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# Nekateri vidiki čezmejnega uveljavljanja terjatev v potrošniških sporih

CHRISTOPHE VERDURE

**Povzetek**

Čezmejno uveljavljanje terjatev v potrošniških sporih povzroča veliko težav. Glavno težavo predstavlja dostop do pravnega varstva, saj se potrošniki v splošnem ne zavedajo svojih pravic in pravni postopki so lahko dragi. Največja težava pri vlaganju tožbe zoper nasprotno stranko s sedežem v drugi državi članici je določitev pristojnega sodišča. Vendar pa je ta težava mednarodnega zasebnega prava šele prvi korak pri vlaganju tožbe. To dejanje je lahko nesorazmerno glede na čas in vrednost v primerjavi z višino terjatve, ki jo potrošnik želi izterjati. Kot rezultat tega je bila na ravni EU sprejeta Direktiva 2008/52/ES o nekaterih vidikih mediacije v civilnih in gospodarskih zadevah, katere namen je olajšati čezmejne spore, v katere so vključeni potrošniki. Po pregledu glavnih značilnosti omenjene direktive avtor izpostavlja še t. i. internetno mediacijo kot različico mediacije, ki lahko prav tako vodi do učinkovitejših rezultatov.

**Ključne besede:** • čezmejno uveljavljanje terjatev • internetna mediacija • potrošniško pravo • alternativni načini reševanja sporov • Direktiva 2008/52/ES • mendarodno zasebno pravo

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# Some Observations Regarding Cross-border Debt Collection in Consumer Disputes

CHRISTOPHE VERDURE

**Abstract**

Cross-border debt collection in consumer dispute leads to many difficulties. The main one is the access to justice as consumers are generally not aware of their rights and legal proceedings may be expensive. The major difficulty in order to sue a counterpart based in another Member States is the determination of the competent court. However, this private international law issue is the first step in order to bring a legal action. This action may be disproportionate, on time and value, in comparison with the amount of the debt a consumer wants to recover. As a result, the European Commission has adopted the Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters which aims at facilitating cross-border disputes involving consumers. After recalling the main characteristics of the Directive, author also discusses online mediation, that can also lead to more effective results.

**Keywords:** • cross-border debt collection • online mediation • consumer law • alternative litigation proceedings • Directive 2008/52/EC • private international law

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## 1. Introduction

Taking out an insurance, buying a plane ticket, have a loan credit, or buying a product represents an act which give the person who raises them the status of consumer (see Krämer, 1988: 1; Calais-Auloy, 2006: 65; for an overview of the recent case-law of the Court of Justice of the European Union (*ex* European Court of Justice; Court) in the different areas of consumer law, see a.o. S. Mahieu, Van Huffel, 2009: 22; Mahieu, Van Huffel, 2010: 19; Tichadou, 2009: 71; Verdure, 2010: 67; Aubry, Poilot, Sauphanor-Brouillaud, 2010: 790), if the act occurs in the private area.

The protection of consumers has been very soon considered as a major European policy. With this regard, different regulations have been adopted in the field of consumer law, taking into account the economic and health, societal and environmental issues (see Rinkes, 2008: 16; Mahieu, 2007: 209). The starting point for the European consumer protection policy is the idea that market integration is in the consumer interest. The aim is the amplification and the strengthening of competition between the Member States' businesses. This influence on the competition reduces the price level, increases the choice of products and services and, last but not least, enhances the quality of business performance.

Recently, various changes have occurred, to follow up the revision of the »*acquis communautaire*«, which started in 2004.[1] Thus, a new Directive was adopted on time-sharing,[2] and recently a draft Directive on consumer rights.[3] This draft Directive produces, in addition to an overhaul of several guidelines (Micklitz, in Howells, Schulze (ed.), 2009: 48), full harmonization of its scope and aims ultimately to give consumers better protection.

Consumer law also seeks to restore relationships between professionals and consumers (Chamoulaud-Trapiers, 2007: 48). Indeed, the opening of frontiers in Europe, combined with the development of modern means of communications (such as Internet) leads to potential new markets for

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[1] Communication from the Commission to the European Parliament and the Council - European Contract Law and the revision of the *acquis*: the way forward, COM(2004)651 final, 11 October 2004; See also the Green Paper on the Review of the Consumer Acquis, COM(2006)744 final, 8 February 2007.

