

QUO VADIS CONSUMER DISPUTE RESOLUTION? UK & EU CROSS BORDER CONSUMER DISPUTE RESOLUTION IN THE POST BREXIT LANDSCAPE

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ABSTRACT: The United Kingdom's exit from the European Union challenges the existing framework for cross border consumer dispute resolution and exacerbates the negative effect of the EU's harmonisation approach in this area. This paper will analyse and evaluate key challenges to UK and EU consumer cross border dispute resolution. The paper will consider procedural impediments to UK consumers enforcing consumer rights against EU/EEA traders as well as to EU consumers bringing claims against UK traders. Specifically, the paper will consider the jurisdictional impact of UK's status and its effect upon the reciprocal enforcement of consumer court judgments/ADR decisions between the EU and UK. Finally, the paper suggests that a Lugano+ approach would help to mitigate the impact of the impediments to effective consumer dispute resolution between EU and UK entities. In doing so, it first takes a preliminary look at the existing paradigm of cross border cooperation in consumer dispute resolution. The chapter also includes some thoughts on the normative clashes facing the creation of a new relationship in this area.

KEYWORDS: cross border; consumers; dispute resolution; Brexit.

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INTRODUCTION

The United Kingdom's decision to leave the European Union has unmasked legal and practical conundrums inherent in the unravelling of a closely bound legal relationship. The UK's ambition to create a 'new, deep and special partnership with the European Union' will need to cohabit with the underpinning norms of the European Union and its legal instruments. This will involve addressing a series of challenges; challenges which will influence the facilitation of cross border consumer dispute resolution for UK and EU consumers. This paper contends that a Lugano plus (Lugano+) model would help to mitigate the impact of the impediments to effective consumer dispute resolution for EU and UK consumers post Brexit. The paper first takes a preliminary look at the pre-Brexit paradigm of cross border cooperation in consumer dispute resolution. It then analyses the implications of the UK and EU's post Brexit approach to cooperation in civil and commercial matters for consumers. The paper ends with consideration of the Lugano+ approach as a model for a new relationship in this area.

1. THE PRE-BREXIT EU LANDSCAPE IN CONSUMER DISPUTE RESOLUTION

The EU's current framework for consumer protection has its provenance in its treaty instruments² and the Charter of Fundamental Rights of the European Union ('CFR'). Indeed Articles 114(3) and 169 TFEU and Article 38 CFR all refer to the EU's purpose in this area as ensuring a 'high level' of protection. It is within this framework that *judicial* and *extrajudicial* mechanisms to facilitate the private enforcement of consumer rights were created. These mechanisms seek to reassure the EU consumer by the provision of protections and entitlements that are substantively similar across Member States. The operation of these mechanisms is strengthened by the EU's legislative measures on judicial cooperation particularly, Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels Ibis')³. Together, they constitute the core of the private law measures in the 'EU enforcement toolbox' for consumer law. Unfortunately, the judicial and extra judicial tools largely operate in parallel, supplementing each other rather than forming part of a coherent, interconnected system specifically designed for consumer dispute resolution.⁴

² See for example, The Treaty of the Functioning of the European Union, OJ C 326, 26.10.2012.

³ (2012) OJ L 351. The EU Mediation Directive (Directive 2008/52/EC) is also of relevance as it contains enforcement provisions for cross-border civil and commercial disputes involving parties from EU member states.

⁴ See Cortés P., 'The Need for Synergies in Judicial Cooperation and Dispute Resolution' in Burkhard Hess, Xandra E. Kramer (Ed.) *From common rules to best practices in European Civil Procedure, Studies of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law*, (2017) vol. 8, pg. 393.

Consequently, this structural approach compartmentalizes the enforcement of consumer law,⁵ thus effective and efficient enforcement of consumer rights is largely contingent upon the peculiarities of the consumer's chosen judicial /extra-judicial procedure.

1.1. Private law judicial elements in the 'EU enforcement toolbox'

Key private judicial measures within the toolbox are the European Order for Payment (EOP) procedure⁶ and the European Small Claims Procedure (ESCP)⁷. Whilst not specifically designed for consumer dispute resolution, both optional instruments are geared towards consumers. The objective of the procedures is to achieve equality of treatment for its users.⁸ The intentions of the measures are to 'simplify, speed up, and reduce the costs of litigation concerning claims in cross-border cases'⁹ as well as to secure easier circulation of judicial decisions between Member States via the removal of enforceability proceedings.¹⁰ Operationally, these procedures supplement national court procedures in Member States rather than replacing them.¹¹

