

# INTERNATIONAL JURISDICTION OVER DISPUTES ARISING OUT OF THE CONSUMER CONTRACTS IN THE EUROPEAN UNION LAW

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## ABSTRACT

As a result of globalization processes, the increased regional integration and the Internet development, the cross-border transactions are among the most common transactions concluded nowadays. Consumers conclude international consumer contracts very often without being aware of it. Consequently, new legal norms have been developed, aiming to protect consumers' rights. Essentially, the main objective of these norms is to protect the consumer as a contracting party, which is in unequal position in relation to the trader, since he does not possess the necessary knowledge and has sufficient funds, in comparison with the trader.

This paper analyzes the norms of jurisdiction in disputes arising out of the consumer contracts with a foreign element contained in: Regulation (EU) no. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judicial decisions in civil and commercial matters (Brussels I Regulation - recast) as well as, in the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judicial decisions in civil and commercial matters (Brussels I Regulation). The main objective of this paper is to research and find out does the norms contained in above mention EU acts are protecting the consumers in sufficient way. To reach this objective the following methods were applied: historical method, method of analysis, normative method, comparative method, case law and Internet research.

**Keywords:** consumer contract, jurisdiction, Brussels I Regulation (recast).



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## 1. INTRODUCTION

The consumer cross-border right of entry to justice represents a predominantly topical issue in the legal theory and case-law area. European private international law, when designs the provisions for determining international jurisdiction over disputes arising out of the consumer contracts with a foreign element, applies the legal theory of “weaker party”, i.e. assumes that the consumer is generally weaker in the consumer contract and therefore, special protection is needed. As a result of that, in the determination of the international jurisdiction for the consumer contracts disputes with a foreign element in the European Union law, the following instruments play a significant role:

a) the party autonomy limitation during the selection of an internationally competent court, especially if it concerns an adhesive consumer contract; and

b) special international jurisdiction - the court of the country in which the consumer’s domicile is located is competent.

The consumer’s domicile court jurisdiction has two objectives: a) to ensure the application of the imperative positive material norms in the country in which the consumer has domicile or b) to provide a more favorable court for the consumer which is more suited due to physical proximity, language, availability of legal advice and procedural law that is applicable.

The European model for determining international jurisdiction for consumer contracts disputes also takes into account the development of electronic commerce and protects consumers who conclude electronic consumer contracts. In that view, the European Union private international law is an overall and sophisticated system of provisions, which is applied as a protective model to consumer contracts with a foreign element.

## 2. DETERMINATION OF THE INTERNATIONAL JURISDICTION OVER DISPUTES ARISING OUT OF THE CONSUMER CONTRACTS

The Article 18 of the Brussels I Regulation-recast (Regulation (EU) No 1215/2012) determines the international jurisdiction over consumer contracts covered by the provision of Article 17:

*“1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.*

*2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.*

*3. This Article shall not affect the right to bring a counterclaim in the court in which, in accordance with this Section, the original claim is pending.”*

The Brussels I Regulation (recast) provisions concerning the international jurisdiction over consumer contracts are simple and sufficient, in the sense that the consumer has a choice, while the other contracting party – the trader has no choice.

Namely, the consumer may initiate litigation against the trader either in the courts of the Member State in which the trader has a domicile or in the Member State courts where the consumer is domiciled. Basically, the consumer is allowed to bring the proceedings in the most convenient court for him. (Psodorov, 2003:87) The Brussels I Regulation (recast), in Article 18, paragraph 1, regulates international and local competence. (Sajko, 2009:388) Thus, if the consumer is a natural person with Macedonian citizenship and with a domicile in a certain Member State, he can initiate litigation against the trader in the courts located in that Member State.

The first alternative given to the consumer to initiate litigation practically is corresponding with Article 4 of the revised Regulation, while the second possibility represents a stunning example of international jurisdiction, justified by the need of the consumer procedural protection. If

the trader is domiciled in a Member State A and has a subsidiary or branch in a Member State B and the dispute has arisen in connection with the operation of the subsidiary or branch, the consumer, according to Article 18 paragraph 1 and paragraph 3, has a possibility to choose to initiate litigation either in the courts of these two Member States, or in the court of the Member State where he is domiciled.

This provision has introduced certain changes in relation with the provision of Article 16 paragraph 1 of the Brussels I Regulation, in terms of increased and improved consumer protection. Namely, according to the new provision of Article 18 paragraph 1, the consumer is protected, regardless of whether the defendant has a domicile in a Member State or in a third state that is not EU member. Whereas, in the line with the Brussels I Regulation, the consumer was protected only if the trader, as a contracting party, had or was assumed to have a domicile in a Member State, pursuant to Article 15 S 2. (Schlosser, 1979: 161) Accordingly, in the cases where the trader had a domicile in a state which is not an EU member and has no subsidiary, agency or other enterprise in EU Member State in respect of whose operations the dispute had arisen, the Member State national provisions for international jurisdiction were applying instead of the Brussels I Regulation provisions.