[2] Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, OJ L 33, 3.2.2009, p. 10–30 (for an overview of this Directive see Busseuil, 2009: 468).

[3] Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614 final, 8 October 2008 (see a.o. Micklitz, Reich, 2009: 471; Howells, 2009: 805).

national companies. Consumers also benefit from this extended market as they can enjoy a wider choice of products and lower prices through increased competition.

The right of action for an individual is determined by national law. The standing and the legal interest in bringing proceedings can therefore differ between Member States. Nevertheless, European law requires national laws not to undermine the right to effective judicial protection.[4] It is for the Member States to establish a system of legal remedies and procedures which ensure respect for that right.[5]

As a result of liberalization and market integration, new risks in terms of consumer protection have arisen. In case of cross-border litigation, consumers may face many practical issues such as: are they adequately informed about their rights, how to be reimbursed if the good has been withdrawn, how to introduce a complaint against an enterprise located in another Member State, which is the competent court, etc. The cross-border nature of a dispute therefore leads to some difficulties. Distance, different legal rules and languages may all raise barriers to cross-border dispute resolution, especially in the consumer field as »consumers are generally poorly-equipped to overcome them and the value of the dispute will rarely justify the time and expense needed to do so« (Dickie, 1999: 81).

Two main issues need to be solved regarding private international law (i) the conflict of law, and (ii) the conflict of jurisdiction. Firstly, conflict of laws is part of the law in each country that determines whether, in dealing with a particular legal situation involving a foreign element, its law or the law of some other jurisdiction will be applied. Whenever more than one regime is applicable to one contract, there are rules of private international law determining which law is applicable. The main source of conflict of law rules is 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).[6] Secondly, conflict of jurisdiction may arise some difficulties as, when the buyer of a good is domiciled in a foreign country, and the consumer wants to be reimbursed, it could be difficult to determine where the action has to be brought. With this regard, private international law issues and especially the determination of the competent court will be of major importance, because the private international law is often regarded as »being derived from a desire to do justice to parties involved in cross-border

[4] Verholen and Others, Joined Cases C-87/90 to C-89/90 [1991] ECR I-3757 (para. 24).
[5] Unibet v Justitiekanslern, Case C-432/05 [2007] ECR I-2271 (para. 42).
[6] OJ L 177, 4.7.2008, p. 6–16.

disputes« (Gilles in Rickett, Telfer (ed.), 2003: 359).

Generally speaking, the law applicable to contracts related to a transaction will lead to fewer difficulties as companies often predetermine which law will be applicable to their agreement, or the applicable law has already been discussed between parties.

Once the competent court and the applicable law is determined, the consumer will have the possibility to sue its opponent in order to recover his debt. However such judicial action may take a long time and have huge implications. This can be sometimes disproportionate to the value of the debt to be collected.

In 1985, the United Nations has provided with guidelines stating that:

> »Governments should establish or maintain legal and/or administrative to enable consumers or, as appropriate, relevant organizations to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Such procedures should take particular account of the needs of law-income consumers«.[7]

These guidelines also »encourage enterprises to resolve consumer disputes in a fair, expeditious and informal manner«[8] and to provide consumers with accurate information. Following these guidelines, the main procedures which can offer consumers expeditious, fair and inexpensive access to justice are the mechanisms of alternative dispute resolution (ADR). ADR was historically associated with lengthy and costly proceedings, caused to businesses by the U.S. court system in the seventies. Moreover, both companies exposed to altered their image to a deterioration in their relations trade (Cruyplants, Gonda, Wagemans, 2008: 3 à 5, nos 10 à 13).

Based on the conclusion that less than five percent of lawsuits were successful, U.S. companies sought out their legal advisers and lawyers to develop methods which would conclude an amicable and peaceful resolution between the parties. Various initiatives resulted, including the creation in 1983 of the Program on Negotiation at Harvard Law School (Cruyplants, Gonda, Wagemans, 2008: 4, No 12).