The EOP procedure seeks to reduce the cost of cross-border enforcement where an uncontested debt is owed by a party in one Member State to a party in another Member State. The ESCP is designed to provide a standardized procedure for cross-border civil and commercial claims up to EUR5,000.¹² The ESCP supplements the operation of Art.17 Brussels 1bis, providing an avenue for claims by consumers who are not able to satisfy the 'purposes' requirement in s.1 of that Article. The abolition of the exequatur is one of the most important features of the EOP and ESCP procedures. In consumer claims, the likely cost of enforcing a cross-border judicial decision may exceed the value of the claim, especially where the claim sums are of low value. As a result of such enforcement costs, consumers may be deterred from pursuing the enforcement of their rights at the outset. As such, the EOP and ESCP procedures mitigate the impact of this deterrent and make it wor-

⁵ See also Onanu E., 'Court and Out-of-Court Procedures: In Search of a Comprehensive Framework for Consumers' Access to Justice in Cross-Border Litigation' in Cadet L., Hess B., Requejo Isidro M., (eds.) *Privatizing Dispute Resolution: Trends and Limits* (Nomos 2019). Ontanu argues that a danger of fragmentation is created (pg. 51).

⁶ Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006.

⁷ Regulation 861/2007/EC of the European Parliament and of the Council. The UK decided to opt out of one additional measure – the European Account Preservation Order Procedure. Accordingly, UK courts do not issue EAPOs, and UK bank accounts held are not subject to these orders.

⁸ Storskrubb E, *Civil Procedure and EU Law: a Policy Area Uncovered* (Oxford University Press 2008) pgs. 229-230.

⁹ Recital 9 of the EOP and recital 8 of the ESCP.

¹⁰ Recital 9 and Art 1(1)(b) of EOP and recital 30 of the ESCP.

¹¹ See recital 10 of the EOP and recital 8 of the ESCP.

¹² Art. 2(1).

thwhile for parties to pursue claims (particularly those for money) which they might otherwise have abandoned.

However, the procedures are not perfect, and their aims are undermined by their structural design and the degree of their reliance/ dependence upon national procedural rules. Indeed, the functionality, success and consumer experiences of these procedures are dependent upon the national procedural rules in each Member State. For example, both procedures leave costs and service of documents at the discretion of national courts.¹³ Further, in some Member States, consumers will have to navigate internal national procedural rules to determine which specific courts have competence to hear their claims under these procedures.¹⁴

1.2. The extrajudicial elements in the 'EU enforcement toolbox'

The EU's extrajudicial mechanisms complement the judicial instruments. When compared to judicial measures, ADR processes for consumers pursuing small value claims can be at times 'the only proportionate option'.¹⁵ ADR options, when available, offer a higher degree of satisfaction for users with consumers tending to be 'more satisfied with out-of- court dispute resolution (54.1%)' compared to courts' handling of claims (45.7%).¹⁶ Accordingly, ADR options sit at the top of the hierarchy of options for consumers to resolve their disputes. The ADR Directive¹⁷ and ODR Regulation¹⁸, which pursue a horizontal legislative framework for consumer ADR and ODR, are key extrajudicial components of the EU's toolbox.

1.2.1 ADR Directive

Under the ADR Directive, EU Member States are required to enable access to ADR for consumers. Member States have to ensure that consumers are directed to quality-certified ADR entities to resolve domestic and cross-border Business to Consumer (B2C) disputes with a trader established within the EU.¹⁹ Through a minimum harmonization approach, the Directive imposes

¹³ See for example Art. 13 EOP and Art. 13 (1)(b) ESCP on service.

¹⁴ Hess B et al (ed.), *Mutual Trust and Free Circulation of Judgments Study (2017)* available at: <https://publications.europa.eu/en/publication-detail/-/publication/531ef49a-9768-11e7-b92d-01aa75ed71a1/language-en>, pg.340 -347.

¹⁵ Cortés P and Mañko R, 'Developments in European Civil Procedures' in Cortés P (ed.), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 56-57.

¹⁶ European Commission, *Consumer Conditions Scoreboard. Consumers at Home in the Single Market (2019)* < https://ec.europa.eu/info/files/consumer-conditions-scoreboard-2019-edition_en > pg. 10.

¹⁷ Directive 2013/11/EU on alternative dispute resolution for consumer disputes.

¹⁸ Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes.

¹⁹ Certification is not compulsory for all ADR entities under the Directive. Further, the Directive's provisions are not designed to apply to complaints submitted by traders against consumers or to dis-

binding quality requirements for ADR entities and the ADR procedures offered by these entities.²⁰ Compliance with the quality requirements is ensured through certification and monitoring executed by competent national authorities in each Member State. The Directive also imposes information obligations on traders to let consumers know the ADR provider(s) with competence to resolve a dispute.²¹

In line with its minimal harmonization approach, the Directive does not regulate whether participation in the procedure is voluntary or mandatory²² nor does not prescribe the types of ADR procedures Member States should have. Most importantly however, the Directive does not prescribe whether a procedure's outcome should be binding²³ or stipulate how an ADR procedure's outcomes are to be enforced. As the Directive sets the floor for quality requirements, Member States have the freedom to establish or maintain quality requirements that go beyond those laid down in the Directive.²⁴

