

Legal barriers in the EU-third countries retailing*

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Abstract

The EU-third countries retail is especially interesting from a legal point of view, given that the EU protection standards are higher than the standards of other markets. Thus, the design of the business internationalization should take into account the legal barriers in two scenarios: EU professional who contracts with consumers from third countries and third country professional who contracts with EU consumers.. Particularly the case "EU professional-consumer from third country" is characterized by the lack of protection of the so called "passive" consumer under the rules of the "Brussels I.a" Regulation. Moreover, certain contradictions are observed by the different definitions of "consumer" provided by "Rome I" Regulation and by Directive 2011/83. On the other hand, the case "professional from third country-EU consumer" is very influenced by the new rules of "Brussels I.a" Regulation, under which the consumer is entitled to claim in his proper domicile. However, the eventual decision will be considered unable to be recognized by many conventions on recognition and enforcement concluded by Spain and third countries. Meanwhile the protection of the EU Law is not guaranteed by "Rome I" Regulation in relation to consumers attracted in a Member State other than the Member State of his residence. This lack of protection is corrected by the EU overriding mandatory provisions.

1. Introduction

The EU-third countries retail is especially interesting from a legal point of view, given that the EU protection standards are higher than the standards of other markets. Thus, the design of the business internationalization should take into account the legal barriers in two scenarios: EU professional who contracts with consumers from third countries and third country professional who contracts with EU consumers.

In this sense, the Directive 2011/83 on consumers' rights harmonized at maximum the national laws of the Member States. Thus, the main legal barriers are observed in the EU-third countries retailing. Furthermore, Regulation EU 593/2008 (Rome I Regulation) on applicable law to contractual obligations provides the application of the law of the habitual residence of the consumers, when the professional pursues his commercial or professional activities in the country where the consumer has his habitual residence, or by any means, directs such activities to that country or to several countries including that country (hereinafter, "passive consumer" attracted in his residence). Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

From the point of view of the disputes professional-consumers, the main amendment of the Regulation EU 1215/2012 (Brussels I.a Regulation) on international jurisdiction and recognition and enforcement of judgments is its application to consumers domiciled in the EU who contract with third countries undertakings, without domicile or branch in the EU. These EU rules replace the national rules which were applicable to third countries undertakings, although the EU Consumers Alternative Dispute Resolutions (Directive 2013/11/EU, ADR) or the EU Consumers On line Dispute Resolution (Regulation EU 524/2013, ODR) do not fit in these cases, due to the European mechanism of co-operation cannot be applied when third countries are involved.

2. Model Case 1: EU Professional-Third Country Consumer

2.1. Un-protection Of The Consumer From A Procedural Point of View

2.1.1. Irrelevance of the Attraction in Third Country

In the case of consumer with residence or domicile in a third country, EU Law cannot regulate the jurisdiction of the court of consumer's domicile, because it is located in a third country. For these reason, EU Law has paid special attention for jurisdiction of the court of professional's domicile when the professional is the defendant (Art. 18.1 Reg. "Bruselas I.a" y Art. 16.1 Lugano Convention). If the case is linked to a EU or EFTA undertaking with branches in several Member or Contracting States other than the State of domicile, the claim can be brought before the courts where the branch which has managed the contract is located (= establishment in which the dispute is arisen out *ex* Art. 7.5 Reg. "Bruselas I.a and Art. 5.5 Lugano Convention). In all these cases, the Brussels I.a Regulation and the Lugano Convention are applied in an exclusive way,

irrespective of national legislations of Member States. It is irrelevant that the national legislation of the Member States contains other jurisdiction grounds, for instance, where the advertisement is made or the necessary acts for the conclusion of contracts are made. The fact that the Brussels I.a Regulation cannot attribute jurisdiction to the court of the consumer' domicile has provoked that the passive consumer protected by Brussels I.a Regulation is the consumer attracted by the professional and domiciled in a Member State -this fact does not happens in Rome I Regulation, on applicable law to contractual obligations, which protects to the consumer attracted and resident in third countries-. However, this spatial delimitation of the Brussels I.a Regulation has not been extended to the consumer who buys goods on installment credit terms and its loans [lit a) y b) Art. 17.1]. This situation arises two issues:

