

# Jurisdiction and applicable law in crowdfunding

---

**Kunda, Ivana**

*Source / Izvornik:* **Economic and Social Development (Book of Proceedings): 16th International Scientific Conference on Economic and Social Development "The Legal Challenges of Modern World", 2016, 253 - 263**

**Conference paper / Rad u zborniku**

*Publication status / Verzija rada:* **Published version / Objavljena verzija rada (izdavačev PDF)**

*Permanent link / Trajna poveznica:* <https://urn.nsk.hr/urn:nbn:hr:118:517733>

*Rights / Prava:* [In copyright](#) / [Zaštićeno autorskim pravom.](#)

*Download date / Datum preuzimanja:* **2024-12-29**

**PRAVRI**

Pravni fakultet Faculty of Law



Sveučilište u Rijeci  
University of Rijeka

*Repository / Repozitorij:*

[Repository of the University of Rijeka, Faculty of Law](#)  
[- Repository University of Rijeka, Faculty of Law](#)



Varazdin Development and Entrepreneurship Agency  
*in cooperation with*  
Faculty of Law, University of Split and University North

# Economic and Social Development

16<sup>th</sup> International Scientific Conference on Economic and Social Development –  
“The Legal Challenges of Modern World”



Editors:

**Zeljka Primorac, Candida Bussoli and Nicholas Recker**

## Book of Proceedings

ISSN 1849-7535



9 771849 753006 >

Split, 1-2 September 2016

**Varazdin Development and Entrepreneurship Agency**  
*in cooperation with*  
**Faculty of Law, University of Split and University North**

Editors:

**Zeljka Primorac, Candida Bussoli and Nicholas Recker**

## **Economic and Social Development**

16<sup>th</sup> International Scientific Conference on Economic and Social Development –  
“The Legal Challenges of Modern World”



## **Book of Proceedings**

Split, 1-2 September 2016

**Title ■** Economic and Social Development (Book of Proceedings), 16<sup>th</sup> International Scientific Conference on Economic and Social Development – “Legal Challenges of Modern World”

**Editors ■** Zeljka Primorac, Candida Bussoli and Nicholas Recker

**Scientific Committee ■** Marijan Cingula, University of Zagreb, Croatia (President); Ayuba A. Aminu, University of Maiduguri, Maiduguri, Nigeria; Gouri Sankar Bandyopadhyay, The University of Burdwan, Rajbati Bardhaman, India; Haimanti Banerji, Indian Institute of Technology, Kharagpur, India; Alla Bobyleva, The Lomonosov Moscow State University, Russia; Leonid K. Bobrov, State University of Economics and Management, Novosibirsk, Russia; Rado Bohinc, University of Ljubljana, Slovenia; Ratko Brnabic, University of Split, Croatia; Adnan Celik, Selcuk University - Konya, Turkey; Angelo Maia Cister, Federal University of Rio de Janeiro, Brazil; Mirela Cristea, University of Craiova, Romania; Sreten Cuzovic, University of Nis, Serbia; Oguz Demir, Istanbul Commerce University, Turkey; T.S. Devaraja, University of Mysore, India; Alba Dumi, Vlora University, Vlore, Albania; Ksenija Dumcic, University of Zagreb, Croatia; Galina Pavlovna Gagarinskaya, Samara State University, Russia; Fran Galetic, Zagreb University, Croatia; Mirjana Gligoric, Faculty of Economics, Belgrade University, Serbia; Mehmet Emre Gorgulu, Afyon Kocatepe University, Turkey; Hana Horak, University of Zagreb, Croatia; Anica Hunjet, University North, Koprivnica, Croatia; Oxana Ivanova, Ulyanovsk State University, Ulyanovsk, Russia; Irena Jankovic, Faculty of Economics, Belgrade University, Serbia; Lara Jelenc, University of Rijeka, Croatia; Myrl Jones, Radford University, USA; Ana Jovancai Stakic, Univerzitet Dzon Nežbit, Belgrade, Serbia; Gorazd Justinek, Graduate School of Government and European Studies, Slovenia; Hacer Simay Karaalp, Pamukkale University, Turkey; Dafna Kariv, The College of Management Academic Studies, Rishon Le Zion, Israel; Salih Katircioglu, Eastern Mediterranean University, Northern Cyprus, Turkey; Hilal Yildirim Keser, Uludag University, Bursa, Turkey; Sophia Khalimova, Institute of Economics and Industrial Engineering of Siberian Branch of Russian Academy of Science, Novosibirsk, Russia; Marina Klacmer Calopa, University of Zagreb, Croatia; Mirko Klaric, University of Split, Croatia; Vladimir Kovsca, University of Zagreb, Croatia; Goran Kozina, University North, Koprivnica, Croatia; Lejla Lazovic Pita, School of Economics and Business, University of Sarajevo, Bosnia and Herzegovina; Robert Lewis, Les Roches Gruyère University of Applied Sciences, Bulle, Switzerland; Ladislav Lukas, Univ. of West Bohemia, Faculty of Economics, Czech Republic; Pascal Marty, University of La Rochelle, France; Vaidotas Matutis, Vilnius University, Lithuania; Marjana Merkač Skok, GEA College of Entrepreneurship, Ljubljana, Slovenia; Daniel Francois Meyer, North West University, South Africa; Marin Milkovic, Rector, University North, Koprivnica, Croatia; Gratiela Georgiana Noja, West University of Timisoara, Romania; Zsuzsanna Novak, Corvinus University of Budapest, Hungary; Mislav Ante Omazic, University of Zagreb, Croatia; Matko Pajcic, University of Split, Croatia; Vera Palea, Università degli Studi di Torino, Italy; Dusko Pavlovic, President DIU Libertas International University, Zagreb, Croatia; Zeljka Primorac, University of Split, Croatia; Mirosław Przygoda, University of Warsaw, Poland; Nicholas Recker, Metropolitan State University of Denver, USA; Zeljko Radic, University of Split, Croatia; Kerry Redican, Virginia Tech, Blacksburg, USA; Robert Rybnicek, University of Graz, Austria; Katarzyna Szymanska, The State Higher School of Vocational Education in Ciechanow, Poland; Ilaria Tutore, University of Naples Parthenope, Italy; Mladen Vedris, University of Zagreb, Croatia; Ilko Vrankic, University of Zagreb, Croatia; Rebeka Danijela Vlahov, University of Zagreb; Mladen Vukcevic, President of the Judicial Council of Montenegro; Thomas Will, Agnes Scott College, USA; Li Yongqiang, Victoria University, Australia; Peter Zabielskis, University of Macau, China; Tao Zeng, Wilfrid Laurier University, Waterloo, Canada; Snezana Zivkovic, University of Nis, Serbia.