The minimum harmonization approach has led to doubts about the Directive's ability to facilitate and promote high quality ADR across the EU.²⁵ In practice, Member States have capitalized upon the flexibility built into the Directive, tailoring their ADR architectures and oversight processes to reflect their individual legal traditions²⁶ or their respective national policies. Across the EU, Member States either opted for an open system whereby dispute resolution bodies are certified if they comply with stipulated quality requirements or a closed system where an exhaustive list of ADR entities is provided in the implementing legislation. Where the open models exist, divergences in certification approaches occur. Member States have either adopted a sectoral model where different authorities operate according to the sector (e.g. UK), or a generalist model where a singular authority is responsible for certifying ADR entities across all sectors (e.g. France). Further layers of diversity and

putes between traders (recital 16). However, the Directive's provisions do not preclude Member States from adopting provisions on procedures for the out-of-court resolution of such disputes.

²⁰ See Chapter II of the Directive with specific provisions on accessibility, expertise, independence, impartiality, transparency, effectiveness, fairness, liberty and legality.

²¹ Art. 13.

²² Recital 49.

²³ *Ibid.*

²⁴ Article 2(3) of the ADR Directive. See recital 15 of the Directive where this approach is premised on the need to respect Member State legal traditions.

²⁵ Kirkham, R. 'Regulating ADR—lessons from the UK' in Cortés P. (Ed.), *The New Regulatory Framework For Consumer Dispute Resolution* (Oxford: Oxford University Press 2016) pp. 297–324. See also, Cortés, P. (2015) The impact of EU law in the ADR landscape in Italy, Spain and the UK: Time for change or missed opportunity? *ERA Forum*, 16, 125–147 and Loos, M. 'Enforcing consumer rights through ADR at the detriment of consumer law' (2016) (1) *European Review of Private Law*, pg. 61.

²⁶ See European Commission, Report From The Commission To The European Parliament, The Council And The European Economic And Social Committee On The Application Of Directive 2013/11/EU Of The European Parliament And Of The Council On Alternative Dispute Resolution For Consumer Disputes And Regulation (EU) No 524/2013 Of The European Parliament And Of The Council On Online Dispute Resolution For Consumer Disputes Com (2019) 425 Final and Biard, A., 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 142 *Journal of Consumer Policy* 109.

complexity are prevalent in some Member States where ADR providers are granted permission to operate in confined parts of sectors,²⁷ and non-certified private ADR entities (who fulfill national quality requirements but did not seek certification) can offer ADR services alongside certified ones.

The ADR Directive was transposed into the UK via two statutory instruments: the Alternative Dispute Resolution for Consumer Dispute (Competent Authorities and Information) Regulations 2015 and the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 (both instruments are herein referred to as 'ADR Regulations 2015'). Overall, the ADR landscape in the UK is characterized by a fragmented mixture of schemes across regulated and unregulated sectors.²⁸ This fragmentation is caused in a large part by a drive for competition between schemes,²⁹ an absence of a requirement for all ADR schemes to become certified and the absence of a requirement for businesses to participate in an ADR scheme in all sectors. Whilst it is common for businesses to be required to participate in ADR schemes in regulated sectors³⁰, businesses retain a large degree of discretion in the unregulated sectors. Additionally, the UK has adopted a largely sectoral approach to ADR certification and monitoring with several independent authorities operating in sectors. The Government took the view that "unpicking existing statutory relationships between regulators and ADR schemes would not be helpful and requiring ADR bodies to provide similar information to a regulator and a separate ADR Competent Authority would be duplicative and an unnecessary and costly burden"³¹

Overall, the ADR Directive has had some impact within Member States. In each Member States, ADR schemes are now available. However, in the light of the ADR Directive and the consequential growth of ADR schemes (with varying architectures) across the Union, consumers in cross border consumer disputes face a sectoral lottery as to ADR quality and are therefore subjected to a haphazard experience in resolving their disputes. It is not surprising that consumers are therefore confused³² as to the ADR schemes to be used for the

²⁷ For example, the AMF Ombudsman in France who can act in some financial services matters and not others. The AMF ombudsman can deal with disputes relating to investment services providers, but not in the areas of life insurance, taxation or bank transactions. See also Baird (n26), pg. 121 for further discussion.

²⁸ See also, Cortés, P., 'Consumer ADR in Spain and the United Kingdom' (2018) 2 EuCML, 82. Cortés describes the UK system as 'patchy'.

²⁹ On the desire for competition, see for example, CTSI chief executive letter to BIS (8 July 2016). Chartered Trading Standards Institute: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/559877/alternative-dispute-resolution-annual-CTSI-letter-fees.pdf

³⁰ See for example, the Financial Ombudsman Service for the financial sector.

