

DIRECTING PROFESSIONAL ACTIVITIES UNDER EUROPEAN PRIVATE INTERNATIONAL LAW

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FACULTY OF LAW
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DIRECTING PROFESSIONAL ACTIVITIES UNDER EUROPEAN
PRIVATE INTERNATIONAL LAW

(Master's Thesis)

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SUMMARY

Controversies related to the interpretation and application of the protective provisions of the Brussels I Regulation and the Rome I Regulation have led to the necessity of further elaboration of the respective provisions in the relevant legislation, case-law and jurisprudence. Detailed comprehension of the notion of “directing” or “targeting” one’s activities within the European law is especially necessary during the era of rapid globalization of the 21st century, in order to both ensure and strengthen consumer protection. Relevant scholarly comments provisions and case-law should assist in better understanding and elimination of ambiguities related to consumer protection.

Key words: Brussels I Recast, Rome I Regulation, consumer, consumer contract, targeting, Internet.

PREFACE

The author of this paper which was written within the Department of International and European Private Law at the end of the graduate program at the Faculty of Law at the University of Rijeka would like to thank her mentor doc. dr. sc. Ivana Kunda for her help with structuring the paper and guidance in the course of writing.

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1. Introduction

Parties within the commercial legal relationships often have unequal bargaining positions. The imbalance of power between the parties results from many practical reasons, but is mainly due to lack of information, experience or knowledge. The party which is in a less favourable position is usually referred to as the 'weaker' party. Both the European substantive and procedural law try to balance the position of the parties in consumer contracts with a cross-border element. In so far as one of the parties, usually the trader, completely dictates the terms of a transaction, its actions will have no effect on the other party¹. Therefore, the 'weaker' party is protected from such dominance under the European law, including private international law.

Juridical protection for consumers contracting electronically or otherwise in the EU is threefold. First, in order to enhance consumer protection, the EU re-regulated the jurisdiction rules. Secondly, the EU sought to promote alternative dispute resolution methods in forms of introducing numerous arbitration courts, mediation methods, establishing complaints committees and other out-of-court mechanisms for dispute resolution, which cover all consumer disputes. Finally, the third aspect for juridical protection of consumers is the protective mechanism provided by the choice of law rules.² First and third mentioned mechanisms belong to the realm of private international law and are dealt with in this thesis.

The thesis commences by identifying the main legal sources and their basic characteristics, followed by a chapter defining basic legal concepts and specific features of the consumer contracts under the respective regulations and as interpreted by the relevant case law and jurisprudence. Primarily focus is then put on the protective provisions and the concept of "directing" or "targeting" one's activities with the help of the relevant case-law and scholarly comments.

¹ Lazić, Vesna, *Procedural Justice for 'Weaker Parties' in Cross-Border Litigation under the EU Regulatory Scheme*, *Utrecht Law Review*, vol. 10, 4 Nov 2014, p. 100.

² Gillies, Lorna E., *Electronic Commerce and International Private Law*, Ashgate, UK, 2008, p. 123-124.

2. Legal sources

There are two main legal sources of private international law which provide legal protection for consumers entering into cross-border relations. Those are the 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 matters³ (hereafter: Brussels I Recast) and the 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)⁴ (hereafter: Rome I Regulation). Brussels I Recast unifies the rules on jurisdiction and recognition and enforcement of judgments, while Rome I unifies the rules on the applicable law within the EU. They both provide specific protection to consumers having domicile or habitual residence in a Member State.

2.1. Brussels I Recast

Originally, the Member States of then the European Community concluded the Brussels Convention of 27 September of 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters⁵ (hereafter: Brussels Convention). It was replaced by the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁶ (hereafter: Brussels I Regulation). The Brussels I Regulation applied from 1 March 2002 and was replaced on 10 January 2015 by Brussels I Recast. Brussels I Recast does not significantly differ from the Brussels I Regulation. However, certain changes have been made in order to expand the scope of application of the rules relating to jurisdiction agreements, to strengthen the arbitration exclusion, abolish the *exequatur*⁷ and, among other, extend the scope of application *ratione personae* and, along with it, consumer protection.

Apropos the protective provisions subsequently referred to by the relevant case law, paragraph 34 of the Preamble to the Brussels I Recast assures the autonomous and uniform

³ OJ L 351, 20.12.2012, pp. 1-32 as amended by Regulation No. 542/2014 of the European Parliament and of the Council of 15 May 2014 amending Regulation (EU) No. 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and Benelux Court of Justice, OJ L 163, 29.5.2014, pp. 1-4.

⁴ OJ L 177, 4.7.2008, p. 6-16.

⁵ OJ L 299, 31.12.1972, p. 32-42.

⁶ OJ L 12, 16.1.2001, pp. 1-23.

⁷ Lacey, Stephen (Linklaters), *The Brussels I Recast - A guide to the changes to the EU jurisdiction regime*, 2014, p. 2.

interpretation of the vexed concepts established by Court of Justice of the European Union (hereafter: ‘CJEU’ or ‘the Court’). It states that the continuity between the Brussels Convention, the Brussels I Regulation and the Brussels I Recast should be ensured, and transitional provisions should be laid down to that end. The same paragraph specifies that the need for continuity applies as regards the interpretation by the CJEU of the Brussels Convention and of the Regulations replacing it.

The scope of application *ratione temporis* of the Brussels I Recast is provided in Article 66 and makes it applicable to all legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015. According to paragraph 2 of the same Article, it will also apply to judgements given in legal proceedings which were instituted before 10 January 2015, as well as to authentic instruments formally drawn up and to court settlements approved or concluded before that date, when they fall under the Recast.