Alternative Dispute Resolution (ADR) is a term used for a wide variety of

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[7] GA Res 248, 39 UN GAOR (106th plen. Mtg), UN Doc A/Res/39/248 (1985).
[8] GA Res 248, 39 UN GAOR (106th plen. Mtg), UN Doc A/Res/39/248 (1985).

mechanisms aimed at resolving conflicts without the (direct) intervention of a court. ADR covers a wide range of mechanisms. One type of ADR is arbitration which means that a neutral third party that has been agreed upon by the parties decides on the claim and the decision is binding on the parties. Arbitration is most commonly used for commercial disputes, but not for consumer disputes.

However, consumers' ADR are mainly focused on mediation which is any process, however named or referred to, where two or more parties to a dispute are assisted by a third party to reach an agreement on the settlement of their dispute. This occurs regardless of whether the process is initiated by the parties, suggested or ordered by a court or prescribed by the national law of a Member State.

As explained before, cross-border consumer dispute resolutions may raise some difficulties. In this paper, we would like to highlight two of them. The first is the determination of the competent court, as it is the main difficulty in bringing an action against a foreign opponent. Indeed, the law of contract is mainly predetermined or discussed by the parties before any dispute arises. The competent court must be determined when the consumer brings a judicial action. In this regard, the provisions of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[9] (Regulation (EC) No 44/2001) will be assessed in the first part of this contribution. The second part of this contribution will focus on an alternative to judicial action which can be long and expensive in relation to the value of the debt. In this view, mediation appears to be an interesting new mechanism within all the alternative dispute resolution schemes.

## 2. Private international law

### 2.1. General provisions

In this section, the determination of the competent jurisdiction will be discussed. This process is the identification of the jurisdiction in the event of a dispute between a consumer and a supplier located in another Member State. To determine matters of jurisdiction within Europe, we have to look to Regulation (EC) No 44/2001.

The main rule in the Regulation (EC) No 44/2001 is that the defendant

[9] OJ L 12, 16.1.2001, p. 1–23.

should be sued in the State in which he is domiciled.[10] This is supplemented by special rules for contracts,[11] tort[12] and for the protection of consumers. The special rules determining jurisdiction in consumer contracts are to be found in Articles 13–15 of the Regulation EC No 44/2001.

These rules permit consumers to bring proceedings against another party to the contract in either courts of the state in which that other party is domiciled or in the courts of the state in which the consumer is domiciled.[13] Proceedings may only be brought against the consumer in the courts of the state in which the consumer is domiciled.[14]

In addition, if the other party is not domiciled in a Contracting State but has a branch, agency or establishment in one state then as regards disputes arising out of the operation of that branch, agency or establishment the party shall be deemed to be domiciled in that state.[15] The rules may only be derogated from in limited circumstances which favour the consumer.[16]

### 2.2. Consumers' protection

The consumer rules described above only apply in three types of situations. According to Article 15 of Regulation (EC) No 44/2001, the first two apply where goods have been purchased with the assistance of credit and cover (a) contracts for the sale of goods on instalment credit terms[17] and (b) contracts

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[10] Article 2 of the Regulation (EC) No 44/2001.
[11] Article 5(1)(a) of Regulation (EC) No 44/2001.
[12] Article 5(3) of the Regulation (EC) No 44/2001. This has been interpreted by the Court to include both the place where the damage occurred and the place of the event giving rise to it (Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA, Case 68/93 [1995] ECR I-415 2 AC 18. In Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others, Case 189/87 [1988] ECR 5565 the Court rules on the scope of 'matters relating to tort', and in effect excluded any case in which the parties are in a contractual relationship. This greatly reduces the relevance of this basis of jurisdiction in consumer cases.
[13] Article 16(1) of the Regulation (EC) No 44/2001.
[14] Article 16(2) of the Regulation (EC) No 44/2001.
[15] Article 15(2) of the Regulation (EC) No 44/2001.
[16] Article 17 of the Regulation (EC) No 44/2001: »The provisions of this Section may be departed from only by an agreement:1. which is entered into after the dispute has arisen; or 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«.
[17] Article 15(1)(a) of the Regulation (EC) No 44/2001.

for a loan repayable by instalments or any other form of credit made to finance the sale of goods.[18]

The third provision which is very important as it has a wider scope, covering contracts other than those for credit purchase where »the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities«.[19] An exception, however, this provision does not apply to »contracts of carriage other than those for a fixed price, combine travel and accommodation«.