³¹ BIS, Government response to the consultation on implementing dispute resolution directive and the online dispute resolution regulation. November 2014. Department for Business Innovation and Skills: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/377522/bis-14-1122-alternative-dispute-resolution-for-consumers.pdf

³² See UFC Que Choisir (2016) Généralisation de la médiation de la consommation. L'heure doit être à la bonne information: www.quechoisir.org/action-ufc-que-choisir-generalisation-de-la-mediation-de-la-consommation-l-heure-doit-etre-a-la-bonne-information-n13131/ and Biard, A (n 26), pg. 120.

resolution of their disputes. As such, it is arguable that the ADR Directive has underachieved in its goal to reduce 'barrier(s) to the internal market'³³ and increase consumer confidence.

1.2.2. ODR

The ODR Regulation created an online dispute resolution (ODR) platform which is operated and maintained by the EU Commission. The online platform facilitates the resolution of a dispute through the coordination claims. In this light, the ODR complements the ADR Directive, supporting the uptake of ADR processes for the resolution of disputes. The platform hosts the complaint form, informs the respondent party about the complaint, identifies national ADR bodies who will consider the dispute (if the trader agrees to its use) and supports electronic case management.

1.2.3. BREXIT

The state of play of European legislation within the UK at the end of the transition period is determined by the EU (Withdrawal) Act 2018 ('EUWA'), the EU (Withdrawal Agreement) Act 2020 ('WAA'), and Brexit related statutory instruments. The Withdrawal Acts give effect to the Withdrawal Agreement between the UK and EU. Substantively, EUWA repeals the European Communities Act 1972 (ECA 1972). However, EUWA simultaneously introduced savings provisions which preserve the legislative status quo during the transition period. At the end of the transition period, EUWA also creates a new category of UK law: EU retained law³⁴, a domestic form of law which is based on applicable EU law up to the end of the transition period. This species of law will be subject to statutory instruments, the majority of which came into force at the end of the transition period as well.

1.3. Impact on legislative measures

As the transition period has now expired, claimants in the UK are unable to avail themselves of the EOP and ESCP procedures against defendants in EU Member States.³⁵ Reciprocal enforcement of EU court decisions made under the EOP and ESCP Regulations are also no longer possible. The practi-

³³ Recital 6.

³⁴ Excluding the Charter of Fundamental Rights (see s5(4) EU (Withdrawal) Act 2018).

³⁵ The converse will also apply i.e. the use of these procedures by EU claimants against UK defendants will no longer be possible. The EOP and ESCP Regulations are revoked by the European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendment etc.) (EU Exit) Regulations 2018 (2018/1311) which prevents those Regulations from becoming part of retained EU law.

cal consequence of the removal of these procedures is a reduction in judicial options for UK and EU consumers to enforce their rights before national courts. In particular, should consumers wish to pursue a judicial measure to resolve their dispute, they will have no choice but to utilise regular civil court procedures in their respective State.

In addition to the removal of the EOP and ESCP, significant changes to the field of judicial cooperation in civil and commercial matters have transpired. Save for matters commenced prior to the end of the transition period³⁶, the Brussels Ibis regime no longer governs judicial cooperation in civil and commercial matters between the UK and EU. Within the UK, the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 ('CJJ')³⁷, modifies the existing framework. This SI revokes the application of Brussels Ibis and terminates the effect of the Lugano Convention 2007³⁸. Consequently, statute and the law of each UK jurisdiction will determine the rules governing jurisdiction, recognition and enforcement of judgments in cross-border disputes.³⁹ Within England and Wales, the provisions of the Civil Jurisdiction and Judgments Act 1982, the common law and Part 6 of the Civil Procedure Rules 1998⁴⁰ are key. However, the UK government has introduced exceptions to the revocation and, in relation to jurisdiction in consumer matters, have taken the approach of adopting and restating consumer specific Brussels Ibis rules into national law. Accordingly, pursuant to s. 26 CJJ, the Brussels regime rules on jurisdiction in consumer matters is *retained* and sections 15A, 15B, 15D and 15E is inserted into the Civil Jurisdiction and Judgments Act 1982⁴¹. These provisions largely mirror Sections 4 of Brussels Ibis.

Unlike the approach taken to the EOP and ESCP, the CJJ inserts provision to preserve the utility of EU law on jurisdiction in consumer matters after the transition period. S.15E(2) empowers English courts to have regard to, but not obliged to follow, "any relevant principles laid down before exit day by the European Court in connection with Title II of the 1968 Convention or Chapter 2 of the [Brussels Ibis] Regulation and to any relevant decision of

³⁶ Art. 67(1) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

³⁷ The Civil, Criminal and Family Justice (Amendment) (EU Exit) Regulations 2020 will also amend the CJJ in order to better align the savings provisions with Title VI of the Withdrawal Agreement.