Paragraph 1, Article 1 of the Brussels I Recast lays down the substantive scope of application and defines that it will apply in ‘civil and commercial matters’ whatever the nature of the court or tribunal. It does not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta jure imperii*).

The CJEU has established several prerequisites which have to be fulfilled in order for a dispute to fall within ‘civil and commercial matters’. First, in cases where one or both parties are governed by public law, the parties must not act with public authority, but within their private capacity.⁸ The second condition is closely linked to the nature of the claim in the dispute in question. In the case where the state-school teacher supervised his pupils during a school trip and occasioned loss to a pupil, the CJEU established that, even though there was coverage by a scheme of social insurance under public law and the damages claim arose from a criminal offence which was made in the context of criminal proceedings, the claim was civil in nature.⁹ The third requirement is the nature of the relationship of the parties involved in the dispute. In the case where a public authority (a municipality granting social assistance) commenced

⁸ Judgement in *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol*, 29/76, EU:C:1976:137, paragraph 4; Judgement in *Netherlands State v Reinhold Rüffer*, 814/79, EU:C:1980:291, paragraphs 10-12; Judgement in *Eirini Lechouritou and Others v Dimosio tis Omospondiakis Dimokratias tis Germanias*, C-292/05, EU:C:2007:102, paragraph 31.

⁹ Judgement in *Volker Sonntag v Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann*, C-172/91, EU:C:1993:144, paragraph 19.

proceedings against a private person under a statutory obligation to pay maintenance for his former spouse and their child, CJEU established that the municipality was exercising a right of the civil-law nature.¹⁰

And finally, in regard to the personal field of application, Brussels I Recast is applicable in all legal proceedings against defendants domiciled in a Member State, regardless of their nationality. That jurisdiction rule is worded in General provisions, Article 1, according to which the principal connection for establishing jurisdiction is the domicile of the defendant.¹¹ This rule is subject to exceptions in five cases of exclusive jurisdiction pursuant to Article 24 when a Member State court will be competent to hear a case regardless of the domicile of the parties; and in the case of prorogation of jurisdiction in which the parties, regardless of their domicile, may agree that one court or several courts of a Member State will have jurisdiction to settle any dispute which have arisen or may arise in a connection with a particular legal relationship.

2.2. Rome I Regulation

The Rome I Regulation governs choice of law in the European Union and it was preceded by the Convention of 19 June 1980 on the law applicable to contractual obligations¹² (hereafter: the Rome Convention). The Rome Convention was applied from 17 December 2009. After adopting the Brussels I Regulation, the Rome Convention was the only Community private international law instrument that remained ‘in international treaty form’¹³ and the harmonisation of the conflict-of-law rules relating to contractual obligations was necessary for the proper functioning of the internal market¹⁴.

¹⁰ Judgement in *Gemeente Steenbergen v Luc Baten.*, C-271/00, EU:C:2002:656, paragraph 37.

¹¹ Brussels I Recast distinguishes the domicile of a physical person and that of a legal entity. In order to determine whether a party is domiciled in a Member State the court seized of the matter will apply its internal law (Article 62, paragraph 1) or, in case of a party who is not domiciled in the Member State of the seized court, then, in order to determine whether the party is domiciled in another Member State, the court will apply the law of the Member State in which it believes the physical person is domiciled (Article 62, paragraph 2). Regarding the domicile of legal entities, for the purpose of Brussels I Recast, a company or other legal person or association of natural or legal persons is deemed to be domiciled at the place where it has its either statutory seat, central administration, or principal place of business (Article 63, paragraph 1) and the plaintiff may alternatively initiate proceedings before the courts of either place.

¹² OJ C 27, 26.1.1998, p. 34–46.

¹³ Proposal for a regulation of the European Parliament and the Council from 15 December 2005 on the law applicable to contractual obligations (Rome I), Brussels, 15 December 2005, COM(2005) 650 final, p. 2, section 1.1.

¹⁴ *ibid.*, p. 4, section 3.1.

Three basic principles of the Rome I Regulation are to provide the parties freedom to choose the applicable law, to establish a high degree of predictability¹⁵ and to leave the courts manoeuvre space which enables them to apply the law of the country which is ‘most closely connected’ to the contract.¹⁶

Specifically, Rome I Regulation applies to situations involving conflict of laws, to contractual obligations in civil and commercial matters. It does not, in particular, apply to revenue, customs or administrative matters.¹⁷ It applies only to contracts concluded after 17 December 2009¹⁸ and to proceedings commenced after that date. If a certain country was not a Member State country when the Regulation entered into force the Rome I Regulation shall apply from the date when that country joined the EU: In case of Croatia that is from 1 July 2013. The Regulation is applicable in all Member States, except Denmark¹⁹. Its universal scope of application guarantees that the law which is specified by the Regulation will be applied, whether or not it is a law of a Member State.²⁰ Accordingly, due to the specific nature of the Rome I Regulation there is no mention of *ratione personae* scope of application, as it is the case with Brussels I Recast. The Rome I Regulation is always deemed to be applicable by the seized court of an EU Member State in cross-border disputes which arose from contractual obligations in civil and commercial matters, i.e. when the seized court adjudicates over a contract concluded after 17 December 2009.

Main rule for determining applicable law under the Rome I Regulation is provided in Article 3 which says that a contract shall be governed by the law chosen by the parties. The choice, as long as it was made validly, is absolutely free and the chosen law doesn’t need to have any connection with the parties or the contract (with the exception in cases of contracts of carriage²¹ and insurance contracts for small insured risks²² when the choice of law is limited to several courts indicated by the latter provisions).²³ Where there has been no choice of law, the applicable law shall be determined in accordance with the rules specified for the particular

¹⁵ Point 16 of the Preamble to the Rome I Regulation states that conflict-of-law rules should be highly foreseeable. However, the courts should retain a degree of discretion to determine the law that is most closely connected to the situation.