The applicability of this third provision means several conditions are fulfilled:

(i) A contract. Since the adoption of Regulation (EC) No 44/2001, any contract entered into by a private consumer now benefits from the protective rules (Nuyts, 2001: 917).[20] This can be done by demonstrating that the issue falls within the contractual sphere (Boularbah, Nuyts, Watté, 2002: 166). Otherwise, any action by a consumer in tort will be subject to ordinary rules of jurisdiction and will not enter the sphere of Article 15.

As part of the Judgement of the Court in *Kapferer*,[21] delivered on 16th of March, 2006, the Advocate General stated in his findings only when sending flyers with the promise of a prize had not been followed by the conclusion of such a contract, the consumer had no control of the company mail.[22] It was outside the contractual framework and therefore the rules of competence in Article 15 of Regulation (EC) No 44/2001 did not apply.

More recently, the Court has assessed this condition of the existence of a contract, in the *Ilsinger*[23] ruling of 14th of May 2009. In this case, an Austrian national received a letter from a company based in Germany, addressed to her, informing her that she had won a significant prize and if she stuck a coupon on the certificate and returned it within seven days, she would be entitled to the prize. She complies with the instructions but did not receive

[18] Article 15(1)(b) of the Regulation (EC) No 44/2001.
[19] Article 15(1)(c) of the Regulation (EC) No 44/2001.
[20] See however Article 22 of the Regulation (EC) No 44/2001.
[21] Rosmarie Kapferer v Schlank & Schick GmbH, Case C-234/04 [2006] ECR I-2585.
[22] Opinion of Advocate General Tizzano, 10 November 2005, Case C-234/04 [2006] ECR I-2585 (para. 44).
[23] Renate Ilsinger v Martin Dreschers, C-180/06 [2009] ECR I-3961 (see also Idot, 2009: comment No 290; Crawford, 2009: 861).

the advertised amount. She therefore sued the German company before the judge of her domicile *i.e.* the Austrian court.

It should be noted that similar cases had already been brought before the Court. Thus, in the case *Gabriel* in 2002 concerning the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgements in civil and commercial matters (Brussels Convention), which was replaced by Regulation (EC) No 44/2001, the Court held that the consumer action was closely related to the contract between the parties. To the extent that, in such a situation, the professional correspondence sent to that consumer establishes an inseparable relationship between the prize and the ordering of goods. Moreover, the buyer presents the ordering as being the prerequisite for the granting of the prize announced, precisely in order to persuade the consumer to order.[24]

An important feature of *Ilsinger* was that the claim of earnings was not conditional to the subscription of a contract. However, this hypothesis was already addressed by the Court in *Engler* in 2005, but the *Engler* case was related to the Brussels Convention[25] and not the Regulation (EC) No 44/2001. The Court had excluded the application of protective rules for the consumer because the prize allegedly won was not conditional on the consumer ordering goods from the company.

The central issue addressed in the *Ilsinger* decision therefore relates to the question of whether the solution in the *Engler* case, adopted in the framework of the Brussels Convention, could be transposed in Regulation (EC) No 44/2001. The Court noted that the interpretation given in respect of the Brussels Convention applies to the Regulation (EC) No 44/2001, if the provisions thereof and those of the Brussels Convention may be regarded as equivalent.[26] In this regard, the Court considered that although the wording of Article 15 of Regulation (EC) No 44/2001 was wider than Article 13 of the Brussels Convention, there was no substantial difference between the relevant provisions of the two legal instruments concerning the requirement of a contract between the parties. Therefore, in accordance with recital 19 of Regulation (EC) No 44/2001, it is necessary to ensure continuity in the interpretation thereof.[27]

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[24] Rudolf Gabriel, Case C-96/00 [2002] ECR I-6367 (para. 54).
[25] Petra Engler v Janus Versand GmbH, Case C-27/02, [2005] ECR I-481 (paras. 37, 38 and 44) (see also Watté, Nuyts Boularbah, 2006: 300, para. 15).
[26] Case C-180/06, op. cit. (para. 41).
[27] Case C-180/06, op. cit. (para. 58).

