept, as referred to Brussels I Recast, only a natural person can introduce small claim procedures before his domicile. (*cf. supra*, nr. 18). Moreover, the consumer has to prove that the professional was directing his sale or service efforts towards or pursuing activities in the Member State of the consumer's domicile.

Furthermore, the ESCP is still a fairly unknown and, therefore, rarely used procedure. Finally, despite its simplicity during proceedings on the merits, an enforcement procedure in a different Member State might still be necessary. This domestic enforcement procedure shall probably involve legal representation and assistance and may consequently be considered to be too costly and time consuming.

III. Alternative Dispute Resolution (“ADR”)

24. The European legislator offers the consumer, confronted with cross border e-commerce problems, an alternative to avoid court proceedings (be it national or European procedures) altogether. Alternative Dispute Resolution (“ADR”) may well be a first remedy to promote the effectiveness of consumer law, balancing the collective and individual interests specific to this field of law. Indeed, ADR offers a simple, fast and low-cost out-of-court solution to disputes between consumers and traders. In order to make ADR easier to use, the EU has issued Directive 2012/11 on consumer ADR⁶⁶ (which had to be implemented by 9 July 2015), as supplemented by Regulation 524/2013 on online dispute resolution for consumer disputes⁶⁷ which is applicable since 9 January 2016.

A. National ADR-Solutions

1. Starting point: Directive 2013/11 on alternative dispute resolution for consumer disputes

25. Directive 2013/11 applies to procedures for the out-of-court resolution of domestic as well as cross-border disputes, concerning contractual obligations, stemming from sales contracts or service contracts⁶⁸ between a trader established in the Union and a consumer resident in the Union through the intervention of an ADR entity. This ADR entity either

⁶⁶ Directive 2013/11 on alternative dispute resolution for consumer disputes, *OJ* 2013, L165/63.

⁶⁷ Regulation 524/2013 on online dispute resolution for consumer disputes, *OJ* 2013, L165/1.

⁶⁸ Art. 2.1 of the ADR Directive.

proposes / imposes a solution or brings the parties together with the aim of facilitating an amicable solution.⁶⁹

The complaint has to be lodged by a consumer, defined as natural person who is acting for purposes, which are outside his trade, business, craft or profession,⁷⁰ against a professional trader.⁷¹ EU e-commerce does fall within the scope of this Directive. Cross-border disputes involving a party established in Non-Member State, however, are excluded from the scope of application of this ADR Directive.

26. According to the Directive, an ADR entity is any entity (however named or referred to) which is established on a durable basis and offers the resolution of a dispute through an ADR procedure. It must be a permanent entity, or, must be created for a particular dispute. Easy access is one of the most crucial challenges for the ADR's success. Moreover, the Directive insists on universal access, meaning contractual consumer disputes from all economic sectors, involving a trader established in a Member State should be submitted to an ADR entity, which complies with the requirements set out in the Directive.⁷² To guarantee a universal access for all concerned disputes, Member States have to create (at least) a residual ADR entity, which has jurisdiction to deal with disputes for which no existing ADR entity is already competent.⁷³

Moreover, to improve consumer access to ADR across the EU, recital 26 of the ADR Directive indicates that Member States should have the possibility to rely on ADR entities established in another Member State or on regional, transnational or pan-European ADR entities, where traders from different Member States are covered by the same ADR entity.

2. Principles leading the ADR procedure

27. With regard to the admissibility of the ADR procedure, ADR entities may introduce procedural rules thereby refusing to deal with a given dispute on the grounds that: a) the consumer did not attempt to contact the trader as first step; b) the dispute is frivolous or vexatious; c) the dispute is being or has previously been considered by another ADR entity or

⁶⁹ Art. 2.1 of the ADR Directive.

⁷⁰ Art. 4.1 a) of the ADR Directive. However, if the contract is concluded for purposes partly within and partly outside the person's trade (dual purpose contracts) and the trade purpose is so limited as not to be predominant in the overall context of the supply, that person should also be considered as a consumer; *Cf.* Recital 18 of the ADR Directive.

⁷¹ Defined in Art. 4.1 b) of the ADR Directive as any natural person, or any legal person irrespective of whether privately or publicly owned, who is acting, including through any person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession.

⁷² Art. 5.1 of the ADR Directive.