¹⁶ Van Calster, Geert, *European Private International Law*, 2013, p. 125-126, section 3.1.1.

¹⁷ Rome I Regulation, Article 1, paragraph 1; The Regulation also provides an exhaustive list of matters which are excluded from its scope of application in its Article 1, paragraph 2.

¹⁸ *ibid*, Article 28.

¹⁹ *ibid*, recital 46 of the Preamble.

²⁰ *ibid.*, Article 2.

²¹ *ibid.*, Article 5.

²² *ibid.*, Article 7.

²³ Van Calster, *op.cit.*, p. 132, section 3.2.4.

type of contract²⁴ prescribed by Article 4²⁵ or by Articles 5 to 8 of the Regulation which provide specific provisions for contracts of carriage and consumer, insurance and employment contracts.

²⁴ Rome I Regulation, point 19 of the Preamble.

²⁵ Article 4 of the Rome I Regulation lists eight types of contracts and determines which law is to be applied.

3. Basic concepts

Both Brussels I Recast and the Rome I Regulation provide protection for consumer as the ‘weaker’ party to the consumer contract and to that end they both define consumers and consumer contracts. The intention of both Regulations was not to define consumers *per se* but they, in fact, encompass the notion of a consumer within their definitions of consumer contracts.

3.1. Consumer

Consumers are defined by numerous legislative acts and pursuant to the relevant provisions of the EU law consumer is any natural person who is acting for purposes which are outside his or her trade, business or profession²⁶. Although the wording is slightly different, the definition always consists of the same two elements, i.e. the consumer must be a natural person and he must act for a private purpose.

The precondition that the consumer may only be a natural person does not seem controversial when it comes to its interpretation. For instance, in Croatian law a natural person is defined as every living human being and as such he or she is a holder of rights and obligations.²⁷ Likewise, the Black’s Law Dictionary defined natural person as a human being, as distinguished from an artificial person created by law.²⁸

During the negotiation on the Brussels I Regulation representatives of businesses and e-lobby have put forward the argument that businesses, including small to medium enterprises (SMEs), should be provided the same protection as natural persons. The main reason for that argument was that SMEs are also in an economically weaker position and less informed in comparison to foreign businesses trading *via* WWW. If SMEs were to be afforded the same level of protection, “this would have been a shift in EU policy and by implication an extension

²⁶ Article 17, paragraph 1 of the Brussels I Recast and Article 6 of Rome I Regulation; as well as Article 2(e) of Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1–16. (‘the Electronic Commerce Directive’); Article 2 of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 372 , 31.12.1985, pp. 31-33; Article 2 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 095, 21.04.1993, pp. 29-34; Article 2(2) of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6.1997, p. 19–27.

²⁷ Kunda, Ivana in: Šarčević, Petar et als, “Family and Succession Law in Croatia”, International Encyclopaedia of Laws, Supplement 55, Wolters Kluwer, The Hague (The Netherlands), 2011, p. 70.

²⁸ Garner, Brian A., Black’s Law Dictionary, 7th Edition, 1999, p. 1162.

of substantive and juridical protection for consumers”.²⁹ In his opinion on *Mietz*, Mr Advocate General Léger, regarding the hesitation of the referring judge to consider the debtor as a consumer under Article 13 of the Brussels Convention,³⁰ stated that the status of consumer is not reserved only to those persons who are economically weak or disadvantaged.³¹ Usually consumers are in a weaker position and the latter is an exception which only indicates that the Court is not obliged to determine which party to the consumer contract has the upper hand or is in a financially better position when it applies the consumer protection provisions.

On the other hand, what was proven to be debatable is the requirement of acting for private purposes. In *Benincasa*, the Court stated that consumer is a person acting “for a purpose which can be regarded as being outside his trade or profession³²” and added that “it follows from the wording and the function of that provision that it affects only a private final consumer, not engaged in trade or professional activities”³³. In order to strictly construe the definition of a consumer “reference must be made to the position of the person concerned in a particular contract, and not to the subjective situation of the person concerned, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned.”³⁴ The latter is especially important in cases where the consumer is a self-employed person, for example a farmer, doctor, lawyer or independent contractor because they “may be regarded as a consumer in relation to certain transactions and as economic operator in relation to others”³⁵.

Only contracts concluded outside of a professional activity, “solely for the purpose of satisfying an individual’s own needs in terms of private consumption are covered by the special rules laid down by the Brussels Convention to protect the consumer as the party deemed to be the weaker party”³⁶. But what about the cases of mixed contracts when private and professional purpose of the contract overlap?

In the case *Gruber*, a contract for the purchase of tiles intended for reconstruction of both his business premises and personal residence served partly private and partly business

²⁹ Gillies, op.cit., p. 78.

³⁰ Brussels I Recast, Article 17.

³¹ Judgement of *Hans-Hermann Mietz v Intership Yachting Sneek BV.*, Case C-99/96, EU:C:1999:202, Opinion of Mr Advocate General Léger delivered on 8 October 1997, paragraph 43.

³² Judgement of *Francesco Benincasa v Dentalkit Srl.*, C-269/95, EU:C:1997:78, paragraph 15.

³³ *ibid.*; CJEU repeated the same in Judgement of *Petra Engler v Janus Versand GmbH*, C-27/02, EU:C:2005:33, paragraph 34 and the Judgement of *Rudolf Gabriel v Schlank & Schick GmbH*, C-96/00, EU:C:2002:436, paragraph 39.

³⁴ Judgement of *Francesco Benincasa v Dentalkit Srl.*, op.cit., paragraph 16.