³⁸ This approach is taken as the regime operates on a reciprocal basis and this reciprocity is lost due to Brexit. See paras. 2.3-2.5 of the CJJ's Explanatory Memorandum.

³⁹ There is an argument that pre-EEC judgment recognition conventions and treaties (not discussed in this paper) will resurrect. See for example, Dicey, Morris & Collins on The Conflict of Laws (Sweet & Maxwell, 15th ed, 2012), 5th Supplement. Potential revived instruments include: The Convention Between The United Kingdom Of Great Britain And Northern Ireland And The Kingdom Of The Netherlands Providing For The Reciprocal Recognition And Enforcement Of Judgments In Civil Matters 1967.

⁴⁰ See also Practice Direction 6B.

⁴¹ S.42 of CJJ inserts S42A into the Civil Jurisdiction and Judgments Act 1982. This provision incorporates the definition of domicile of a corporation or association as used in EU law for the purposes of s15.

that court before exit day as to the meaning or effect of any provision of that Title or Chapter...”⁴²

1.4. Impact on extra judicial measures

The approach to extrajudicial measures has been less drastic compared to the approach taken to judicial measures⁴³ and has largely involved removing references to EU legislation from EU-derived consumer protection legislation and the insertion of amendments to confirm equality of treatment for consumers from both EU countries and non-EU countries.⁴⁴ In respect of ADR regimes, ADR providers in the UK are no longer *required* to act in cross-border disputes and the ODR platform will no longer be available in the UK.⁴⁵ With regards to mediation specifically, the provisions of the Civil Procedure Rules to aid in the enforcement of cross-border mediation settlements have been revoked.⁴⁶

2. WHAT DOES THIS MEAN FOR CONSUMERS?

Given the impacts mentioned above, consumer choice of options to resolve cross border disputes is diminished. More importantly, the hierarchy between judicial and extrajudicial measures to resolve cross border UK/EU consumer disputes is now reversed. In particular, the option that grants consumers greater confidence and reassurance is likely to be the resolution of disputes via national court procedures rather than through ADR processes. This will worsen the enforcement gap for consumers, particularly as only 32.7 % of consumers think it is easy to settle disputes with retailers and service providers through the courts.⁴⁷

At present, the EU-UK Trade and Cooperation Agreement (“TCA”) currently governs the post Brexit relationship between the EU and UK in specific areas.⁴⁸ Unfortunately, the TCA is largely silent on a post transition agreement on judicial and extrajudicial mechanisms to facilitate the private enforcement of consumer rights. In specific sectors⁴⁹, it adopts a vague approach to measures

⁴² See s.15E 2(a).

⁴³ See the Consumer Protection (Amendment etc.) (EU Exit) Regulations (SI 2018/1326).

⁴⁴ See The Consumer Rights Act 2015 and the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations.

⁴⁵ Fn.43. Additionally, UK traders will no longer be able to offer consumers EU alternatives to UK-based ADR regimes.

⁴⁶ The Cross-Border Mediation (EU Directive) (EU Exit) Regulations 2019 and will repeal Part 78 of the CPR

⁴⁷ Consumer Scorecard, (n.16) pg. 28. This can be compared to 43% of consumers who think it is easy to settle disputes through an out-of-court body.

⁴⁸ The TCA was signed on 30 December 2020 and took provisional effect on 1 January 2021. It entered into force on 1 May 2021.

⁴⁹ E.g. e-commerce, air transport, energy.

to protect consumers, directing the ‘what’, but not the ‘how’ for enforcement of consumer protection.⁵⁰ Additionally, it does not address judicial cooperation in civil and commercial matters.

2.1. Judicial Tools

2.1.1. *The EU consumer*

For EU consumers, the continued operation of some provisions of Brussels Ibis between EU and UK parties remains a useful tool. The provisions in Section 4 are of note. These provisions are protective and are premised on the consumer being in a weaker position⁵¹ compared to other party to the contract. If the consumer successfully fulfils the gatekeeper provisions of Art.17, Art 18 gives the consumer a choice of bases to commence a claim—either the other party’s domicile (where that party is domiciled in a Member State) or, regardless of the domicile of the other party, in the consumer’s domicile.⁵² Where the consumer is the defendant in proceedings, the consumer can only be pursued in their domicile.⁵³ Art 18(1) is particularly beneficial to the EU consumer as it enables the consumer to commence a claim in its own domicile against a trader not domiciled in an EU Member State. In the post transition paradigm, this provision allows the EU consumer to maximise the procedural and jurisdictional advantages of its domicile against a UK trader, particularly one who does not have an established presence in the EU.

The inapplicability of the ESCP for EU-UK claims after the end of the transition period has removed the extra layer of protection that it afforded. EU consumers now face a limit on the options available to enforce their rights against UK domiciled defendants. Arguably, this leaves the EU consumer at a disadvantage compared to their UK counterparts. However, it is recognised that in practice, the ESCP and EOP procedures are underused by the EU consumer⁵⁴ and so the impact of the unavailability of the procedures in EU-UK disputes may not be as extreme as it appears.