In accordance with the amendments introduced by the revised Regulation, its “external effect” is practically expanded to all foreign traders which direct their business and trade activities towards EU Member States. So, the traders domiciled in a third country may be sued in any EU Member State. In this case, the Brussels I Regulation (recast) protective provisions will be applied.

If the consumer changes his domicile to another Member State subsequently to the contract conclusion, there is a dilemma whether he can elect to bring proceedings between the courts of the State of his previous domicile and the courts of the State of his new domicile. According to the Brussels Convention, as a Brussels I Regulation predecessor, the consumer could make a choice only for the contracts referred to in Article 13, paragraph 1, items 1 and 2, but not for the contracts covered by the point 3.

Since the Brussels I Regulation (recast) provisions of Article 17 (1) point (a) and point (b) are identical to the abovementioned provisions of the Brussels Convention, it is clear that the consumer has the right

to choose between the courts of the old or new domicile Member State. (Arnt,2007:320) For the third type of contracts covered by point (c), the determining factor is no longer “the place where the consumer took the necessary steps for the contract concluding”, but “whether the place in which the other party has taken trade or professional activities is located or not located in the Member State in which the consumer has a domicile.” In view of that, it can be concluded that, in the cases covered by Article 17 paragraph 1 point (c), the consumer should have the right to choose between the court of the old and the new Member State of the domicile, provided that the other contracting party has overstepped trade or professional activities in both Member States and the contract is covered with the field of these activities in both States.

The trader may bring proceeding against the consumer only in the Member State in which the consumer is domiciled. This provision is identical to Article 4 of the Brussels I Regulation (recast). *Ratio legis* for this provision is the fact that there is no other alternative for the trader. Therefore, the only place where a procedure may be brought against a consumer whose contract is covered by Section 4 of the Brussels I Regulation (recast) is in the Member State where the consumer is domiciled. This kind of procedural consumers protection combined with the available choice for consumer according to Article 18 (1) represents a key factor for the EU consumer protection in respect of international jurisdiction.

The European Court of Justice case-law along the same line as the positive law. In the case **Bertrand v. Paul Ott KG** the Court stated that “*this provision must be construed restrictively to meet the objectives of Section 4 to protect the economically weaker party in the consumer contract.*”

### **3. PROROGATION OF JURISDICTION OVER DISPUTES ARISING OUT OF THE CONSUMER CONTRACTS**

The party autonomy principle is allowed for determination of the international jurisdiction over disputes arising out of the consumer contracts. Namely, the Article 19 of the Brussels I Regulation (recast) determines when and under what conditions, the consumer and the trader can draft the prorogation clause:

*“The provisions of this Section may be departed from only by an agreement:*

*(1) which is entered into after the dispute has arisen;*

*(2) which allows the consumer to bring proceedings in courts other than those indicated in this Section; or*

*(3) which is 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.”*

An identical provision was also contained in Article 17 of the Brussels I Regulation, Article 15 of the Brussels Convention and Article 15 of the Lugano Convention of 1988 and 2007.

In the Section 4 of the Brussels I Regulation (recast) there is no specific provision regarding the form in which the prorogation agreement between the consumer and the trader should be concluded. Also, Article 19 does not contain an explicit provision that determines that a prorogation agreement should meet the conditions provided by Article 25. However, although not explicitly foreseen, the prorogation agreement on consumer disputes must meet the formal requirements laid down in the provision of Article 25 to the extent permitted under Article 19.(Arnt,2007:320).

On the other hand, the substantial validity of the prorogation agreement on disputes arising out of the consumer contracts is assessed in accordance with the national law of the court which is competent in the specific consumer dispute.

The provision of Article 19 is a key provision for consumer protection and it is in complementary correlation with Article 3 and Article 6 of the Council Directive 93/13/EEC on unfair terms in consumer contracts.  
**Choice of court agreements on consumer contract disputes**

According to the Article 19 of the Brussels I Regulation (recast), the provisions in Section 4 may be waived, on the basis of a prorogation

agreement, only in three cases, determined by the Article itself. Accordingly, it is a closed list. In the case **Océano Grupo Editorial SA and Salvat Editores** the European Court of Justice faced a legal situation in which two Spanish companies entered into contracts with a large number of consumers with a domicile in Spain for the sale of encyclopedias in installments. Since the case was purely national, the Brussels Convention was not applicable. However, the Court's ruling, in this case, is of great importance in order to understand European consumer protection, in the general sense of the word. The Court noted as follows:

*“It follows that where a jurisdiction clause is included, without being individually negotiated, in a contract between a consumer and a seller or supplier within the meaning of the Directive and where it confers exclusive jurisdiction on a court in the territorial jurisdiction of which the seller or supplier has his principal place of business, it must be regarded as unfair within the meaning of Article 3 of the Directive in so far as it causes, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.*

*As to the question of whether a court seised of a dispute concerning a contract between a seller or supplier and a consumer may determine of its own motion whether a term of the contract is unfair, it should be noted that the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms.”*

According to the European Union private international law three types of prorogation agreements on disputes arising out of the consumer contracts are permitted: a) a prorogation compromise; (b) prorogation clause for jurisdiction, which extend the choice of the consumer and (c) a clause on jurisdiction under national law.