Thus, the Court adopted the approach adopted in the *Engler* and stated that Article 15(1)(c) of Regulation (EC) No 44/2001 could not be applicable to such legal action unless the business had contractually committed to pay the price promised to the consumer who claimed the payment. When this condition was not met, the same provision was applicable to such legal action only if the false promise of gain was followed by the conclusion of a contract with the consumer society mail, materializing by placing an order from the latter.[28]

(ii) A consumer. Contracts that protect consumers must also be made for use that can be regarded as outside a professional activity.[29] For example, a case of the Court of Appeal of Antwerp (Belgium) of 20 March 2007 illustrates this: since the appellant is a retired person, he was *de facto* considered a consumer (see Verdure, 2008: 171–174). *A contrario*, when the contractors are acting in the course of their profession, they cannot qualify for protective rules in favour of consumers, »whether or not equal economic strength, whether or not the same specialty« (Gaudemet-Tallon, 2002: 226).

The Court had the opportunity to assess the intermediary situation, namely a contract for goods intended for use both professionally and privately, in its *Gruber* case.[30] *A priori*, the person who concluded the contract on this property is not of the quality of consumer.

However, if the business use is limited in the overall context of the transaction in question, the transaction will fall into the private life and the buyer will be seen as a consumer, and not a professional. In this regard, it is for the court to determine whether the business use was the essence of the contract. This assessment will be based on relevant facts, without taking into account the facts or circumstances which the contractor may have been aware at the conclusion of the contract unless the person who raises the quality of consumer behaved manner which could legitimately give rise to the impression in the head of the other party to the contract, she was acting for business purposes.[31]

The consumer quality is personal and cannot be transmitted. Thus, any assignment by the consumer of his right to claim, to a professional, does not mean that it can rely on the consumer rules.[32] In addition, when a person enters into a contract for future employment, he cannot be regarded as a

[28] Case C-180/06, op. cit. (paras. 59 and 60).
[29] Art. 15(1)(1) of the Regulation (EC) No 44/2001.
[30] Johann Gruber v Bay Wa AG, Case C-464/01 [2005] ECR I-439.
[31] Case C-464/01 [2005] ECR I-439.
[32] Shearson Lehman Hutton Inc./TVB, Case C-89/91 [1993] ECR I-139 (para. 23).

consumer, even if it does not carry that activity at the conclusion of the contract and even if that activity will never be exercised.[33]

(iii) A foreign element. For the purposes of, Article 15(1)(c) of the Regulation (EC) No 44/2001, the contractor must exercise its activities into the state of the consumer's home.

This requirement of activity directed toward the consumer's country allows the contractor of the latter to have its interests protected if he »cannot legitimately be expected to appear in court in a state towards which it directs any activity«. The doctrine notes finally that the concept of directed activity is inherently flexible, and depends on a case by case assessment of the circumstances of the case (Boularbah, Nuyts, Watté, 2002: 166). However, one can infer from the correspondence between a foreign company and a consumer, that the company runs its business to the country of residence of the consumer.

(iv) Existence of a website. The existence of a website can often demonstrate that the other partyprofessional has its activities directed to the country of residence of the consumer. However, for the protection prescribed by Article 15 of Regulation (EC) No 44/2001 to be applicable, it is not enough that the website is accessible by the consumer. The Council and the Commission estimated it was required that the website invites the conclusion of distance contracts and that a contract has actually been concluded at a distance by any means.[34]

The doctrine holding that position somewhat closer to reality, is that in order not to distort the notion of directed activity, it is necessary to take into account the measures taken by the operator of a website to target specific markets, or to exclude others (Boularbah, Nuyts, Watté, 2002). It is the destination website that should be taken into account.

The abovementioned decision of the Court of Appeal of Antwerp illustrates this situation. The only phone number specified content on the website was not a free phone that any average person could call. It was exclusively made available to a number of individuals who were already customers. The Court of Appeal has held, rightly, that this circumstance excluded that the counterparty has expanded its activities directly to the country of residence of the consumer.