³⁵ *ibid.*

³⁶ Judgement of *Johann Gruber v Bay Wa AG*, C-464/01, EU:C:2005:32, paragraph 39.

purposes. Mr Gruber, being a farmer, acquired the tiles for both the area of the farm building used for residential purposes (slightly more than 60% of the total floor area of the building) and the area of the same farm building used for professional purposes. The CJEU stressed that if the protective provisions are to be invoked in respect to dual contracts it is not enough for the private element of the consumer contract to be predominant. On the contrary, the professional purpose of the contract has to be “negligible in the overall context of the supply” and the court seized has to take into account all facts and circumstances of which the other party to the contract may have been aware.³⁷ It seems that in cases where a professional deceptively enters a contract giving the impression he is acting for a private purpose, such a person will not be covered by the protective provisions if he misleads the co-contractor.

In order to ascertain whether a person is a consumer it will suffice that a natural person does not act within its professional capacity. However, for a contract to fall under a ‘consumer contract’ there are several other prerequisites which have to be met.

3.2. Consumer contract

According to Paragraph 1, Article 17 of the Brussels I Recast, there are three types of consumer contracts; two of them are specific and one generic. The generic category can only apply when the consumer has been actively recruited across border.³⁸ The three categories are: (a) a contract for the sale of goods on instalment credit terms, (b) contract for a loan repayable by instalments or for any other form of credit, made to finance the sale of goods (c) other consumer contracts under certain conditions.³⁹

General requirements for a consumer contract under all points, and as interpreted by the CJEU define that the “protected” consumer contract has to meet:

- 1) The person entering the contract with a trader is a consumer acting for a purpose regarded as being outside his trade or profession and the professional is acting within his commercial or professional activities and
- 2) There has to be a contract. i.e. “reciprocal and interdependent obligations between the two parties”⁴⁰

³⁷ *ibid.*, paragraph 54.

³⁸ Van Calster, *op.cit.*, p. 65, section 2.2.8.6.

³⁹ For a contract to be considered a consumer contract which falls under Brussels I Recast a contract must be concluded by a consumer, for a purpose which is outside his trade or profession, and one of the conditions from points (a), (b) or (c) of Article 17 of the Brussels I Recast must be met.

⁴⁰ Van Calster, *op.cit.*, p. 64, section 2.2.8.3.

Obligations of the parties to the contract must be reciprocal. There must be a commitment on both sides and one side to the contract has to fulfil its obligation⁴¹, “purely unilateral commitments will not suffice”.⁴² When vendor’s initiative is not followed by the conclusion of a contract between him and the consumer for one of the purposes referred to in Article 17 and the parties do not assume reciprocal obligations, but only one party freely assumes an obligation towards another by a unilateral expression of will, such a situation does not constitute a contract in the meaning of Article 17.⁴³

Each category has its own special additional requirements:

Point (a)

- 3) The contract has to be for the sale of goods
- 4) The contract involves payment on instalment credit terms

Point (b)

- 3) The contract for a loan to finance sale of goods
- 4) The loan is repayable by instalments or other form of credit.

Point (c)

- 3) The professional pursues its commercial or professional activities in the Member State of the consumers domicile, or, alternatively, the professional directs its activities, by any means, to the Member State of the consumer's domicile or to several States including that Member State and
- 4) The contract is concluded within the framework of the professional’s activities.⁴⁴

The subject matter of the contract must concern the activities which the co-contracting party to the contract, the professional, exercised or directed to the Member State of the consumer’s domicile. It will not be difficult for a national court to establish the activities the professional pursued in the Member State of the consumer’s domicile. Difficulties may arise when determining which activities have been directed to the Member State of the consumer’s

⁴¹ Judgement of *Rudolf Gabriel v Schlank & Schick GmbH*, op.cit., paragraphs 44, 45.

⁴² Van Calster, op.cit., p. 63, section 2.2.8.3.

⁴³ See Judgement of *Petra Engler v Janus Versand GmbH*, op.cit., paragraphs 25-26, 50 and the case-law cited therein.

⁴⁴ Joint declaration of the Council and the Commission on Articles 15 and 73 of Regulation No 44/2001, which is available in English at <http://ec.europa.eu/civiljustice/homepage/homepage_ec_en_declaration.pdf>.

domicile and whether they were directed at all.⁴⁵

Hence, consumer contracts which do not fall under the scope of the application of the Section 4 of the Brussels I Regulation Recast are governed by the general jurisdiction rule in Article 4, paragraph 1, and special jurisdiction rules contained in Article 7 of the Brussels I Recast. The rules on special jurisdiction from Article 7 define certain situations in which one can alternatively step away from the general jurisdiction rule (*forum domicili*) and establish the jurisdiction of a court which is closely linked to the matter of the dispute.⁴⁶

The Rome I Regulation, in its Article 6, also defines agreements which are to be treated as ‘protected’ consumer contracts. While the Brussels I Recast defines ‘protected’ consumer contracts as contracts entered into by a consumer who is acting outside his professional purpose and lists three categories of consumer contracts which merit special protection, the definition of a ‘protected’ consumer contract in Article 6 of Rome I Regulation is not divided to different categories of contracts, but defines special conditions under which such contract has to be concluded. These conditions correspond to the point (c) of Article 17, paragraph 1 of the Brussels I Recast. .⁴⁷

Contracts which do not constitute a consumer contract under Rome I Regulation are regulated by the uniform rules of Articles 3 and 4, which regulate choice-of-law agreements and which law is to be applied in the absence of choice.⁴⁸

⁴⁵ See *infra*, section 5.

⁴⁶ Brussels I Recast, point 16 of the Preamble, refers to the alternative jurisdictional grounds and states as follows: „In addition to the defendant’s domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen”.

⁴⁷ Rome I Regulation, Article 6, paragraph 1 provides the following: “Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional: (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.”