The choice of court agreement on consumer contract disputes has a legal force only if it is concluded after the occurrence of the dispute.

Accordingly, the prorogation agreements that were concluded before the dispute arises, which in practice is very common considering the fact that the prorogation clause is the standard part of the consumer contract have no legal force. Thus, Article 19 paragraph 1 of the Brussels I Regulation (recast) applies only if the consumer accepts the prorogation agreement after the dispute arises, *post litem natam*. Due to the inequality of the contracting parties in the consumer contracts, the right to conclude a prorogation agreement in this type of contracts is limited in an explicit manner.

Following the general objective for consumer protection, the provision in Article 19 paragraph 1 item (2) of the revised Regulation allows the consumer and trader to conclude a prorogation agreement even before the dispute arises, in the cases when: a) the international jurisdiction of a court which is not covered by Article 18 is determined and b) the chosen court is in favor of the consumer. Accordingly, only the consumer may bring proceedings against the trader in the courts not covered by Article 18. The trader has not that right.

The third type of jurisdiction clauses permitted under Article 19 of the Brussels I Regulation (recast) are provided in point 3. This provision applies in an exceptional situation in which the consumer and trader have a domicile or habitual residence in the same Member State at the time of contract concluding and later the consumer moves to another Member State. So, in this case the prorogation agreement is concluded between the consumer and the trader before the dispute arises.

This provision has been analyzed with particular attention by Peter Schlosser in his Report, for the purposes of the Brussels I Regulation (Schlosser, 1979: 122) :

*“In substance, the new Article 14 closely follows the existing Article 14, while extending it to actions arising from all consumer contracts. The rearrangement of the text is merely a rewording due to the availability of a convenient description for one party to the contract, the ‘ consumer which was better placed at the beginning of the text so as to make it more easily comprehensible. The Working Party s decision means in substance that, as in the case with the existing Article 14 the consumer may sue in the courts of his new State of domicile if he moves to another Community State*



*after concluding the contract out of which an action subsequently arises. This only becomes practical, however, in the case of the instalment sales and credit contracts referred to in points (1) and (2) of the first paragraph of Article 13. For actions arising out of other consumer contracts the new Section 4 will in virtually all cases cease to be applicable if the consumer transfers his domicile to another State after conclusion of the contract. This is because the steps necessary for the conclusion of the contract will almost always not have been taken in the new State of domicile. The cross-frontier advertising requirement also ensures that the special provisions will in practice not be applicable to contracts between two persons neither of whom is acting in a professional or trading capacity.”*

### **Tacit jurisdiction agreements on consumer contracts disputes**

The Article 26 of the Brussels I Regulation refers to tacit prorogation, stating that:

*“2. In matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant, the court shall, before assuming jurisdiction under paragraph 1, ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance.”*

So, it is explicitly confirmed that the tacit international jurisdiction covers the disputes arising out of the consumer contract. As an additional protection mechanism in this provision, a subjective element has been introduced, that is, the consumer in this case must be informed previously about the rights and consequences of the establishment, i.e. the non-establishment of the tacit international jurisdiction of a particular court. In this sense, the court is obliged to assess whether the consumer is informed, that is, the court must not disclose this fact in discretion.

## 4. CONCLUSION

Mechanisms that reflect the theory of a “weaker party” in the context of determining international jurisdiction over disputes arising out of the consumer contracts are contained in the European Union private international law acts, through the application of the so-called “Double rules system:”

first, the consumer may bring a lawsuit against the trader in the Member State courts where he is domiciled or in the Member State courts where the trader is domiciled;

secondly, the trader may bring a lawsuit against the consumer solely in a court of the Member State in which the consumer’s domicile is located;

thirdly, limiting the party autonomy in choice of court clauses in consumer contracts.

It can be concluded that the Brussels I Regulation (recast) does not provide for a single international jurisdiction for consumer contracts. The contracting parties may, under certain circumstances, derogate the provisions provided for in Section 4, which means that the party autonomy is allowed with certain limitations. The Brussels legal regime for consumer protection represents an overall and sophisticated system of provisions. These provisions are considered as a protective mechanism in respect of consumer contracts with a foreign element, which establish a balance between the legal interests of consumers and the legal security of traders.

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