⁷³ Art. 5.3 of the ADR Directive.

by a court; d) the value of the claim falls below or above a pre-specified monetary threshold; e) the consumer has not submitted the complaint to the ADR entity within a pre-specified time limit (minimum one year); or f) dealing with such a type of dispute would otherwise seriously impair the effective operation of the ADR entity.⁷⁴

These principles ensure that both the ADR entity and the people entitled to initiate these ADR proceedings comply with the aims of the Directive and strengthen both consumers' and traders' confidence in such procedures.⁷⁵ The natural persons in charge of ADR have to possess the necessary expertise, including a general understanding of the applicable law. They have to be independent and impartial, meaning that a conflict of interest may not exist.

The ADR entities should be accessible and ensure that consumers can submit their complaint online and offline.⁷⁶ They have to make clear and easily understandable information on how ADR works publicly available, and are obliged to publish an annual activity report.

In order to improve the efficiency of the proceedings, the ADR procedure is either free of charge, or available at a nominal fee for consumers.⁷⁷ Furthermore, the outcome is made available within a period of 90 calendar days from the date on which the ADR entity has received the complete complaint file.⁷⁸ It has to consider fairness,⁷⁹ which entails the compliance with the requirements of a contradictory proceeding, a motivated ruling and adequate information. The parties have the prerogative to withdrawing at any stage if they are dissatisfied with the performance or the operation of the procedure.⁸⁰

28. Nevertheless, the consumer must remain free to sue the trader before a judicial court. Even though the ADR Directive ensures several guarantees within the ADR procedure, the right to an effective remedy and the right to a fair trial are fundamental rights laid down in Article 47 of the Charter of Fundamental Rights of the European Union. Therefore, ADR is not meant to replace court procedures and should at no point deprive consumers or traders of their rights to seek redress before the courts.⁸¹

⁷⁴ Art. 6.4 of the ADR Directive.

⁷⁵ Recital 37 of the ADR Directive.

⁷⁶ Art. 5.2 of the ADR Directive.

⁷⁷ Art. 8 c) of the ADR Directive.

⁷⁸ Art. 8 e) of the ADR Directive.

⁷⁹ Art. 9 of the ADR Directive.

⁸⁰ Where national rules provide for mandatory participation by the trader in ADR procedures, only the consumer has this opportunity (Art. 9.2 a) of the Directive).

⁸¹ Recital 45 of the Directive.

The outcome of the ADR procedure may be binding upon the parties only if they were informed of its binding nature in advance, and if they have accepted this binding force.⁸² Moreover, due to the legality principle, the solution imposed upon them should not result in the consumer being deprived of the protection afforded to him by provisions from which no derogation is possible by virtue of the law of the Member State where the consumer and the trader are habitually resident.⁸³

3. Specific questions

3.1. Privacy

29. Information processing in ADR proceedings should comply with the rules on the protection of personal data laid down in the laws, regulations and administrative provisions of the Member States, adopted pursuant to Directive 95/46/EC.⁸⁴ Yet, according to article 9.1 a) of the ADR Directive, any party in the proceedings must have the possibility of accessing the arguments, evidence, documents and facts put forward by the other party. As the ADR procedure is willingly entered into by the parties, privacy issues should not be a real problem.

3.2. Prescription periods

30. Article 12 of the ADR Directive ensures that parties who, in an attempt to settle a dispute, have recourse to ADR procedures, the outcome of which is not binding, are not subsequently prevented from initiating judicial proceedings in relation to that dispute as a result of the expiry of limitation or prescription periods during the ADR procedure.

4. Is the consumer protection under the ADR Regulation adequate?

31. ADR are a useful tool for domestic and cross-border consumer disputes alike. The advantages are groomed to the specificities of this kind of litigation. In particular, the cost effectiveness, the short duration of the procedure, the place where the ADR procedure can be conducted, the particular specialised ADR entities per economic sector and the online and offline complaints possibilities open many doors.

32. The most important disadvantage is the non-binding effect of the decision. What if one of the parties disagrees with the outcome and refuses to enforce it? In that respect, the

⁸² Specific acceptance by the trader is not required if national rules provide that solutions are binding on traders Art. 10.2 of the Directive.

⁸³ Art. 11 of the Directive.

⁸⁴ Recital 28 of the Directive.

willingness of the parties throughout the proceeding remains the most important prerequisite for its success.