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[33] Francesco Benincasa v Dentalkit Srl, Case C-269/95 [1997] ECR I-3767.
[34] Council Declaration, doc. No 13742/00, Just. civ. 131, 24 November 2000 (see Verbiest, Wéry, 2001: 954).

Recently, the Court has assessed this section in its judgment *Pammer*.[35] The Court ruled that the sole existence of a website is not sufficient, since this method of communication inherently has a worldwide reach. Therefore advertising on a website by a trader is in principle accessible in all States, and, therefore, throughout the European Union (EU), without any need to incur additional expenditure and irrespective of the intention or otherwise of the trader to target consumers outside the territory of the State in which it is established.[36]

It is therefore necessary to proceed to an in-depth analyze of the website. With this regard, the Court has provided with some features capable of demonstrating the existence of an activity directed to the Member State of the consumer's domicile : »the international nature of the activity at issue, such as certain tourist activities; 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«.[37]

(v) Conclusion. The conditions of the applicability of Article 15(1)(c) of Regulation (EC) No 44/2001 are cumulative. Therefore, if one of them fails, the protection of this article is given to the person who invokes it.

## 3. Alternatives to court proceedings

### 3.1. Introduction

More and more disputes are being brought to court. As a result, this has lead to longer waiting periods for disputes to be resolved and has pushed up legal costs to disproportionate levels in comparison with to the value of the dispute.

This is where some may look to dispute resolution alternatives. These are extra-judicial procedures used for resolving civil or commercial disputes.

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[35] Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG, Joined Casess C-585/08 and C-144/09, not yet reported.
[36] Joined Cases C-585/08 and C-144/09, not yet reported (para. 68).
[37] Joined Cases C-585/08 and C-144/09, not yet reported (para. 83).

These usually involve the collaboration of disputing parties in finding a solution to their dispute with the help of a neutral third-party. As there are numerous types of ADR methods available, they can be applied and adapted to a variety of areas whether civil or commercial in nature.

Moreover, the advent of the single European market has also increased the movement of goods and of people across the EU. Unfortunately, it also has increased the number of disputes involving nationals of different Member States. These cross-border disputes add another dimension of complexity to already complicated issues. In this context, ADRs are regarded as an important element in the attempt to provide fair and efficient dispute-resolution mechanisms at EU level.

Mediation is an excellent way of conflict resolution for several reasons. First of all, mediation provides better access to justice, in terms of speed and lower cost compared to traditional litigation or arbitration. Secondly, it avoids the confrontation of the parties that is inherent in the judicial process and enables the maintenance of personal relationships between the parties beyond their dispute. Finally, mediation allows creative solutions in order to avoid disputes getting to court and it also permits parties to resolve disputes raised by cross-border complex legal issues, such as conflicts of laws (Cole, 2006: 205). It is also a less formal procedure.

Finally, disputing parties are more likely to comply with an agreement crafted by themselves than decisions rendered by the seized court (Diéguez, 2008).

The Directive 2008/52/EC of the European parliament and of the Council on certain aspects of mediation in civil and commercial matters was adopted on the 21st of May 2008[38] (Directive 2008/52/EC). Vice-President *Viviane Reding*, EU Commissioner for Justice expressed her views on this Directive stated that:

»These EU measures are very important because they promote an alternative and additional access to justice in everyday life. Justice systems empower people to claim their rights. Effective access to justice is protected under the EU Charter of Fundamental Rights. Citizens and businesses should not be cut off from their rights simply because it is hard for them to use the justice system and because they cannot afford it, cannot wait for their time in court, or cannot deal with the red tape«.[39]

[38] OJ L 136, 24.5.2008, p. 3–8.

[39] European Commission calls for saving time and money in cross-border legal disputes through mediation, IP/10/1060, 20 August 2010.

### 3.2. Overview of Directive 2008/52/EC

The purpose of Directive 2008/52/EC[40] is to encourage and facilitate mediation as an alternative form of resolution for cross-border disputes in the EU (with the exception of Denmark). That sounds good in principle but a closer look at the Directive 2008/52/EC shows it does not aim to change existing national laws very much. It defines mediation as including processes in which two or more parties to a cross-border dispute attempt by themselves, voluntarily, to reach an amicable agreement on the resolution of their dispute with the help of a mediator.[41] It does not apply to rights and obligations which the parties have not freely available under applicable law, which limits its application in family law.