⁴⁸ See *supra*, section 2.2.

4. Protective provisions

The risk which consumers experience when entering cross-border consumer contracts may manifest in the “lack of prior contact with the foreign seller, the consumer’s reliance on the information contained in the seller’s website regarding the seller’s identity, location and information on the goods / services on offer, the inability of the consumer to view or inspect the goods prior to contracting with the seller, the requirement for the consumer to reveal personal information and pay for goods or services prior to receiving them and the potential risk of interception of the consumer’s personal (including financial) data by third parties”⁴⁹ and many other.

The need for adequate substantive and juridical protection of the ‘weaker’ party to the consumer contract is especially important in case of a consumer who subsequently enters into a dispute with a foreign seller. In such cases it is necessary to establish which court is competent to rule on the subject matter, as well as the relevant law which will be applied before the seized court. Two most significant connecting factors which enable the court, before which one of the parties to the consumer contract has submitted a claim, to establish its jurisdiction and determine the applicable law are the “identity of the parties” and “the place where they are located”.⁵⁰

It is a feature of both Brussels I Recast and the Rome I Regulation to “include a number of headings which aim to provide for protective measures to the benefit of what are seen as weaker parties. These 'protected categories' have now become 'European', or 'harmonised' protected categories, in that European policy itself consider that these weaker categories need to be protected against abuse which would result from standard clauses in contracts forced upon them by the contracting party with the upper hand.”⁵¹

⁴⁹ Gillies, *op.cit.*, p. 1-2.

⁵⁰ Gillies, *op.cit.*, p. 2; and p. 3: "When a consumer contract is entered into between parties across borders by electronic means and a dispute arises between the parties, the effective application of certain and predictable jurisdiction and choice of law rules to determine which jurisdiction will hear the dispute and what law will apply is crucial."

⁵¹ Van Calster, *op.cit.*, p. 61, section 2.2.8.1.

4.1. Brussels I Recast

Articles 17 to 19 of Section 4 of the Brussels I Recast (formerly Articles 15 to 17 of the Brussels I Regulation) provide protection for consumers, which is why they are usually referred to as the protective provisions.

According to the Brussels I Regulation, consumers in the EU could benefit from the jurisdictional rules only against the defendants domiciled in EU Member States in which the Regulation applied. National legal system also provided consumer protection; however, the ‘level of protection’ varied among Member States which lead to the necessity for broadening the personal scope of application in cases of consumer disputes by introducing the Brussels I Recast.⁵² In relation to consumer contracts, point 18 of the Preamble to Brussels I Recast guarantees that the ‘weaker’ party will be protected by rules of jurisdiction which are more favourable to his interests than the general rules. Provisions on jurisdiction in disputes arising from consumer contracts exclude national rules on jurisdiction⁵³ and aim at protecting the jurisdictional position of a ‘weaker’ party while being independent from the general rule contained in Article 4 of the Brussels I Recast”.⁵⁴

Amendments to the Brussels I Regulation have introduced the possibility for a court to establish jurisdiction – regardless of the domicile of the professional – when it finds that the dispute resulted from a consumer contract. This extended personal scope of application now enables consumers to initiate proceedings against traders who are not domiciled in a Member State, provided that the conditions of Article 17 of the Regulation are met. Also, point 14 of the Preamble to the Brussels I Recast states that in order to ensure the protection of consumers certain rules of jurisdiction should apply regardless of the defendant’s domicile; and that was the main idea behind the recent changes of the protective provisions of the Recast.

Precisely, when a contract falls under the scope of the protective provisions because it constitutes a consumer contract from Article 17 of the Recast, a consumer may choose to initiate proceedings against a professional before the local courts of his domicile or the professional’s domicile.⁵⁵ On the other hand, the professional may only, *in favorem* of the consumer, sue a defendant consumer before the courts of the consumer’s domicile.⁵⁶ The

⁵² Lazić, *op.cit.*, p. 102.

⁵³ Brussels I Regulation, Article 4, paragraph 1 says the Regulation shall apply to defendants domiciled in a Member State “whatever their nationality”.

⁵⁴ Lazić, *loc.cit.* p. 102 and 105.

⁵⁵ Brussels I Regulation, Article 18, paragraph 1.

⁵⁶ *ibid.*, Article 18, paragraph 2.

asymmetry of the jurisdiction rules is slightly reduced by the fact that if a consumer raises a claim ‘at home’, he will still have to enforce the judgement abroad.⁵⁷

Article 19 provides the possibility of departing from the provisions of Section 4 by an agreement on jurisdiction between a consumer and a professional which is entered into after the dispute has arisen and which allows the consumer to bring proceedings in courts other than those indicated in Article 18. Another possibility provided by point 3 of Article 19 is an agreement on jurisdiction entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State. Article 19 limits the choice of court agreements and protects consumers from being drawn into undesirable agreements by unscrupulous merchants in a way that it prohibits any pre-dispute choice of forum clause which would lead to courts of a different Member State.⁵⁸ If the prerequisites provided in Article 17 are not met, a consumer cannot rely on the protective provisions of Articles 18 and 19 of Brussels I Recast.

Article 45 provides for the protection of consumers in a way that it allows, upon the application of any interested party, the requested court to refuse recognition of a judgment when it conflicts with the protective provisions of the Brussels I Recast.

4.2. Rome I Regulation

Protective provisions of Article 6 of the Rome I Regulation provide the protection for consumers in cases of cross-border disputes when Rome I Regulation applies.⁵⁹

A “protected” consumer contract within the meaning of the Rome I Regulation shall be governed by the law of the country where the consumer has his habitual residence.⁶⁰ Article 6, paragraph 2, of the Rome I Regulation affords parties to a “protected” consumer contract the possibility to depart from paragraph 1 of Article 6 and, by agreement, choose the law which will be applied to the contract in case of a dispute. The relevant consumer contract must fulfil

⁵⁷ Edwards L., Waelde C., *Law and the Internet*, 3rd Edition, 2009, p. 137.