⁵⁰ See for example, Article DIGIT.13 which seeks to afford protection of consumers engaged in online transactions between the EU and UK. The Article mandates the parties to “adopt or maintain measures to ensure the effective protection of consumers engaging in electronic commerce transactions, including but not limited to measures that[...] grant consumers access to redress for breaches of their rights, including a right to remedies if goods or services are paid for and are not delivered or provided as agreed.”

⁵¹ See recitals (14), (18) and (19) of Brussels Ibis.

⁵² An EU consumer is also free to utilise the residual or traditional jurisdictional rules in their domicile. (See Art. 6).

⁵³ Art 18(2). The rules in Art.18 are subject to the operation of Art.26.

⁵⁴ European Commission, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of the Regulation (EC) No. 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure (Commission ESCP Report), COM(2013) 795 final, Brussels, 19 November 2013; European Commission, Report from the Commission to the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of the Regulation (EC)

2.1.2. *The UK consumer*

Through the adoption and retention of the Brussels Ibis rules on consumer jurisdiction, the UK legislator has embarked upon a version of its 'copy out' exercise commonly used for the transplantation of EU Directives into national law. The 'copy out' exercise raises the danger of an incoherence between existing national law and newly implemented law⁵⁵ and has undermined the timely creation of a coherent system of consumer law within the UK in the past.⁵⁶ The concern is whether the domestic law provisions adopting and retaining the pre-Brexit interpretation of Art.17-19 Brussels Ibis will adequately align to existing national consumer law. It is argued that the interpretation of 'consumer' retained for the functions of s15 of Civil Jurisdiction and Judgments Act 1982 does not adequately align with the existing interpretation of consumer under key domestic law provisions such as s.2(3) of the Consumer Rights Act ('CRA').⁵⁷ A key concern arises from the thresholds for a 'consumer' in mixed purposes contexts. Whereas the CRA incorporates a wider "wholly or mainly" threshold in its definition of 'consumer', EU law contains a narrower construction for the purposes of the operation of Art. 17, preferring instead to focus on whether the trade or professional element was 'marginal to the point of having a negligible role'.⁵⁸ Accordingly, wholesale adoption of the Art. 17 definition into UK domestic law effectively creates two different interpretations (and tiers) of 'consumer', fragmenting the alignment between standards and enforcement in national consumer law. The utilisation of this threshold for the purposes of s15 of Civil Jurisdiction and Judgments Act 1982 severely limits the range of UK consumers who can benefit

No. 1896/2006 of the European Parliament and of the Council creating a European Order for Payment Procedure (Commission EOP Report), COM(2015) 495 final, Brussels, 13 October 2015. See also Onjanu E, *Cross-Border Debt Recovery in the EU. A Comparative and Empirical Study on the Use of the European Uniform Procedures* (Intersentia 2017); Hess B et al (ed.), *Mutual Trust and Free Circulation of Judgments Study* (2017) available at: <https://publications.europa.eu/en/publication-detail/-/publication/531ef49a-9768-11e7-b92d-01aa75ed71a1/language-en> , pg.340 -347. Eurobarometer 395 showed that 86% of citizens had never heard of the ESCP.

⁵⁵ See discussion in Van Hoecke M, *et al*, 'Legal cultures, legal paradigms and legal doctrine: towards a new model for comparative law' (1998) 47 *International and Comparative Law Quarterly* 495, 533. See also Giliker, P., 'The transposition of the Consumer Rights Directive into UK law: Implementing a maximum harmonisation directive.' (2015) 23(1) *European Review of Private Law* 5.

⁵⁶ See Giliker, *ibid* and her discussion of the transposition of the Consumer Rights Directive.

⁵⁷ Section 2(3) CRA defines 'consumer' as: 'an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession'. An individual is a 'natural person' (See CRA Explanatory Notes, para. 36). A consumer under Art.17 of Brussels Ibis is regarded to be a person who concludes a contract for a purpose outside and independently of his present or future trade/profession. See also *Benincasa* Case C-269/95, [1997] ECR I-3767, *Overy v Paypal (Europe) Ltd* [2012] EWHC 2659, citing *Benincasa*.

⁵⁸ *Bay Wa AG v. Gruber* C-464/01, [2005] ECR I-439. Given that the ECJ in *Schrems* applied the 'predominant test' at the enforcement stage of the contract, EU law is one step away from inserting this test at the earlier 'creation' stage when the contract is actually agreed. *Schrems* can be distinguished in that the case concerned the evolution of the weaker party's position where they slowly take on professional services but was originally a consumer.

from its provisions. A realignment of the meanings of the term will need to be executed. The domestic courts can utilise the interpretive freedom available to them under s.15E (2) and expand the adopted meaning of 'consumer' to achieve a better alignment. This can only benefit UK consumers and offers them more space for enforcement before national courts compared to consumers based in EU Member States. With regards to defendants, the reference to 'other party'⁵⁹ as used by Brussels Ibis is unlikely to pose similar problems to 'consumer' as this term adequately covers 'trader' as used in s.2(2) of the CRA.