**Review Committee ■** Marina Klacmer Calopa (President); Ana Aleksic; Ayuba Aminu; Mihovil Andjelinovic; Josip Arneric; Lidija Bagaric; Tomislav Bakovic; Sanja Blazevic; Leonid Bobrov; Ruzica Brecic; Ratko Brnabic; Anita Ceh Casni; Mirela Cristea; Oguz Demir; Stjepan Dvorski; Robert Fabac; Ivica Filipovic; Fran Galetic; Mirjana Gligoric; Tomislav Globan; Anita Goltnik Urnaut; Tomislav Herceg; Irena Jankovic; Dafna Kariv; Oliver Kesar; Hilal Yildirim Keser; Mirko Klaric; Tatjana Kovac; Vladimir Kovsca; Petar Kurecic; Angelo Maia Cister; Vaidotas Matutis; Marjana Merkač Skok; Daniel Francois Meyer; Natanya Meyer; Josip Mikulic; Ljubica Milanovic Glavan; Guenter Mueller; Ivana Nacinovic Braje; Gratiela Georgiana Noja; Zsuzsanna Novak; Alka Obadic; Claudia Ogorean; Matko Pajcic; Igor Pihir; Najla Podrug; Vojko Potocan; Zeljka Primorac; Zeljko Radic; Sanda Renko; Souhaila Said; Armando Javier Sanchez Diaz; Tomislav Sekur; Lorena Skuflic; Mirko Smoljic; Petar Soric; Mario Spremic; Ana Jovancai Stakic; Matjaz Stor; Lejla Tijanic; Daniel Tomic; Boris Tusek; Mladen Vedris; Rebeka Daniela Vlahov; Ilko Vrankic; Thomas Will; Zoran Wittine; Tao Zeng; Snezana Zivkovic; Berislav Zmuk.

**Organizing Committee ■** Zeljka Primorac (President); Domagoj Cingula (Co-President); Hana Horak; Marina Klacmer Calopa; Erlino Koscak; Mirosław Przygoda; Rebeka Danijela Vlahov.

**Publishing Editor ■** Domagoj Cingula

**Publisher ■ Design ■ Print ■** Varazdin Development and Entrepreneurship Agency, Varazdin, Croatia  
Faculty of Law, University of Split, Croatia  
University North, Koprivnica, Croatia

**Printing ■** Online Edition

**ISSN 1849-7535**

The Book is open access and double-blind peer reviewed.

Our Books are indexed and abstracted by ProQuest, EconBIZ and CPCI (WoS) databases and available for download in a PDF format from the Economic and Social Development Conference website:

<http://www.esd-conference.com>

© 2016 Varazdin Development and Entrepreneurship Agency, Varazdin, Croatia; Faculty of Law, University of Split, Croatia; University North, Koprivnica, Croatia.