⁵⁸ Brand, Ronald A., *The Evolving Private International Law/Substantive Overlap in the EU*, Festschrift für Ulrich Magnus, 2014, p. 379.

⁵⁹ Rome I Regulation, paragraph 23 of the Preamble: “As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of-law rules that are more favourable to their interests than the general rules.”

⁶⁰ *ibid.*, Article 6, paragraph 1.

the requirements of paragraph 1 and it has to be in accordance with Article 3 which provides freedom of choice of law. However, a choice-of-law agreement may not deprive the consumer of the protection afforded to him by the provisions of the law that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.⁶¹ Also, the formal validity of choice-of-law agreement between a consumer and a professional is governed by the law of the country where the consumer has his habitual residence.⁶²

⁶¹ *ibid.*, Article 6, paragraph 4, prescribes five cases in which paragraph 1 and 2 of Article 6 are not applicable due to lack of the connecting factor of habitual residence and the fact that certain contracts are already regulated by a specific directive or public law.

⁶² *ibid.*, Article 11, paragraph 4; Otherwise, formal validity of a contract entered into by the parties or their agents who are in the same country at the time of its conclusion is governed by the law which governs the contract in substance according to Rome I Regulation, or by the law of the country where the contract was concluded. If the parties or their agents find themselves in different countries at the time of the conclusion of the contract the formal validity of the contract is governed by the law which governs it in substance under Rome I Regulation, or by the law of either of the countries where either of the parties or their agent was present at the time of conclusion, or by the law of the country where either of the parties had his habitual residence at that time. Also, formal validity of a unilateral act intended to have legal effect relating to an existing or contemplated contract is governed by the law which governs or would govern the contract in substance under Rome I Regulation, or by the law of the country where the act was done, or by the law of the country where the person by whom it was done had his habitual residence at that time. (Article 6, paragraphs 1-3, of the Rome I Regulation)

5. “Directing one’s activities”

Both point (c) of Article 17, paragraph 1, of the Brussels I Recast and point (b) of Article 6, paragraph 1, of the Rome I Regulation, provide that consumers may rely on the protective provisions of those regulations when the co-contractor (the professional) directs his activities, by any means, to the Member State of the consumer’s domicile or to several States including that Member State. The latter provisions are of high relevance when it comes to electronic commerce. In cases when a consumer enters into an agreement with a professional who operates online it might be difficult to determine to which countries a specific trader directed his activities through the Internet, i.e. whether the consumer is covered by the protective provisions of the Brussels I Recast and Rome I Regulation.

5.1. By classical means

Professors Mario Giuliano and Paul Lagarde have specified, in the Council Report on the Convention on the law applicable to contractual obligations from 31 October 1980⁶³ (hereafter: Giuliano and Lagarde Report), that directing professional activities may grasp both mail order and door-step selling⁶⁴ and in order for a professional or commercial activities to be deemed as ‘being directed’, “the trader must have done certain acts such as advertising in the press, or on radio, or television, or in the cinema or by catalogues aimed specifically at that country, or he must have made business proposals individually through a middleman or by canvassing. If, for example a German makes a contract in response to an advertisement published by a French company in a German publication, the contract is covered by the special rule. If, on the other hand, the German replies to an advertisement in American publications, even if they are sold in Germany, the rule does not apply unless the advertisement appeared in special editions of the publication intended for European countries. In the latter case the seller will have made a special advertisement intended for the country of the purchaser.”⁶⁵

⁶³ OJ 1980 C 282.

⁶⁴ In *Gabriel*, the Court stated that “(T)he concepts of 'advertising' and 'specific invitation addressed' featuring in the first of those conditions common to the Brussels and Rome Conventions cover all forms of advertising carried out in the Contracting State in which the consumer is domiciled, whether disseminated generally by the press, radio, television, cinema or any other medium, or addressed directly, for example by means of catalogues sent specifically to that State, as well as commercial offers made to the consumer in person, in particular by an agent or door-to-door salesman.”; Judgement of *Rudolf Gabriel v Schlank & Schick GmbH*, op.cit., paragraph 41.

⁶⁵ 1980 OJ C282, p. 23-24.

5.2. By means of Internet

The Council and the Commission have acknowledged, in their joint declaration on Articles 15 and 73 of the Brussels I Regulation, that ‘targeting’ activities relate to various marketing methods which also include contracts concluded at a distance through the Internet.⁶⁶

The latter was reiterated in *Pammer and Heller*⁶⁷, where the CJEU had to decide whether the accessibility of an Internet website automatically triggers the use of the protective provisions under the Brussels I Regulation. Mr Pammer was an Austrian resident who booked a voyage by freighter with Reederei Karl Schlüter, a company whose seat was in Germany, through a website of Internationale Frachtschiffreisen Pfeiffer GmbH, an intermediary company also seated in Germany. Mr Pammer booked his voyage through the website of the intermediary company but refused to embark because the conditions on the vessel did not correspond to the description on the website. Consequently, he was reimbursed a part of the sum he paid for the voyage he did not partake and he claimed payment of the balance before the courts of the Member State of his domicile. Reederei Karl Schlüter contended that it did not pursue any professional or commercial activity in Austria and raised the plea that the Austrian court lacked jurisdiction.⁶⁸

The latter case was joined with the case of Hotel Alpenhof, a company which operated a hotel with the same name located in Austria, which was in dispute with a consumer, Mr Heller, domiciled in Germany. Mr Heller found out about the hotel from its website and reserved a number of rooms for a period of a week contacting them *via* e-mail address featured on the hotel’s website. He was not satisfied with the service and left without paying the bill. As Hotel Alpenhof brought an action before an Austrian court, Mr Heller raised a plea that the court lacked jurisdiction.⁶⁹

Mr Pammer found out that the voyage existed by consulting the intermediary company’s website on which various voyages were advertised. He contacted the intermediary company by email and consequently booked the voyage by post. On the other hand, Mr Heller found out that the hotel existed and made and confirmed his reservation at a distance, by means

⁶⁶ Joint declaration of the Council and the Commission on Articles 15 and 73 of Regulation No 44/2001, which is available in English at http://ec.europa.eu/civiljustice/homepage/homepage_ec_en_declaration.pdf.