A second difficulty originates from the fact that the existence of ADR is unknown to many consumers. It thus seems that traders will only inform consumers regarding the competent ADR entity or ADR entities when they commit to or are obliged to use these entities to resolve disputes with consumers.⁸⁵ Currently, however, most traders are not obliged to use ADR and, even if they would be obliged to use ADR, the law provides no penalties if they do not. Important to note is that public campaigns might be able to promote ADR with consumers.

5. Perspectives

5.1. Completion of ADR implementation in the Member States

33. Directive 2013/11 has been adopted only three years ago and the Member States had to comply with it by the 9 July 2015.⁸⁶ By 9 July 2019, a first report on the application of this Directive shall be submitted by the Commission to the European Parliament, the Council and the European Economic and Social Committee.⁸⁷ It will be the opportunity to evaluate this device in each Member State.

34. In Belgium, new rules⁸⁸ on ADR entities have been adopted in accordance with the Directive. They have entered into force since the 1st of June 2015. An independent public service, called “Consumer Mediation Service”⁸⁹, has been created for extra-judicial settlements of disputes when no other qualified entity is competent. It informs consumers and companies about their rights and obligations, receives all requests for the extra-judicial settlement of consumer disputes and, if applicable, either transfers them to another qualified entity competent in the matter, or handles them itself.

The scope of the Belgian ADR rules are broader than the ones included in the Directive. Not only consumers, yet also companies may introduce complaints before an ADR entity.⁹⁰ The dispute may concern the execution of a contract of sale or service, as referred to the Directive, or the use of a product.⁹¹ The Belgian ADR proceedings are not limited to

⁸⁵ Art. 13.1 of the ADR Directive.

⁸⁶ Art. 25 of the ADR Directive.

⁸⁷ Art. 26 of the ADR Directive.

⁸⁸ See in Book XVI of the Code of Economic Law and the royal decree of 16 February 2015.

⁸⁹ <http://www.consumerombudsman.be/en>.

⁹⁰ G. RENIER, « Le règlement extrajudiciaire des litiges de consommation. Analyse de transposition de la directive « ADR » 2013/11/UE en droit belge », *DCCR*. 2015, 107, 5.

⁹¹ Article I.19 of the Code of Economic Law.

contractual disputes alone, yet may equally deal with litigations relating to products that consumers have obtained free of charge or in exchange for other. Moreover, the Consumer Mediation Service is also entitled to act within the framework of class action for compensation.⁹² This entitlement might affect the needed (appearance of) independency and impartiality of the ADR entity.⁹³ However, no specific rules have been adopted yet. One possible role for the Consumer Mediation Centre might be collecting consumer complaints, and forwarding them to a private or public consumer association in order to facilitate the initiation of judicial proceedings.

5.2. Consumer class action

35. Another solution for consumers to obtain compensation is the class action. By joining many complaints, consumers become a serious opponent in any proceeding. However, if an agreement through ADR is achieved, the group of consumers can no longer reclaim the compensation they seek through a class action.

Nevertheless, a non-judicial class action, overseen by the ADR entities, might be a new way to compel traders to commit to an agreement, which would complete the new tools foreseen in Directive 2013/11. If these class actions are coordinated on a European level as the ADR Directive had envisaged, they will increase the consumer's power of negotiation and the willingness of all parties involved to reach a mutually satisfactory agreement.

B. European ODR solution

1. ODR definition

36. Online Dispute Resolution (“ODR”) is a form of ADR, using online technology. ODR is introduced by Regulation 524/2013. ODR entities enable consumers and companies to settle their disputes online. This is especially advantageous for contracts involving online purchases, where consumer and professional are most often located in different Member States.⁹⁴

⁹² Book XVII of the Code of Economic Law.

⁹³ G. RENIER, “Le règlement extrajudiciaire des litiges de consommation. Analyse de transposition de la directive « ADR » 2013/11/UE en droit belge », *DCCR*. 2015, 38.

⁹⁴ J. HÖRNLE, “Encouraging Online Alternative Dispute Resolution in the EU and beyond”, *E.L. Rev.* 2013, 188.

2. How does it work?

37. The European Commission launched an online platform for ODR proceedings.⁹⁵ This new website enables the settling of complaints regarding online sales and/or purchases outside the courtroom. The website makes it easier for a consumer, who is not satisfied with an online transaction, to file a complaint. In addition, it avoids the initiation of a long and expensive judicial procedure. The website only deals with disputes between consumers or traders that are based within the EU, regarding products or services bought online, both for domestic and EU transactions.⁹⁶ The whole procedure is carried out online and the platform is available in all EU languages.