In essence, the Directive 2008/52/EC is aimed at encouraging the use of mediation in civil and commercial matters and in addition to make uniform across the Member States of the EU the legal status of certain principles of the mediation practice. It is important to note that states are faced with the challenge of having to enact laws, regulations and/or administrative provisions which are consistent with the stated provisions in the Directive 2008/52/EC but all the Member States (excluding Denmark)[42] are free to do so pursuant to laws of their own making.

*Michel Kallipetis Q.C.* underlined that especially the Eastern European newcomers to the EU had to date been benefiting from extensive mediation training and that mediation, not for historical reasons alone, appeared to be well-established in the East (Blanke, 2008: 442).

The Directive 2008/52/EC only applies to cross-border disputes[43] which concern civil and commercial matters and it excludes, amongst other things, disputes in family, employment law, community law and administrative actions.[44]

Article 2(1) of the Directive 2008/52/EC states that for the purpose of the directive, a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which: (a) the parties agree to use mediation after the dispute has arisen; (b) mediation is ordered by a court; (c) an obligation to use mediation arises under national law; or (d) for the purposes

[40] Article 1(1) of the Directive 2008/52/EC.
[41] Article 3 of the Directive 2008/52/EC.
[42] Article 1(3) of the Directive 2008/52/EC.
[43] Article 1(2) of the Directive 2008/52/EC.
[44] Article 1(2) and Recital 10 of the Directive 2008/52/EC.

of Article 5 of the Directive 2008/52/EC an invitation is made to the parties.

Directive 2008/52/EC applies when one party to the dispute is domiciled in a different Member State from that of the other party and when national law requires mediation to be used in similar domestic disputes or when a court seized of the dispute invites the parties to have recourse to mediation.

The determination of the domicile of the parties shall be in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001. The Court shall apply its internal law in order to determine whether a party is domiciled in the territory of the Member State to which he belongs. If there is no positive response, the court will apply the law of that State in determining whether that party is domiciled in another Member State. Companies and corporations are, for their part, residents here where they have their registered office, central administration or principal place of business.

The appreciation of the foreign element of the dispute within the meaning of Article 2(1) of the Directive 2008/52 takes place either when the parties agree to mediation after the dispute arises, or the date on which mediation was ordered by a court or when an obligation to use mediation takes effect under national law and is finally on the date on which the parties are invited to submit to mediation by the courts seized of the matter. In other words, the fact that the parties domicile (or are ordinarily resident) in the same country after agreeing to mediation does not affect the application of the Directive, when for instance such a situation occurs after the mediation was ordered by a court or after the use to mediation became obligatory (Bombois, Renson, 2009: 521).

The Directive 2008/52/EC contains three basic rules. The first one, established in Article 5 of the Directive 2008/52/EC implies a judge in Europe must have the right to propose mediation to the parties at some point in the proceedings as it deems appropriate. The judge may also invite parties to attend an information meeting on mediation. This section is the only measure contained in the proposal that promotes directly and specifically the use of mediation. Other rules indirectly encourage the use of mediation by establishing a sound relationship between mediation and judicial proceedings.

The first rule is to ensure proper coordination between the courts and mediation for the effect of the mediation agreement (Article 6 of the Directive 2008/52/EC). As it stands, a settlement agreement resulting from mediation is a simple contract between the parties. The Directive gives them more: it obliges Member States to establish a mechanism by which mediation agreements become binding if the parties to the dispute agree. This can be

done, for example, through a probate court or a deed executed before a notary. The Directive leaves the choice to Member States. The agreement thus obtains a legal status equal to that of a trial or a deed.

Some states already allow members to use a mediation enforcement order but other Member States do not allow it. The binding order can be recognized and enforced in all Member States under existing EU instruments on the Recognition and Enforcement of Judgments judiciary, in particular Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000[45] or Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.[46]

This will not affect the system of mutual recognition established by these regulations. The possibility of a settlement agreement made enforceable is not without limits: the contents of the agreement clearly should not be contrary to the applicable national law.