In addition to the above, for a consumer to benefit from the provision of s15, the contract itself must still fall within the purposive definition of a 'consumer contract' as elucidated under s15E(1). This provision incorporates the EU approach in Art 17 (1)(a) - (c) and Art. 17(3) and reaffirms the position that not every contract entered into by a consumer will be a 'consumer contract'. From a UK consumer perspective, the adoption of the law behind Art. 17(1) (c) does have a benefit. Given its wide material scope⁶⁰ and its low threshold to establish 'activities pursued' and 'activities directed'⁶¹, UK consumers will benefit from the ease in which a consumer contract with an EU retailer can crystallise to enable them to seize the advantage of their domestic jurisdiction to resolve a claim.

An additional benefit to the UK consumer is given by s.15B 5(c) which preserves the operation of any other rule of law which permits a person not domiciled in the UK to be sued in the courts of a part of the United Kingdom. This is particularly useful to the consumer given the operation of the common law rules on submission to the jurisdiction of the English courts. Additionally, the classic requirement for claimants to seek permission to serve out of jurisdiction (where the defendant is outside the UK) is dispensed with where the court has jurisdiction under the new s15 rules for consumers.⁶² This dispensation of permission bolsters the value of S. 15B and complements the safety net provided by s.15B 5(c) for the English consumer.

⁵⁹ s2(2) CRA defines 'trader' as: a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf. Reference to "Other Party" in the Brussels Ibis refers to a party engaged in commercial or professional activities (See See C-508/12 *Vapernik v Thurner* [2014] 1 WLR 2486)

⁶⁰ C-180/06 *Ilsinger v. Schlank & Schick GmbH (in liq)* [2009] ECR I-3571, [50].

⁶¹ Subject of course to the need for the retailer to exhibit 'positive conduct' preceding the consumer's involvement. (See: joined cases of *Pammer v. Reederei Karl Schlatter & Co KG* and *Hotel Alpetihof GmbH v. Heller* [2010] ECR I-12527) The test to determine whether a trader has directed activities seems to be an objective one and each case will be decided on its facts - See *Pammer*) See also the factors listed in The Joint Statement by the Council and Commission on Arts 15 and 73 of the Brussels I Regulation.

⁶² CPR r. 6.33(2). See also: Civil Procedure Rules 1998 (Amendment) (EU Exit) Regulations 2019 (SI 2019/521).

2.1.3 .Recognition & Enforcement

The inapplicability of Brussels I bis regime to EU-UK cross border dispute resolution has its greatest impact on UK and EU consumers in the cross-border enforcement of decisions.

2.1.4. *The UK consumer*

It is noteworthy that the logic of the UK approach to jurisdiction lies in the belief that the adopted provisions provide “ a right to sue the other party in such a dispute in parts of the UK with relevant connections – all of which largely obviates the need for the consumer, ...to sue abroad in such cases (with the attendant expense and difficulty for this category of economically weaker parties which having to sue outside their own forum brings).”⁶³ This seems to demonstrate that the greater focus of protection lay in the issue of jurisdiction rather than in enforcement.⁶⁴ The deficiency in the UK government’s thinking is the belief that the approach to jurisdiction “*obviates* [emphasis added] the need for the consumer ... to sue abroad”. The UK government seems to have overlooked that in consumer claims, where the sums involved can be minimal, the enforcement costs of cross-border judicial decision may exceed the value of the claim, thus deterring consumers from pursuing the enforcement of their rights at the outset. The value of the ability to sue an EU retailer in the UK is only maximised or enhanced if the consumer has confidence that any successful domestic judgement will be easily recognised and/ or enforced in the domicile of the retailer in an EU Member State.

As a matter of principle, judgments obtained at the end of the transition period will not be automatically recognised and enforced in the respective national jurisdictions of the parties but will be subject to national rules on recognition and enforcement.⁶⁵ From a UK claimant perspective, reversion to individual national rules raises practical concerns. These include coping with variations of public policy in different EU Member States with regards to enforcement of foreign (here UK) judgments and the unenforceability of costs awards in some EU states. The latter is particularly problematic as, depending on the Member State concerned, these types of judgments will not be recognised in their jurisdictions.⁶⁶ This extra layer of difficulty complements the existing challenge to judgement creditors to navigate divergences across Member States as to the competent authority responsible for enforcement.⁶⁷

⁶³ Paragraph 2.6 and 7.19 of the CJJ’s Explanatory Memorandum.