First one, the un-protection of the consumer attracted and domiciled in third country: although it is logical because the consumer has not his domicile in EU, it is not totally justified in relation with the jurisdiction agreements in favor of EU courts. An abusive agreement can be imposed to the consumer by the professional in favor of the courts of the Member State of the professional, as if this contract was a B2B contract (*business to business*) (Art. 25 Brussels I.a Reg.). In fact, in the frame of the many bilateral conventions, the judgment provided by the EU court could be recognized and enforced in the third country party in the convention, due to many conventions do not contain special rules of consumers protection at the moment of recognition and enforcement of judgment. This situation is not very clear not only by the legal and economic unbalance in favor of the professional, but also by the comparison with the EU consumers, who are really protected in these case being the jurisdiction agreement invalid. With the aim of preventing these pernicious effects, the case law of the Court of Justice of the EU in *Océano case* shall be extended to cross-border cases, although the case was referred to a local case. In accordance with this Judgment, the prorogation of jurisdiction in favor of professional courts shall be considered an unfair clause given that the unbalance between the rights and obligations of the consumer. The fact that the consumer is attracted or not attracted is irrelevant, because this circumstance is not foreseen in the Directive 93/13/EEC on unfair contract terms. Nevertheless, the characterization of a clause as unfair in accordance with this Directive is surprising when that clause totally fits with the literal text of the Brussels I.a Regulation.

Second one, in absence of choice of court, the third country consumer could be required in a Member State, provided that the national legislation of Member States contains ambivalent jurisdiction grounds, as the performance of necessary acts for the conclusion of the contract, which can be used not only by the consumer but also by the professional. But, even in the case of consumer who is the plaintiff, a paradox is observed in the international legal practice: the un-protected consumer, in other words, the consumer attracted and domiciled in a third country, disposes of more grounds of jurisdiction in the EU than the protected consumer of third country, in other words, the consumer who buys goods on installment credit terms and its loans. The un-protected consumer disposes of three grounds: domicile of defendant *ex* Art. 4 Brussels I.a Regulation, branches or establishments *ex* Art. 7.5 and place of performance of the obligation in question *ex* Art. 7.1. Meanwhile the protected consumer disposes of two grounds of jurisdiction: domicile of defendant *ex* Art. 18.1 or establishment of professional *ex* Art. 7.5. This consumer loses the possibility of claiming in the State where the obligation in question is performed.

2.1.2. The Silence about the movement of the Consumer's Domicile

Apart from the mentioned circumstances, some issues are observed in relation with the consumer attracted and domiciled in a Member State but who moves his domicile to a third country previous to bring the action. This situation is silenced by the Brussels I.a Regulation, inherited of its predecessor and of Lugano Convention. *Prima facie* the domicile is determined at the moment of bringing the action, as it follows of the literal wording of Brussels I.a Regulation: "a consumer may bring proceedings (...) in the courts for the place where the consumer is -and not was- domiciled". That wording means that the consumer who moves his domicile to a third country loses the right to bring an action in the Member State where the consumer was domiciled at the moment in which the consumer was attracted by the professional, despite that this place is closely connected with the dispute. In order to prevent this situation, a possible interpretation would be the reference to the domicile of the consumer at the moment that he was attracted by the professional, in accordance with the backgrounds of the Brussels I.a Regulation. But, anyway, different solutions where the rule does not establish any difference is doubtful. In fact, the issue persists in relation with the consumer that, although he buys goods on installment credit terms, he had been attracted in his domicile too. In this case, the backgrounds of the Brussels I.a Regulation are referred to the consumer's domicile at the moment of bringing the proceeding and not at the moment of the attraction of the consumer by the professional. Nevertheless, so

the professional as the consumer could have some interests in the jurisdiction of the consumer's domicile in a Member State. The professional has some interest because he could calculate the legal risk of being required before an EU court in whose place he pursues or directs commercial activities. Maybe the professional could prefer this EU court that a third country court in whose place he does not pursue activities-. The consumer can have some interests in the EU court because he has an additional ground of jurisdiction, regardless that the legislation of the third country does not contain any ground in favor of the consumer's domicile.