On the 9th of January 2016 the ODR platform was placed online, i.e. the day the ODR Regulation entered into force. The launch intended to counter the growing pains that accompany international online transactions. The European legislator wanted to strengthen the confidence of consumers to buy and order goods or services online by providing a place where the consumer can turn to in case of dispute,⁹⁷ in the language of his choice.⁹⁸

The procedure is as follows:

- The complainer (consumer or entrepreneur) has to fill in an electronic complaint form, using the ODR platform, which is then forwarded to the other party.
- When the parties have reached an agreement regarding the ADR entity the platform will automatically forward the complaint to that entity. The list of ADR entities is provided by the platform.
- The chosen entity must then inform the parties if it will handle the complaint or not. If it agrees to do so, it will provide the parties with the rules of the procedure and an overview of the costs.
- The procedure has to be completed within 90 days, as foreseen by the ADR Regulation. The physical presence of the parties is not required. Everything is done online.

⁹⁵ The platform was operational, but only available since the 15th of February 2016 through an interactive website of the European Union (<http://ec.europa.eu/odr/>).

⁹⁶ M. BOGDAN, "The new regulation on online resolution for consumer disputes", *Masaryk University Journal of Law and Technology* 2015, 158.

⁹⁷ J. HÖRNLE, "Encouraging Online Alternative Dispute Resolution in the EU and beyond", *E.L. Rev.* 2013, vol. 38, 200.

⁹⁸ M. BOGDAN, "The new regulation on online resolution for consumer disputes", *Masaryk University Journal of Law and Technology* 2015, 159.

- After the procedure is finished the entity has to provide the parties with feedback, using the platform. It has to mention the subject of the dispute, the time it took to handle it, and the result itself.

Mediation through the ODR-system is always on a voluntary basis. If the consumer or trader refuses to cooperate, they will have to make use of a judicial procedure before a competent national court. Important to note however is that e-commerce traders are obligated to mention the link to the ODR platform on their website, thus increasing its possible use.⁹⁹ The confidence created by this platform might prove to be a step in the right direction for European e-commerce traders and will allow them to compete with enterprises that are not based within the EU.

38. In sum, the strengths of the ODR proceeding, *i.e.* the easy accessibility and the low cost, are met with certain weaknesses, namely the voluntary basis and the lack of enforceability of the decisions. Moreover, ODR is still quite unknown and not generally accessible to all EU-consumers, of which a large part does not have (easy) access to the internet – although those concluding contracts over the internet must have had an internet connection. Furthermore, more ADR entities will have to join the platform in order to deal with all disputes within a reasonable timeframe.

IV. Conclusion

39. Cross border e-commerce increases. Via a few “clicks” a consumer can buy goods or acquire services in other Member States. Aware of the fact the consumer is most often the weaker party in these transactions, the European legislator has adopted different procedural rules for a consumer, involved in a cross border e-commerce dispute, to find redress.

A first set of rules can be found in the Brussels I Recast facilitating access to justice by offering the consumer the protection of his own court and ensuring an almost automatic enforcement of the judgments that fall within its scope. Secondly, uniform European procedural rules have been developed, like the ESCP, that equally result in a judgment that can be enforced in all the Member States in the same way as a national judgment. But even so, practical problems, such as the low financial stake of most consumer contracts lead to the finding that litigation before the courts is not always the most effective solution.

This is why the European legislator has adopted instruments relating to offline and online alternative dispute resolution methods, known as ADR and ODR. These alternative

⁹⁹ Art. 14 ODR-Regulation.

paths take account of the specificities of consumer disputes and provide a tailored solution. Indeed, costs are significantly reduced, and may, in some cases, even be non-existent. The outcome of such proceedings is made available swiftly, which means that the consumer will not have to wait years before the issue is resolved. In addition, the ADR proceeding takes place in the Member State in which the consumer is domiciled and as far as ODR is concerned, none of the parties need to do any travelling in order to obtain a mutually satisfactory resolution of their dispute. The hope is that the existence of an effective ADR system will stimulate consumers to search actively towards a solution instead of simply leaving the matter be and refraining from any future online transactions.

However, the work is not finished. In order to actually finalize the completion of the internal consumer market, these European instruments providing judicial and extra-judicial solutions will have to be promoted and applied in an adequate manner.