⁶⁷ Judgement in *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG* (C-585/08) and *Hotel Alpenhof GesmbH v Oliver Heller* (C-144/09), Joined cases C-585/08 and C-144/09, EU:C:2010:740.

⁶⁸ *ibid.*, paragraphs 14-18.

⁶⁹ *ibid.*, paragraphs 25-28.

of the Internet.

The referring courts wanted to know on the basis of what criteria an activity can be considered to be 'directed' and whether the fact that those sites can be consulted on the internet is sufficient for that activity to be regarded as such.⁷⁰

Mention of the email address or geographical address of the intermediary company or the trader does not constitute relevant evidence that an activity is being directed because such information is necessary for a consumer to contact the professional. The same is true for use of the language when it corresponds to the languages which are generally used in the Member State from which the trader pursues its activity and to the currency of that Member State. It should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with them. The mere accessibility of the trader's or the intermediary's website in the Member State in which the consumer is domiciled is insufficient. Clear expressions of intention on the part of the trader include mention that it is offering its services or its goods in one or more Member States designated by name. The trader doesn't have to 'purposefully direct his activity in a substantial way'. The Court found that it such wording would have resulted in weakening of consumer protection by requiring proof of an intention on the part of the trader to develop activity of a certain scale. Several items of evidence, possibly in combination with one another, are capable of demonstrating the existence of 'directing' activities, such as: the international nature of the activity at issue, mention of telephone numbers with the international code, use of a top-level domain name (other than that of the Member State in which the trader is established; for example '.de', or use of neutral top-level domain names such as '.com' or '.eu'), the description of itineraries from one or more other Member States to the place where the service is provided and mention of an international clientele composed of customers domiciled in various Member States, in particular by presentation of accounts written by such customers.

Hotel Alpenhof contended that the contract with the consumer is concluded on the spot and not at a distance, as the room keys are handed over and payment is made on the spot, and that accordingly Article 15(1)(c) of Regulation No 44/2001 cannot apply. The Court

⁷⁰ *ibid.*, paragraphs 24, 31 and 47.

established that such circumstances do not prevent that provision from applying if the reservation was made and confirmed at a distance, so that the consumer became contractually bound at a distance.⁷¹

Consequently, the Court displayed a non-exhaustive list of matters which are capable of constituting evidence from which it may be concluded that the trader's activity is directed to the Member State of the consumer's domicile:

1. International nature of the activity,
2. Mention of itineraries from other Member States for going to the place where the trader is established,
3. Use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language,
4. Mention of telephone numbers with an international code,
5. 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,
6. Use of a top-level domain name other than that of the Member State in which the trader is established,
7. Mention of an international clientele composed of customers domiciled in various Member States.⁷²

Further on, the application of the protective provisions is not subject to the conclusion of a consumer contract at a distance, as was established by Professor Fausto Pocar in his explanatory Report on the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007⁷³ (hereafter: Pocar Report). Professor Pocar highlighted that the application of the protective provisions does not depend on the place where a consumer acted or the place where the contract was concluded. What he considered important is the activity of the professional which must be

⁷¹ *ibid.*, paragraphs 76,77, 81-84, 87, 90-92, 94; see also paragraphs 78, 79, 80.

⁷² *ibid.*, paragraph 93.

⁷³ OJ 2009 C 319.

pursued or directed to the Member State of the consumer's domicile and he acknowledges that activities may be directed by electronic means. "In the case of an Internet transaction, the fact that the consumer has ordered the goods from a Member State other than the Member State of his own domicile does not deprive him of the protection offered by the Convention if the seller's activities are directed to the State of his domicile, or to that State among others; in that case too the consumer may bring proceedings in the courts of his own domicile, under Article 16 of the Convention⁷⁴, regardless of the place where the contract was concluded and regardless of the place where a service supplied electronically was enjoyed." Professor Pocar also added that the connection exists only if the commercial or professional activities were "indisputably directed towards to the State where the consumer is domiciled", being of no relevance whether the website was active or passive.⁷⁵

The latter was confirmed in the case of *Ms Mühlleitner*⁷⁶, an Austrian domiciliary, who searched for a German vehicle on-line and wished to acquire it for private use. Ms Mühlleitner connected to a German search platform and selected the vehicle she wanted to acquire for private use. She was directed to an offer from the defendants who operate a German motor vehicle retail business in Germany. Ms Mühlleitner contacted the defendants *via* the telephone number with an international dialling code stated at the website and later on she was contacted by email by the defendants. Subsequently she went to Germany where she bought and took immediate delivery over the vehicle. While returning to Austria she discovered the vehicle was defective and consequently asked the defendants to repair it, which they refused. Ms Mühlleitner raised a plea before the court of her domicile in Austria. The defendants contested by saying they did not direct their activities to Austria and that Ms Mühlleitner had concluded the contract at the seat of their undertaking in Germany and not in Austria, implying that the contract was not concluded at a distance. The court of second instance claimed that a purely 'passive' internet site is not sufficient for it to be considered that an activity is directed to the consumer's State and the contract must be concluded at a distance. However, the Supreme Court referred a question to the CJEU asking whether it is necessary for a consumer contract to be concluded at a distance. The Court stated that the consumer contract does not have to be concluded at a distance and added that there are only two specific conditions imposed by the latter provision; one being related to pursuing or directing activities to the Member State of the

⁷⁴ Article 18 of the Brussels I Recast.