All rights reserved. Authors are responsible for the linguistic and technical accuracy of their contributions

## JURISDICTION AND APPLICABLE LAW IN CROWDFUNDING

Ivana Kunda

Faculty of Law of the University of Rijeka, Croatia  
ikunda@pravri.hr

### ABSTRACT

*As a process of raising monetary contributions from a large number of persons, crowdfunding may take many forms: from traditional benefit events and television fundraising campaigns to increasingly popular internet platform fundraising. The online environment in which the newest forms of CF emerge facilitates its unprecedented ability to cross borders and attract persons from various countries. This having been said, the same environment complicates legal assessment. The issues that inevitably arise in cross-border dealing are particularly intricate: which court decides and which law applies? At the outset, one must differentiate between various types of CF models. Furthermore, the tripartite structure of the CF model involving the specialised internet platforms adds another layer of complexity because the conflict of laws analysis demands the preliminary identification of legal relationships and their legal characterisation. Finally, there is a constant debate about whether investors may be legally characterised as consumers or not, which may significantly affect conclusions on jurisdiction and applicable law.*

*In answering these questions, the author considers national and supranational legal instruments containing provisions on international jurisdiction and applicable law, with the focus on the EU ones. In the course of legal analysis, the interpretational principles set by the Court of Justice of the European Union will be taken into account. Since no such principle is directly related to the internet-based CF, they need to be assessed in terms of their relevancy and potential to be used as starting points in analogical reasoning. Besides drawing a clearer image about the conflict of laws issues for participants in CF, the aim of this article is also to assess the validity of some of the legal terms under which these participants join the CF process.*

**Keywords:** *alternative financing, applicable law, crowdfunding, conflict of laws, European law, international jurisdiction, internet, legal characterisation.*

### 1. INTRODUCTION

Crowdfunding (CF) can be defined as “a collective effort by people who network and pool their money together, usually via the internet, in order to invest in and support efforts initiated by other people or organizations” (Ordanini et al., 2009, 444). Because these means of raising capital are mostly employed by innovators, entrepreneurs and business owners, some authors tend to restrict the notion of CF to the process of raising equity, or ownership capital for a startup or small business firm from a relatively large number of small investors (Cunningham, 2012, 17). Although the concept of raising money from people for a specific purpose is not new, the technological progress and evolving internet user mind-set empowering the phenomenon of Web 2.0, widely open the doors to development of new business models such as CF. Today, the vast majority of CF activities are internet-related and occurring through crowdfunding platforms (CFP). The total global CF industry estimated fundraising volume in 2015 at the level of \$34 Billion (*Massolution Crowdfunding Industry 2015 Report*, 2015). This is largely facilitated by enabling communication across large distances at ultimately low costs, growing importance of online social networks, and rise of online payment systems (Danmayr, 2014, 12). The fact that Europe is a birthplace of CF is owed largely to the specific set of market conditions, in particular, the combination of strong and fast growing levels of entrepreneurial activity, a shortage of seed capital, and the dispersion of wealth. (Lynn & De Buysere, 2014, 204).

Investigation in the structure of the CF reveals the main participating actors and typical interrelations created among them. Both actors and their relations affect the degree of complexity of a particular CF model, not just on the social and economic levels, but also on the legal level. Although the recent comparative analysis of the cross-border CF stresses a legal risk related likewise to public and private law (*Crowdfunding Crossing Borders*, 2016, 5), the legal literature focusing particularly on these issues is scarce. The analysis in this paper intends to provide an insight into the specific private law questions under the EU law: which court has competence to decide on and which law is applicable to the specific aspect of the CF process? Prior to that, it is necessary to understand the inner architecture of the process in order to enable legal characterisation.

## 2. ARCHITECTURE OF THE CF PROCESS

Legal characterisation is concerned with subsuming a social and economic activity under a specific legal regime. In this process, lawyers assign legal names to social-economic relations among humans. Whenever the social-economic reality changes, the lawyers have to characterise new developments in order to be able to know the pertinent legal regulation. The correct legal characterisation depends on understanding the key features of a given social-economic relationship. In the context of CF, this entails identifying the participating actors and their interrelations.

### 2.1. Participating actors

Three actors are involved in a typical online CF process: project owners or creators, funders or investors and the CFPs (De Buysere et al. 2012, 12). While this is essentially a tripartite structure, each of the actors is in a bilateral relationship with the other two, as portrayed in the triangular figure below.

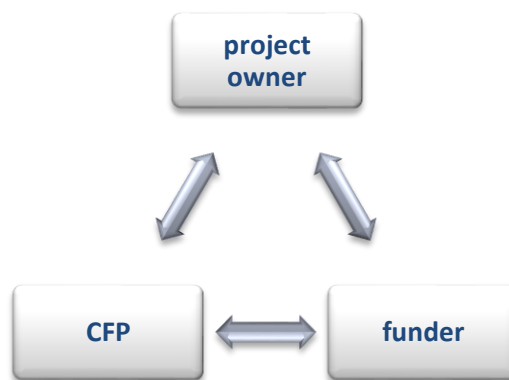


Figure 1: Triangular structure of relationships among CF participating actors

The three relationships are: first, between the project owner and the funder; second, between the project owner and the CFP; and third, between the funder and the CFP. The second and third relationships will usually be alike in all CF situations, while the variations in CF models reflect the difference in relationship between the project owner and the funder as explained in a subchapter below.