2.2. Contradictions in the Substantive EU Law

2.2.1. No Protection Of Protected Consumer?

The law governing the contract concluded with a passive consumer is the law of his habitual residence, although the habitual residence is situated in a third country, as it is this case. The choice of law by the parties cannot affect to the mandatory rules of the State of consumer's habitual residence which deal with the protection of this consumer. These classical solutions of the Rome I Regulation shall match with the national legislation of implementation of Directive 2011/83. Two aspect are specially interested from this Directive: on one hand, the Directive provides a wider protection than the protection of the Rome I Regulation, including passive consumers and active consumers who were not attracted by the professional (Art. 2.1); on the other hand, the Directive provides a higher protection than the protection of many legal systems around the Worlds. These premises arises paradoxes.

In this way, we can refer to the paradox of the "un-protection of the protected consumer": when a professional established in the EU attracts to a consumer in a third country, with low standards of protection, the professional is the most interested practitioner in the application of the Rome I Regulation (Article 6), supposedly designed for the protection of the consumer. In these cases, the consumer exception, in other words, the law of the consumer's habitual residence, refers to the law of a State without high development in this matter. In contrast, the general rule for B2B contracts, in other words, the law of habitual residence of the professional as the party required to effect the characteristic performance, had referred to a Member State Law with high standards of protection. Really protection of consumer is not observed; formally, the consumer's rules are applied with a universal scope (Art. 2).

In these situations, the professional established in the EU is not always interested in imposing his proper law in a general term, due to the mandatory rules of the third countries shall be taken into account. The same solution is applicable to the Common Rules of European Sales. This option can be elected due to the professional has habitual residence in a Member State, even although the address of the consumer or the delivery of goods are not situated in a Member State (art. 4.6). That choice of law shall respect the mandatory rules of the law of consumer's habitual residence where the consumer was attracted. In all these cases, the choice of law plays in favor of the consumer and against the professional, who has not special interest in this choice of law, especially when the EU Law has higher standards of protections than the standards of other countries. As an exception, the professional has a minimum interest in the application of his proper law by his better acknowledgment.

2.2.2. Protection Of Un-protected Consumer?

In the case of EU professional-third country consumer the paradox of protecting un-protected consumers is observed. In this sense, when a EU professional concludes a contract with a consumer who was not attracted in the third country where he resides and whose legal standards of protection are low, it so happens that the Directive 2011/83 will protect to this consumer whom the Rome I Regulation does not consider to deserve this protection. Certainly, the Rome I Regulation considers applicable the general rules on commercial contracts (B2B) and not the specific rules on consumers. In consequence, in absence of choice of law by the parties, the law of the State where the EU professional is established will be applied, due to the professional makes the characteristic obligation. As a result, the law of a Member State is applied, included the national rules implementing the Directive 2011/83 which is also extended to consumers not attracted in his residence. In other words, the characterization as "non consumer" in Rome I Regulation provokes the application of the Directive 2011/83, which does consider to this contracting party as a "consumer".

For these reasons, precisely concerning persons from third countries who concluded contracts outside his trade or profession, the choice of law by the parties is extremely interesting. Paradoxically, if the standards of protection in that third country are not high, the main interest for the professional is the choice of law of the active consumer's residence. That choice of law plays without any problems like the contract was a B2B

contract. On the contrary, if the law of the Member State where the professional is established was chosen, the non professional party would be protected by the EU Directive, although he is not a passive consumer.