⁷⁵ Pocar Report, p. 55, point 83.

⁷⁶ Judgement in *Daniela Mühlleitner v. Ahmad Yusufi and Wadat Yusufi*, C-190/11, EU:C:2012:542.

consumer's domicile and the second being the requirement that the contract at issue must fall within the scope of the directed activities.⁷⁷

Similar to the situation of Mr Heller in *Pammer and Alpenhof*, in the dispute between Mr Emrek, domiciled in Germany, who purchased a second-hand vehicle from a company seated in France which was ran by Mr Sabranovic⁷⁸, Mr Emrek learned about the respective company through his acquaintances and not from the Internet site of Mr Sabranovic. The Internet site contained details of his business and both French telephone numbers and a German mobile telephone number with respective international codes which implied 'targeting' activities. The referring court wanted to know whether, in cases in which a trader's Internet site is directed to the Member State of the consumer there needs to exist a causal link between the Internet site operated by the trader and the conclusion of the contract. In the case of Mr Sabranovic the Court established that a causal link between the conclusion of the contract and the trader's Internet site directing the trader's professional activity to the Member State of the consumer's domicile is not necessary for an activity to be considered as being 'directed'. If there existed a requirement of prior consultation of the Internet site by the consumer it could give rise to problems of proof, especially when the contract was not concluded at a distance through that site, as it was in the main proceedings. Although the existence of a causal link between the means used to direct the activity and the conclusion of a contract constitutes strong evidence of the connection between the contract and the directed activity, difficulties related to proof of the existence of such a causal link would tend to dissuade consumers from bringing actions before the national courts and, consequently, weaken the protection of consumers which those provisions seek to achieve.⁷⁹

Gillies also emphasized the necessity of introducing 'intentional targeting' as a connecting factor for electronic consumer contracts and singled out four concise reasons for applying the aforementioned connecting factor to both jurisdiction and choice of law rules, which are as follows: consistency in approach, prevention of 'fortuitous locations of connecting factors', maximal consumer protection in electronic commerce and finally - extrication of a clear and effective connecting factor "would not thwart or restrict businesses from utilising electronic commerce to target foreign markets".⁸⁰

⁷⁷ *ibid.*, paragraphs 11-17, 19, 22, 24, 25, 35, 36, 43, 45 and 46.

⁷⁸ Judgement in *Lokman Emrek v Vlado Sabranovic*, C-218/12, EU:C:2013:666.

⁷⁹ *ibid.*, paragraphs 9-15, 18 and 21-33.

⁸⁰ Gillies, *op.cit.*, p. 1507.; Also, Point 16 of the Preamble to Rome I Regulation and Point 16 of the Brussels I

6. Conclusion

Consumers are usually the weaker party to the consumer contract due to being in a financially weaker position and less informed. Normally they enter into adhesion contracts, on ‘take it or leave it’ basis, which disables them to moderate the provisions of the contract and, even if they are not financially weaker, they are in a less favourable position when contracting with a professional, especially due to the fact they are less informed.

Two main legal sources, within the European law, which protect consumers who enter into consumer contracts with an international element, are the Brussels I Recast and the Rome I Regulation. The first one regulates the jurisdiction of the courts and the recognition and enforcement of decisions and the second the law to be applied to a consumer contract from which the dispute originated. The protective provisions of the Brussels I Recast, in its Articles 17-19, and Rome I Regulation, in its Article 6, provide protection for consumers, as defined by the relevant Regulations, in cases when the co-contractor to the consumer contract “directed his professional activities” to the Member State of the domicile of the consumer, or to several Member States including that Member State. A consumer in such a legal relationship will be protected by the relevant provisions or the European law.

The notion of “directing” or “targeting” one’s activities is controversial and easily subjected to different interpretations. ‘Targeting’ activities relate to various marketing methods which also include contracts concluded at a distance through the Internet and the CJEU carries both the responsibility and the obligation to interpret the meaning of the latter term. It seems that the intent of the professional is what has to be considered when establishing whether he directed his activities to the Member state of the consumer’s domicile. If it can be clearly determined from the professional’s website that he intended to direct his activities to a certain Member State, in such cases, it is irrelevant whether the consumer consulted the trader’s website or not because the latter is difficult to determine; so the consumer will be covered by the protective clauses or the relevant EU provisions even if he did not consult the webpage but heard of it from another person. Also, when a professional targets his activities to the Member State of the consumer and the subject of the contract falls within the scope of the directed

Regulation Recast emphasize foresee-ability and legal certainty.

activities, the contract does not have to be concluded at a distance, nor are the courts obliged to determine whether a certain consumer is in a 'weaker' position.

List of abbreviations

Brussels Convention	Brussels Convention of 27 September of 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters
Brussels I Recast	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 Regulation	Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
CJEU	Court of Justice of the European Union
EU	European Union
Giuliano and Lagarde Report	Council Report on the Convention on the law applicable to contractual obligations from 31 October 1980, by Professors Mario Giuliano and Paul Lagarde
i.e.	That is
ibid.	ibidem
loc. cit.	locus citatum
Member State	A European Union Member State
op.cit.	opus citatum
Pocar Report	Explanatory Report on the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, by Professor Fausto Pocar, signed in Lugano on 30 October 2007

Rome Convention

Convention of 19 June 1980 on the law applicable to contractual obligations

Rome I 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

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