Regardless of the role one assumes in the CF process, awareness of the legal regulations pertaining to such activity may prove very important. For instance, a donor may not know that under the laws of certain countries it may have the right to receive back what was donated in case the project owner is ungrateful. Or, the project owner may not be aware that the delivery abroad of the product prototype in return for the investment may constitute an infringement under the respective foreign intellectual property laws. Or, the CFP may not know that it



sometimes may be sued before the courts of a foreign country, such as the country of the clients' habitual residence. As in all other transactions, knowing the relevant jurisdiction and applicable law enables one to calculate in advance the risk of engaging in a particular activity. It is to be presumed that the lower the amount which one is putting into (funders)/expecting from (project owners) this activity, the lower the awareness of the legal regulation. Additionally, the larger the difference between the individual amounts paid by the funders and the total amount received by the project owner, the higher the degree of informational asymmetry. These are inescapable consequence of the need to minimise the transaction costs.

## 2.2. CF models

Several CF models distinguishable based on various criteria are currently employed in practice. In determining legal characterisation for the purpose of the topic of this paper, the Hemmer's list seems very useful. It differentiates among the following basic CF models (Hemmer, 2011, 13-14):

- Crowd donations: Donors give money without expecting anything material in return, but the gratitude expressed in a form of a thank-you note, a promotional item (t-shirt or calendar), an invitation to backstage of a film-set or a mention of the donor's name on the respective product.
- Crowd sponsoring: Project owner and sponsor agree that no financial return is due for the money paid; instead, the project owner is obliged to give the sponsor a defined reward. Such reward usually serves as a preliminary test of the market value and may take different forms of marketing of the sponsor, such as through the bulletin board.
- Crowd pre-selling: This model facilitates producing something (printer, CD etc.) and the project owner is obliged to deliver to the funder an early version or a prototype product in return for the money paid.
- Crowd lending: This is the most popular model participating with more than 70% in the total CF industry (*Massolution Crowdfunding Industry 2015 Report*, 2015). The funder lends the money to the project owner who, upon expiration of the lending period, has to return the same amount plus certain interest. An often employed alternative to this is a long-term lending based on the revenue sharing principle. Instead of frequent payment of interest, he gets a predefined amount, including an agreed share of the venture's earnings. Because the lender participates in the business risk, this amount could range from a total loss – in case of bad performance – up to a multiple of the original amount loaned. In cases of loan-based CF, often the funder received a participative note which is not legally characterised as a security instrument.
- Crowd investing: This type is often referred to as the equity-based CF. Against the investment of equity; the funders receive shares, dividends and/or voting rights. This model has two submodels: profit-share streams (with the right to participate in the profits based on the contract or ownership of equity) and securities-based investing (with the rights deriving from the securities held by the funder). This CF model is subject to stricter legislative limitations than other models, in particular where it triggers the operation of securities regulatory framework.

Able to choose among the variety of basic CF models, CFPs sometimes offer several models for simultaneous use. This is one of the features of the CFP's efforts to provide tailored products to satisfy a specific project and project owner's needs. It is expected that the growing

commercial importance of CF and the competition between the CFPs will also contribute to the advancement of the CF models in the future. (Esposti, 2014, 44).

### 3. LEGAL CHARACTERISATION

Legal characterisation in this chapter is provided, not to pinpoint the substantive law defining the parties' rights and obligations, but to identify legal provisions on international jurisdiction and applicable law within the EU. The assessment thus focuses on three main EU legal instruments in the field:

- Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I bis Regulation),
- Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) and
- Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

#### 3.1. Contractual versus non-contractual

The legal relationship between the CF participating actors may in principle be characterised either as a contractual or a non-contractual (tort and quasi-delict). Hence, in situation of dispute, the aggrieved party has to decide whether to base its claim on contract or tort, although in many EU Member States procedural rules permit cumulating these two types of legal basis. Both, the term “contractual” and the term “non-contractual” are autonomously and coherently interpreted in Brussels I bis, Rome I and Rome II, meaning that no national concepts may be invoked and that the same terms in different instruments should be construed in the same vein. In its rulings, the Court of Justice of the European Union (CJEU) held that the contractual relationship in the meaning of Article 7(1) of Brussels I bis exists in a situation in which there is an obligation freely assumed by one party towards another (*Handte*, C-26/91, EU:C:1992:268, paragraph 15). More recently, the CJEU restated that the contractual relation “presupposes the establishment of a legal obligation freely consented to by one person towards another and on which the claimant’s action is based” (*Engler*, C-27/02, EU:C:2005:33, paragraph 51). On the other hand, the dispute is to be classified as non-contractual if it seeks to establish the liability of a defendant that is not related to a contract (*Kalfelis*, C-189/87, EU:C:1988:459, para. 18). By applying these definitions to typical CF situations, it becomes evident that often there will be as many contractual relations as there are relations in the triangular structure: first, between the project owner and the funder, second, between the project owner and the CFP, and third, between the funder and the CFP. As for the non-contractual, these are relationships in which the parties’ encounter is fortuitous without the potential to agree on the distribution of the related risk (Mankowski, 2016, 164). For instance, where there is a non-contractual obligation of the CFP arising out of the prospectus liability or where there is an unfair commercial practice on the part of the CFP (*Crowdfunding Crossing Borders*, 2016, 15). This seems to be confirmed by the recent CJEU judgment where it was held that a consumer, who has acquired a bearer bond from a third party professional, without a contract having been concluded between that consumer and the issuer of the bond, may not invoke jurisdiction in contracts (or the purpose of consumer protective jurisdiction) if suing the issuer of the bond on the basis of the bond conditions, breach of the information and control obligations and liability for the prospectus (*Kolassa*, ECLI:EU:C:2015:37). In addition to direct lawsuit against the tortfeasor, there might be an option to rely on an insurance covering this risk of liability arising out of prospectus, but this issue falls outside the scope of this article.