Nonetheless, the “renounce” of the professional to the EU rules in favor of the law of a third country does not avoid the application of overriding mandatory provisions or equivalent rules contained in national or EU legislations. Special mention has to be made to Directive 93/13/EEC on unfair contractual terms when it provides that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States. Such would be the case in which an EU professional makes or directs commercial activities in a Member State, regardless that the consumer has habitual residence in that Member State (for instance, a tourist from a third country). Thus, the Directive is absolutely applicable to consumers from third countries who are temporally in EU. The same conclusions can be formulated in relation with Directive 2008/48/EC on consumer credit and Directive 1999/44/EC on sale of consumer goods and associated guarantees. The problem is how the Member States implement these EU acts and define the concept of “close connection with the territory of the Member States”. For instance, in Spain the Legislative Decree 1/2007 which adopts the recast of the General Act of Protection of Consumers and Users concrete this “close connection” in an unfortunate way in relation with consumers residing in third countries, including the EU citizenship of the consumer. This criterion is not relevant in relation with consumers’ contracts.

3. Model Case 2: Third Country Professional-EU Consumer

3.1. An Imperfect Right for the Consumer

3.1.1. Point of View of the Member States

The consumer who is domiciled in a EU Member State is entitled to bring the proceeding before the courts of that State under the rules of Brussels I.a Regulation, although the professional is established in a third country and he does not an establishment in the EU. This rule is a great novelty of the Brussels I.a Regulation in matter of consumer (Art. 6.1). This provision is not contained in the Lugano Convention, concerning consumers with domicile in Switzerland, Iceland or Norway, whose courts will apply their national rules on jurisdiction for these cases.

The consumer’s right to claim in his own domicile against professionals of third countries does not impede the application of national legislations of the Member States in order to add more jurisdiction grounds in favor of the consumer. This conclusion is based on a teleological and literal interpretation of the wording of Brussels I.a Regulation. From a theological point of view, the Brussels I.a Regulation has tried to consolidate a consumer’s right, bringing the action in his proper domicile. This new European rule need not exclude other consumer’s rights provided by the national legislations in favor of judicial protection of consumers who are plaintiffs. Furthermore, it does not make sense that a consumer, a weaker party, may not invoke national rules of jurisdiction against defendants domiciled in third countries, meanwhile other parties who are not weaker parties may invoke these national rules. Moreover, it shall be underlined that the possible application of national legislations concerning jurisdiction grounds will play only in favor of consumers who are plaintiffs. If the plaintiff is the professional and the EU consumer is the defendant, the European grounds of jurisdiction contained in Brussels I.a Regulation are applied in an exclusive manner under Article 4, due to the consumer is domiciled in the EU. This teleological interpretation is confirmed by the literal analysis of the Article 6 of Brussels I.a Regulation: “if the defendant is not domiciled in a Member State”, and this is our case, “the jurisdiction of the courts of each Member State shall be determined by the law of that Member State” and this is the consequence. The Regulation only adds a new ground of jurisdiction, as well as the grounds provided by national laws, when the Regulation states “subject to Article 18(1)”, namely, without affecting the consumer’s right to bring the action in his own domicile. In accordance with that, the national rules of the Member States can be applied, particularly, grounds of jurisdiction based on the place of conclusion or performance of the contract.

The accumulative application of the Brussels I.a rules and the national laws could be considered a minor issue and irrelevant in the practice, because the consumer will probably opt for bringing the proceeding in the court of his proper domicile, discarding other legal strategies. Nevertheless, collateral consequences shall be pointed out, mainly, the fact that the court with jurisdiction under the national law is the unique court habilitated for opening an European Small Claims Procedure (for instance, devolution of a defective product valued in no more than 5,000 Euros). Meanwhile, the court of the consumer’s domicile, with jurisdiction under EU rules, is not habilitated for opening this kind of procedure. This paradox happens by the concept of “cross-border dispute” of the Regulation (EC) 861/2007 which requires that at least one of the parties is domiciled in a

Member State other than the Member State where the proceeding was brought (Art. 3.1). As the professional who is defendant is domiciled in a third country, the EU court of the consumer's domicile ex Art. 6(1) Brussels I Regulation is not entitled to open this European Small Claims Procedure, because any party is not domiciled in "other" Member State. In contrast, the court of a Member State with jurisdiction under national law is habilitated to open the European Small Claims Procedure, because the consumer is fortunately domiciled in "other" Member State. For instance: a French consumer with domicile in Spain is entitled to bring the action against a professional of third country. He could bring the action in Spain under Art. 6(1) of Brussels I.a Regulation, but the Spanish court could not open a European Small Claims Procedure because no body is domiciled in other Member State. Meanwhile, the French court would have jurisdiction under the ground of the French Civil Code (not Brussels I.a Regulation) according to which the French parties are entitled to bring actions before a French court. This court could open a European Small Claims because a party is domiciled in other Member State.