The second basic rule of Directive 2008/52/EC is the confidentiality of mediation (Article 7). This rule seems essential in any ADR success because it helps ensure the openness of the parties and the sincerity of communication during the procedure. On the one hand, the confidentiality of mediation, *i.e.* the contractual obligation on the parties and the mediator not to disclose the information exchanged during mediation, may be waived if parties agree to exchange information if they wish. The Directive 2008/52/EC does not change this situation. On the other hand, it ensures that mediation takes place in an atmosphere of confidentiality because the statements made by the parties during mediation may not be used in a subsequent arbitration or judicial proceedings. To this end, the directive provides that, unless the parties agree, the mediator may not be called as a witness or give evidence in subsequent arbitral or judicial proceedings between the parties to mediation. There are exceptions (protection of interests of children...).

The third rule of Directive 2008/52/EC is that mediation is likely to prevent parties from bringing an action in court to the extent that the mediation does not suspend or interrupt the statute of limitations and prescription periods.

[45] OJ L 338, 23.12.2003, p. 1–29.
[46] OJ L 7, 10.1.2009, p. 1–79.

Some national laws already provide for this purpose today, but it is far from being the case everywhere. Article 8 of the Directive 2008/52/EC assures the parties that, when bringing mediation, the limitation periods are suspended or terminated to ensure they do not lose their right to appeal a court or arbitration of the case because of time spent in mediation.

### 3.3. Online mediation

The online consumer dispute is a good choice for ADR because such disputes are usually fairly simple, involving issues or delivery, refunds, replacements, and the like. It is often called ODR (online dispute resolution).

Online mediation is generally considered as a broad concept, which includes everything from automated blind-bidding procedures and e-mediators, to online mediation platforms with a human facilitator and case management programs (Nadja, 2006: 245).

In online mediation the role of the mediator remains the same, but the selection of techniques changes. The flexibility that features the mediation procedure makes it particularly appropriate for being conducted primarily online. ODR platforms are designed to facilitate the negotiation among their users by encouraging the discovery of positive common points that may result in agreements. Thus, online mediation is any dispute resolution process that is directed by a third neutral party (generally a human mediator) which does not impose the resolution, but assists the parties in resolving their dispute by communicating largely through the Internet (Diéguez, 2008).

Such disputes can be resolved using fairly elementary tools such as email, which should be accessible to consumers who have used the Internet to make online purchases and which require little technical expertise to use. The consumer who has the skills to conclude online transactions likely has the skills to use email.

The small euro value of many online consumer disputes lends itself to the more cost-efficient ODR, rather than offline ADR/mediation or small claims court within the Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.[47]

[47] OJ L 199, 31.7.2007, p. 1–22.

In fact, if it weren't for the availability of ODR, many online consumer disputes might have no practical arena for resolution. For certain e-commerce disputes, ODR may be the only medium realistically available for resolution, given the offline problems of obtaining jurisdiction over and enforcing judgments against non-resident defendants (Solovay, Reed, 2003).

## 4. Conclusion

Cross-border debt collection in consumer dispute leads to many difficulties. The main one is the access to justice as consumers are generally not aware of their rights and legal proceedings may be expensive. The major difficulty in order to sue a counterpart based in another Member States is the determination of the competent court. With this regard, Regulation (EC) No 44/2001 states the general rules applicable and offers consumers some derogation in order to enhance their protection.

However, this private international law issue is the first step in order to bring a legal action. This action may be disproportionate, on time and value, in comparison with the amount of the debt a consumer wants to recover. As a result, the European Parliament and the Council have adopted the Directive 2008/52/EC on mediation which aims at facilitating cross-border disputes involving consumers. After recalling the main characteristics of the Directive, we have also stress that online mediation, a variant of mediation, could also lead to more effective results.

These two issues offer the possibility to stress how difficult it could be for a consumer to recover debt from a counterpart based in a foreign country. In this view, a consumer has a first choice to make: bringing a legal action or trying the mediation. We believe the second option will be encouraged in the near future as it is less expensive and more speedy than traditional legal action.

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