### 3.2. Particular contracts

Once the characterisation shows that a specific relationship is contractual, the type of contract may be relevant for the purpose of special jurisdiction or applicable law. Under Article 7(1) of Brussels I bis and Article 4(1) of Rome I, the relevant differentiation is among contract for the sale of goods, contract for the provision of services, and all other contracts. Under Article 4(1) of Rome I, one has to differentiate among contract for the sale of goods, contract for the provision of services, contract concluded within a multilateral system, and all other contracts. Contract for the sale of goods and contract for the provision of services should have the same meaning for the purpose of both instruments. Contract for the sale of goods (Articles 7(1) of Brussels I and 4(1)(a) of Rome I) is understood as contractual exchange of goods against money, involving a transfer of property over goods (Mankowski, 2016, 191). This would encompass a typical pre-selling CF arrangement in which a project owner is obliged to deliver to the funder an early version or a prototype product in return for the money paid. Such arrangement might be considered as a sale of goods with an advance payment. Contract for the provision of services (Articles 7(1) of Brussels I and 4(1)(b) of Rome I) implies that the party who is providing the service carries out a particular activity in return for the remuneration (*Falco*, ECLI:EU:C:2009:257, para. 29). The concept is wide enough to encompass the relationship between the project owner and the CPF since the CPF is actually a CF service provider for the project owner (see by analogy the situations mentioned by Mankowski, 2016, 200-201).

Under Article 4(1)(h) of Rome I, there is a type of contract potentially relevant for the purpose of relationships in the CF triangle. This is the contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third party buying and selling interest in financial instruments. The concept of “financial instruments” is defined under the Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (MiFID) and covers a wide range of instruments such as shares, bonds, options, futures, swaps derivatives etc. The MiFID governs the provision of investment services in financial instruments by banks and investment firms and the operation of traditional stock exchanges and alternative trading venues, and may require the CFP to obtain license to operate in a certain Member State, which is a public law issue outside the scope of this paper. Its importance in interpreting the Rome I provision reaches only to cover the investment-based CF. The dilemma as to whether the provision of Article 4(1)(h) applies only to contracts between acquirers and sellers or also to back-to-back contracts within the multilateral system, seems to be resolved by taking account of the intention to cover the whole chain of transactions. Thus, a contract for the sale of securities will be covered, but not the contract for the provision of services by the CFP to enable sale or purchase of securities. Although there are some contrary opinions, the latter would probably be categorised as contracts for the provision of services (see McParland, 2015, 410–411).

Under the default third category of contracts, the scholarship lists *inter alia* the loan contracts and agreements concerning corporate matters, agreement for contributions to the common venture, share deals and asset deals for acquiring a business, sale of securities (see Mankowski, 2016, 206 and 244). Thus, also donations contract, sponsorship contracts, contracts concluded within a multilateral system and alike are subject to the third category of all other contracts in Article 7(1)(a) of Brussels I bis. Although the default categories in Brussels I bis and Rome I are mostly the same, the contracts concluded within a multilateral system fall within this general default category in Brussels I bis, but not in Rome I.

### 3.3. Consumer Contracts

Private international law in the EU attempts to create a fairer playing field for consumers who are in a particularly vulnerable position towards the professionals due to their uneven

bargaining power. This is done through special protective provisions on international jurisdiction in Section 4 of Brussels I bis and conflict of laws in Article 6 of Rome I, which exclude the application of the formerly discussed provisions on contracts. In both legal instruments the principal requirement of application of the protective provisions is that the contract is concluded between the consumer and the professional. These terms are autonomously interpreted without any reference to a particular national law. A consumer is understood to be a natural person acting for his or her private purpose, while a professional is acting in the exercise of trade or profession. A mixed contract, in which a person is acting in both capacities, may be considered a consumer contract provided the professional capacity is negligible (*Gruber*, ECLI:EU:C:2005:32). According to the definition provided by the CJEU, there has to be a “concordance of intention between the two parties [giving] rise to reciprocal and interdependent obligations” (*Ilsemer*, ECLI:EU:C:2009:303, para. 43).