3.1.2. Point of View of the Third Countries

The consumer's right to bring the action in his own domicile shall be analyzed from the point of view of the third countries where the professional is established and has his domicile. In fact, this right can increase the risk of "failed" decisions, namely, decisions which are effective in the EU but which cannot be recognized in third countries, especially connected with the case, as the country in whose territory the professional has his domicile, establishment or assets. It happens when the international conventions with third countries do not contain special rules for consumers. For instance, many conventions signed by Spain, with some exception, provide the control of the jurisdiction of the court that provided the ruling under the rules for commercial disputes B2B. This situation provokes a pernicious effect in matter of consumer. It is possible the refusal of recognition of decisions from the State where the consumer plaintiff has his domicile, due to the domicile of the defendant is not located in that State. How shall this risk of failed decision solved? In practice it could happen that other links were located in the State of origin of the judgment (for instance, the place of performance of the contract can coincide with the consumer's domicile). These links can be sufficient for obtaining the recognition. But, apart from these cases, the risk of failed decisions is only mitigated by arguing a *favor recognitionis* clause, in other words, the possibility of applying any act which is more favorable to the recognition, regardless the bilateral convention in question. *De lege ferenda*, the EU should require the inclusion of special rules in consumers when international conventions are negotiated.

Finally, the consumer's right to bring the action in his own domicile has not been related with the fact that the parties can choose the courts of the third country where the professional is established. Although the issues are not exclusive of this case, it will be frequent in cases of consumer domiciled in EU and professional domiciled in third country.

On this respect, the EU legislator should provide an uniform solution to this issue. Although it is true that this situation is mainly vinculated to third countries, because their courts are elected, also it is true that this agreement will directly affect to the EU rules and the European consumer's right to bring the action in his proper domicile. In consequence, this situation directly affect to EU Law. From this point of view, the choice of the court of a third country where the professional is established should not be admitted by European courts. The conditions regulated by the Brussels I.a Regulation do not concur: they are not agreement entered into after the dispute has arisen; they are not agreement which allow the consumer to bring proceedings in courts other than those indicated in this Section; and they are not agreement which are 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 (Art. 19). Moreover, the choice of third country court could be considered an unfair contractual term given that the legal and economic unbalance in prejudice of the consumer.

At the moment of the recognition and enforcement of the judgment, the choice of third country court has not been regulated. The absence of special rules in bilateral conventions can provoke the admission of the recognition of judgment from third countries based on choice of courts which are unfair contractual terms. Maybe the recognition and enforcement could be refused under grounds of violation of public policy, in accordance with *Océano* case.

3.2. Gaps In The Standards Of Protection

3.2.1. Approach

The consumers' rules of Rome I Regulation correctly works in relation with passive consumers attracted in his habitual residence. In the case analyzed of consumer resident in a Member State, the law of that State will be applied and the choice of a different law only adds more rights to the consumer. Therefore, the law of the professional will be taken into account only when it increases the protection provided by the EU Law and the law of the Member State where the consumer resides. In fact, the choice of law will have a small impact in practice, if the chosen law has low standards of protection.

The situation is substantially different in relation with active consumers who are not attracted in their residence. In this case the law of the professional is applied as the party who performs the characteristic obligation of the contract (Art. 4 Rome I Reg.). Therefore, if the professional is established in a third country with lower standards of protection than the EU standards, it is not recommendable the choice of law other than the law of the professional. The choice of law of the active consumer resident in EU amplifies the standard of protection, because this consumer, although he is an active one, will be characterized as protected consumer by the Directive 2011/83. In other words, he will be considered as protected consumer by the Directive 2011/83, although he is not considered as protected consumer by Rome I Regulation.