Additionally, the contract has to fall under one of the purposes listed in the provision. (*Gabriel*, ECLI:EU:C:2002:436, para. 49; *Engler*, ECLI:EU:C:2005:33, para. 34; *Ilsemer*, ECLI:EU:C:2009:303, para. 43). Under Brussels I the additional criteria are: a) a contract is for the sale of goods on instalment credit terms; b) a contract is for a loan repayable by instalments, or other form of credit, made to finance the sale of goods; or c) in all other cases, the contract is concluded with a person who pursues commercial/professional activities in the Member State of the consumer’s domicile or directs such activities there. Under Rome I the additional requirements are that the professional: a) pursues his commercial/professional activities in the country of the consumer’s habitual residence, or b) directs such activities to that country. Interpretation of the latter requirement in the online context has been given in CJEU case law (see *Pammer* and *Alpenhof*, ECLI:EU:C:2010:740). Common requirement to all these instances under both Brussels I bis and Rome I is that the contract falls within the scope of such activities, yet no causal link is necessary (*Emrek*, ECLI:EU:C:2013:666, para. 24).

However, not all consumer contracts are covered by the protective provisions because specific exclusions are provided in the Rome I. Particularly relevant for the CF transactions are: a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country of his or her habitual residence; d) rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service; or e) a contract concluded within the multilateral system referred to above.

Turning to the above-described CF structure and models, one may notice that the answer whether a particular relationship within a particular CF model is covered by the consumer protective provisions or not depends on the specific circumstances. The assessment has to be made separately for the purpose of Brussels I and Rome I.

In respect to the first relationship between the project owner and the funder, the variations are plentiful. Regarding the first hurdle – the definition of a consumer and a professional, a typical situation is where a project owner is a professional and the funder is a consumer. It is nevertheless possible that their roles are reversed: A company is donating a small amount of money for a private project of installing the non-profit solar-energy system on the roof of a project owner’s household. Should this also be understood as a consumer contract, in which the project owner is a consumer and the funder is a professional? It seems that in the majority of cases this would not be a proper construction. Rather than acting in the exercise of its trade or profession (such as where a transporting company is carrying the goods or purchasing a truck, or clothes retailer is selling a clothing item or leasing a business premises), the professional’s donation would be an act of sympathy or support. If however, the professional’s activity is to support innovative ideas or finance projects, careful assessment of circumstances might lead to

the conclusion that the requirement is fulfilled. The assessment is made based on the nature of the person's profession or trade, as well as nature and regularity of activities which are at stake in a particular contract (compare McParland, 2015, 536–538). In a different situation of investment-based CF model, this first relationship will fall under the Brussels I and Rome I protective regimes if the funder is a natural person acting outside his or her professional sphere, the professional does or directs its activities to the country of funder's habitual residence, and their contract falls within such activities. However, the same contract would fall outside the Rome I protective regime if it is concluded within the above-described multilateral system.

The second relationship between the project owner and the CFP will usually lack the character of a consumer contract again because of inability to pass the very first hurdle – definition of a consumer. Whereas the CFP, the provider of CF services in this relationship, will always be considered a professional, the project owner, even if a natural person, will rarely be acting for his or her private purpose. One of those rare situations is the above household solar-energy project.

Given that the CFP is a professional, the application of the consumer protective provisions to the third relationship between the funder and the CFP will primarily depend on the legal nature of the funder and the capacity in which he or she is acting. If the funder is a natural person and engages into donating, sponsoring, pre-purchasing, lending or investing, outside his or her trade or profession, he or she would be characterised as a consumer. On the contrary, if the funder is a legal person or a natural person acting within his or her trade or profession, no characterisation as a consumer is possible.

The final issue which needs to be mentioned is the submission that a natural person who is investing his or her privately owned money into an equity-based CF cannot be regarded as a consumer under the current EU financial market and consumer protection regimes. This argument is mainly developed in respect to the substantive law, where it is submitted that retail investors receive adequate and balanced protections through the financial market legal scheme, and are thus do not need the consumer protection legislation. Although voices are increasingly louder to extend the benefits of consumer protection to retail investors (Cherednychenko, 2010), including at the level of the collective redress as a guarantee of access to justice (Amato & Perfumi, 2012), this is still a matter of an ongoing debate. It would be worth investigating into this issue from the private international law perspective. The arguments in the context of substantive law cannot be translated into the private international law because of no special rules on protecting the investors. Passive private investors would thus enjoy no special protection under Brussels I bis and Rome I, unless they are considered consumers.

#### **4. INTERNATIONAL JURISDICTION**

In Brussels I bis, there are special rules applicable to consumer contracts, while majority of the provisions are common to other contracts and torts in general, the difference being only in relation to special jurisdiction under Articles 7(1) and (2).

##### **4.1. Consumer contracts**

Pursuant to Article 18 of Brussels I bis, a consumer may bring proceedings against the other party to a contract in the courts of the Member State of that party's domicile or the consumer's domicile. However, a consumer may be sued only in the courts of the consumer's domicile. The exception is provided for the right to bring a counterclaim in the court in which the original claim is pending. Options to depart from these provisions by parties' agreement on the choice of court are limited to three alternative situations under Article 19. A further condition for the prorogations agreement in consumer contracts to survive is that it is not considered an unfair contract term under the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. Where a defendant enters an appearance and does not contest jurisdiction

and no other court has exclusive jurisdiction under Article 24, the court which otherwise would have no jurisdiction is considered to have one, based on Article 26 of Brussels I on tacit prorogation. If a consumer is the defendant, the court has to ensure that he or she is properly informed of these provisions.

#### **4.2. Non-consumer contracts and torts**

Article 4 of Brussels I bis on general jurisdiction provides for the jurisdiction of the courts of the Member State of the defendant's domicile. Instead, a plaintiff may choose a special jurisdiction in matters related to a contract under Article 7(1) or tort or quasi-delict under Article 7(2). Thus, in the case of the sale of goods, in the place in a Member State where, under the contract, the goods were delivered or should have been delivered, and in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided. In all other contracts, the lawsuit may be brought before the courts for the place of performance of the obligation in question, i.e. the obligation which is the subject matter of the dispute. Article 7(2) conveys special jurisdiction torts and quasi-delicts to courts of the place where the harmful event occurred or may occur.

Pursuant to Article 7(3) of Brussels I bis, it is further possible to rely on the jurisdiction in criminal proceedings, while Article 7(5) provides basis for jurisdiction regarding a dispute arising out of the operations of a branch, agency or other establishment. There are also options for joinder of the parties under Article 8 of Brussels I bis. A parties' agreement to the contrary may override these provisions, provided the conditions set in Article 25 of the Brussels I are met. Whereas the cited Brussels I bis provision defines conditions for formal validity, the substantive validity is subject to the law of the Member State whose courts have been chosen. Priority to any of the above heads of jurisdiction is given to tacit prorogation under Article 26(1) of Brussels I.

### **5. APPLICABLE LAW**

Like under Brussels I bis, the distinction has to be made between contractual and non-contractual relationships, and in the former category between the consumer contracts and non-consumer contracts.

#### **5.1. Consumer contracts**

Special conflicts of law provisions exist for consumer contracts under Article 6 of Rome I, which have precedence over the general provisions addressed in the next subchapter. The parties to consumer contracts may agree on the applicable law, but the choice may not deprive the consumer of the protection afforded to him by mandatory provisions of the law which would have otherwise been applicable. The law governing the consumer contract in the absence of the parties' choice is the law of the country of the consumer's habitual residence. Pursuant to Article 11(4) of Rome I, the law of the country of the consumer's residence is exclusively applicable to formal validity of consumer contracts.

#### **5.2. Non-consumer contracts**

Under Article 3, the primary connecting factor for contracts in the Rome I Regulation is party autonomy. This is subject to certain limitations, and its substantive validity is governed by the chosen law. In the absence of choice, Article 4(1) lists the contract on the sale of goods, the contract on the provisions of services and the contract concluded within the multilateral system. The two former contracts are governed by the law of the country of the habitual residence of the seller and the service provider, respectively. The third contract concluded within the multilateral system, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments in accordance with non-discretionary

rules and governed by a single law, is subject to that law. In all other contracts concluded in the context of CF, the provision of Article 4(2) applies. The applicable law is that of the habitual residence of a party required to perform the characteristic performance. The reference to the above laws law is not final where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country, as provided under Article 4(3). The wording of this escape clause shows that it is reserved for exceptional situations in which narrow interpretation is required. And finally Article 4(4) provides that, where the characteristic performance cannot be determined, such as in case of barter agreements, the contract is governed by the law of the country with which it is most closely connected. The formal validity of a contract is regulated in Article 11.

### 5.3. Non-contractual obligations

Rome II determines the applicable law for non-contractual obligations involving a conflict of laws. In the context of CF, the most common probably would be the application of the general provisions. Under Article 14 of Rome II, the parties may agree on applicable law provided that: a) all the parties are pursuing a commercial activity and an agreement is freely negotiated before the event giving rise to the damage occurred; or b) in all other situations, an agreement on choice of law is entered into after the event giving rise to the damage occurred. Other conditions are parallel to those under the abovementioned Article 3 of Rome I. In the absence of choice, the applicable law is determined pursuant to Article 4 of Rome II. The applicable law is the law of the country in which the direct damage occurs. However, common habitual residence of the person claimed to be liable and the person sustaining damage at the time when the damage occurs takes precedence. Finally, the escape clause enables application of the other law which is manifestly more closely connected with a tort. Such connection might be based in particular on a relevant pre-existing relationship. That might be a respective contract within the CF structure. For instance, in case of non-contractual prospectus liability claimed by the funder against the project owner, such relationship might be manifestly more closely connected to the contract between them existing in relation to equity-based investment.