In this context, although the Rome I Regulation adequately works, a gap is observed concerning the consumer resident in a Member State who is attracted in other Member State by a third country undertaking. Formally, this consumer is an active consumer who is not protected by Rome Regulation. Thus, the law of a third country could be applied, as the law of the professional established in the third country. But, really, the consumer resident in the EU has been attracted in the proper EU, with the unique peculiarity of attraction in other Member State other than the Member State of residence.

3.2.2. Corrective Mechanisms

Fortunately the case of consumer attracted in the EU but in a Member State other than the Member State of residence can be mitigated by the courts of a Member State, with jurisdiction for instance by the domicile of the consumer. This court will apply the overriding mandatory provisions of the EU (Art. 9 Rome I Reg.). These rules are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

In our case, the hypothetical application of the law of the third-country professional is mitigated by the overriding mandatory rules. These ones are the cases of the Directive 93/13/ECC on unfair contract terms and the Directive 2008/48/EC on consumer credit, when, regardless the choice of a third country law, a close relation with a Member State is observed. The fact that the professional carries out activities or direct activities to a Member State is a close connection with the EU, although that Member State is not the State of residence of the consumer. By this way, the consumer attracted in the EU but in a Member State other than the Member State of residence will be protected by the EU Law as overriding mandatory rules and although, in general terms, the law of the third country professional was applicable.

The Directives contain these provisions as overriding mandatory rules when the law chosen by the parties is the law of a third country. But really these provisions should be applied too when the law of a third country is applicable in absence of choice of law (for instance, the law of the professional *ex* Art. 4 Rome I Regulation). The relevance is observed because there are connections with the EU, irrespective of the application of the law of the third country is based on choice of law or in other rules.

4. Conclusions

1. The cross-border retailing of the undertakings requires to distinguish two cases: EU professionals-third countries consumers and third countries professionals-EU consumers.

2. Regarding the first case, the un-protection of consumers shall be amended in the Brussels I Regulation, due to the professional can impose the choice of his proper court. This practice could be avoided considering this choice of court agreement as an unfair contractual term in the frame of the Directive 93/13.

3. In absence of choice of court, the paradox of the Brussels I.a Regulation should be avoided: the protected consumer (purchaser with installment credit) has two grounds of jurisdiction in his favor (defendant's domicile and branch of the professional) and the un-protected consumer has three grounds of jurisdiction (the aforementioned grounds as well as the place of performance of the obligation in question).

4. Moreover, the movement of consumer's domicile should be regulated when the consumer domiciled in a Member State moves his domicile to a third country before bringing the action. It seems to lose the right of

bringing the action in the last domicile in a Member State although the professional had attracted to the consumer in that Member State.

5. In relation with applicable law, the professional shall assess the standards of protection of the consumer's residence. If they are lower than the EU standards, the professional has not interest in choice his proper law, namely, the law of a Member State with higher standards.

6. On the contrary, in relation with active consumers (consumers not attracted in his residence), the professional has interest in the choice of law without any obstacles. In absence of choice of law, the professional would observe the application of the EU Law of consumers (Directive 2011/83).

7. The second case is the case of third country professional-EU consumer. This consumer has the right to bring proceeding in his proper domicile but this European right is an imperfect right. The consumer cannot apply for an European Small Claims Procedure, because any party is not domiciled in other Member State. It is a surprising situation because other EU court with jurisdiction under national legislation can positively open an European Small Claims Procedure.

8. Furthermore, the judgment provided by the court of the consumer's domicile can be failed with a high risk of refusing recognition and enforcement in third countries at the light of some bilateral conventions with third countries. This issue is arisen out because many bilateral conventions do not contain specific rules for consumers.

9. On the contrary, the judgment provided in the third country where the professional is established can be recognized without any obstacles although the jurisdiction of that court was based on a choice of court imposed by the professional. The unique remedy would be the refusal of recognition by public policy reasons regarding the choice of court agreement as an unfair contractual term.

10. In relation with applicable law, the elusion of EU rules in respect of EU consumers attracted in a Member State other than the Member State of residence is neutralized by the characterization of these EU rules as overriding mandatory rules. That means that these rules are applied, irrespective the law of third country governing the consumer contract.

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