## 6. CONSLUSION

Being a business model with a huge potential for future development, CF warrants attention in the legal literature. Because of its contemporary reliance on internet-mediated registries, the cross-border character of the relationships among the three main actors in the CF structure is virtually inevitable. In such situations all actors need to be aware that their CF-related activities will often be subject to the laws different from their own and that they may find defending themselves before foreign courts. In determining the jurisdiction and applicable law, legal characterisation is a preliminary issue because different rules are provided for different types of legal relationships. In the CF context these may be non-contractual or contractual. Contracts are divided to consumer and non-consumer contracts, the latter being further divided based on their different purposes, such as sale or provision of services. These characterisations enable the determination of the entire set of rules in EU legislation (Brussels I bis, Rome I and Rome II) which create the basic legal framework for the cross-border CF practices.

### LITERATURE:

1. Amato, C. & Perfumi, Ch. (2012). Financial investors as consumers: recent Italian legislation from a European perspective. In: Devenney, J. & Kenny, M. *Consumer Credit, Debt and Investment in Europe*. Cambridge: Cambridge University Press (pp. 279–305).

2. Cherednychenko, O. O. (2010). The Regulation of Retail Investment Services in the EU: Towards the Improvement of Investor Rights? In: 33 *Journal of Consumer Policy* (pp. 403–424).
3. CJEU, *Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Lindhorst*, C-533/07, ECLI:EU:C:2009:257.
4. CJEU, *Harald Kolassa v Barclays Bank plc*, C-375/13, 28 January 2015, ECLI:EU:C:2015:37.
5. CJEU, *Johann Gruber v Bay Wa AG*, C-464/01, 20 January 2005, ECLI:EU:C:2005:32.
6. CJEU, *Lokman Emrek v Vlado Sabranovic*, C-218/12, 17 October 2013, ECLI:EU:C:2013:666.
7. CJEU, *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v Oliver Heller*, C-585/08 and C-144/09, 7 December 2010, ECLI:EU:C:2010:740.
8. CJEU, *Petra Engler v Janus Versand GmbH*, C-27/02, 20 January 2005, ECLI:EU:C:2005:33.
9. CJEU, *Renate Ilsinger v Martin Dreschers*, C-180/06, 14 May 2009, ECLI:EU:C:2009:303.
10. CJEU, *Rudolf Gabriel*, C-96/00, 11 July 2002, ECLI:EU:C:2002:436;
11. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. OJ L 95, 21.4.1993, (pp. 29–34).
12. *Crowdfunding Crossing Borders 2016: An Overview of Liability Risks Associated with Cross Border Crowdfunding Investments* (2016). Retrieved 29.07.2016 from <http://www.fglawyersamsterdam.com/wp-content/uploads/2016/03/20160331-Crowdfunding-Crossing-Borders-Report.pdf>.
13. Cunningham, W. M. (2012). *The JOBS Act: Crowdfunding for Small Businesses and Startups*. New York: Apress.
14. Danmayr, F. (2014). *Archetypes of Crowdfunding Platforms.: A Multidimensional Comparison*. Wiesbaden: Springer Gabler.
15. De Buysere, K., Gajda, O., Kleverlaan, R. & Marom, D. (2012). *A Framework for European Crowdfunding*. Retrieved 29.07.2016 from [www.crowdfundingframework.eu](http://www.crowdfundingframework.eu).
16. Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC. OJ L 145, 30.4.2004, (pp.1–44).
17. Esposti, C. (2014). Statistical View of Crowdfunding. In: Dresner, S. (ed.), *Crowdfunding: A Guide to Raising Capital on the Internet*. (pp. 31–45) Hoboken, New Jersey: John Wiley and Sons.
18. Hemer, J. (2011). *A Snapshot on Crowdfunding. Working paper firms and region, No R2/2011*. Retrieved 29.07.2016 from <http://hdl.handle.net/10419/52302>.
19. Lynn, J. & De Buysere, K. (2014). Crowdfunding Laws Based on Global Jurisdiction. In: Dresner, S. (ed.), *Crowdfunding: A Guide to Raising Capital on the Internet*. (pp. 199–211) Hoboken, New Jersey: John Wiley and Sons.
20. Mankowski, P. (2016). In: Magnus, U. & Mankowski, P. (eds.), *Brussels Ibis Regulation*. Köln: Otto Schmidt.



21. *Massolution Crowdfunding Industry 2015 Report (2016)*. Retrieved 29.07.2016 from <http://crowdexpert.com/crowdfunding-industry-statistics/>.
22. McParland, M. (2015). *The Rome I Regulation on the law applicable to contractual obligations*. Oxford: Oxford University Press.
23. Ordanini, A., Miceli L., Pizzetti, M. & Parasuraman, A. (2009), Crowd-funding: transforming customers into investors through innovative service platforms, In: 22 *Journal of Service Management*, (pp. 443–470). Retrieved 27.07.2016 from <http://www.emeraldinsight.com/doi/pdfplus/10.1108/09564231111155079>.
24. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). OJ L 177, 4.7.2008 (pp. 6–16).
25. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). OJ L 199, 31.7.2007 (pp. 40–49).
26. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I bis). OJ L 351, 20.12.2012 (pp. 1–32).