⁶⁴ See comment on jurisdiction above.

⁶⁵ It is recognised that the revocation of Brussels Ibis, the reanimation of bilateral treaties on recognition and enforcement of decisions between some EU Member States and UK is theoretically possible. These include Austria, Belgium, France, Germany, Italy.

⁶⁶ These would have previously been enforceable under Art 2(a) of Brussels 1 bis.

⁶⁷ See Hess et al (fn.16) para.311 ff.

Overall then, UK consumers can expect an increase in the timing and costs of enforcement proceedings.

Due to these enforcement difficulties, it is foreseeable that more proficient UK consumers may embark upon actions in the domicile of the EU trader. However, this will be fraught with difficulty. Recent jurisprudence has shown that some Member State courts are steadfast in their application of national procedural rules that were not previously applicable to UK claimants as long as the UK was part of the EU.⁶⁸ This (re)emerging burden, coupled with known challenges, such as language barriers, and those discussed in the preceding paragraph cumulatively increase the enforcement deficit that UK consumers face.

2.1.5. A trader's perspective

In English common law, a key criteria to enable enforcement of a foreign decision is whether, from the English court's perspective and according to English private international law, the foreign court had 'international jurisdictional' competence over the defendant- i.e. the foreign court is entitled to summon the defendant and subject it to judgement.⁶⁹ The foreign court's own view as to whether it had jurisdiction according to its own domestic law is immaterial.⁷⁰ This international jurisdictional competence is determined according to whether the defendant was present when proceedings in the foreign court were instituted, or the defendant voluntarily submitted⁷¹ himself to the jurisdiction of that court. In essence, both standards generally require a positive act on behalf of the defendant to subject itself to the foreign court. Where a defendant is absent from a country, the defendant will not be deemed to be subject to jurisdiction of a court unless he has voluntarily submitted to that court.⁷² Accordingly, it is argued that an EU trader, who contrary to s15(B)(3) commences an action outside of the UK consumer's domicile when the consumer has not submitted to that foreign court's jurisdiction, will find that its subsequent judgement is unenforceable before the English

⁶⁸ See the German experience where litigants with a habitual residence in the UK were required to provide security for the likely costs of the defendants pursuant to s110 of the German Code of Civil Procedure (Federal Supreme Court on 1 March 2021 and by the Federal Patent Court on 15 March 2021). The CJEU in C-323/95, *David Charles Hayes and Jeanette Karen Hayes v Kronenberger GmbH* ruled the application of this requirement to EU claimants as illegal. This decision was based on the prohibition of discrimination on the grounds of nationality (today Art 18 TFEU, ex Art 12 TEC). See also Dutch courts in *Global Foods Network v RM Support BV*, ECLI: NL: RBOVE: 2018: 4365 - Overijssel District Court, 07-11-2018 / C / 08/219128 / HA ZA 18-278.

⁶⁹ See, e.g. *Salvesen v Austrian Property Administrator* [1927] AC 641, 659, *Pemberton v Hughes* [1899] 1 Ch 781. In common law, the foreign judgment must also be 'final and conclusive' and be for a fixed sum of money.

⁷⁰ Briggs, A. *Civil Jurisdiction and Judgements* (6th ed., Routledge 2015) para. 7.47.

⁷¹ Submission includes being the claimant, voluntarily appearance (subject to restrictions on what is appearance to contest jurisdiction in s33 Civil Jurisdiction and Judgements Act 1982).

⁷² *Harris v Taylor* [1915] 2 KB 580, 589.

courts. This high risk of non-enforcement exists due to the combined operation of both the common law rules and the policy objectives underpinning the UK's approach in the CJJ. Indeed, para. 7.19 of the CJJ's Explanatory Memorandum reiterates the need to "ensure that the consumer ... should in general not ... be sued, in a jurisdiction which is unfamiliar to him in terms of, for example, language."⁷³

Where the reverse is present – i.e. a UK trader has commenced action in their domicile against an EU consumer who has not submitted to the jurisdiction of a court in the UK, the question arises as to whether the provision of Art. 45(1) (e)(i) Brussels Ibis should apply to preclude enforcement of the decision in an EU Member State. As matter of interpretation, the answer is no as the decision would not fulfil the meaning of a 'judgment' in Art.2 of the Brussels Ibis (i.e. judgement *given by a court or tribunal of a Member State* [emphasis added]) and questions of enforcement are left to the domestic law of the court of the Member State where the UK trader is seeking enforcement⁷⁴. As a matter of principle, it seems counterproductive for Brussels Ibis to retain protective jurisdiction over matters relating to EU consumers where a non-EU party is involved, but not offer the same protection and govern the enforcement of non-EU decisions that violate that protective jurisdiction. Arguably the ethos of, and degree of the protection offered in section 4 (particularly Art 18(2)) is undermined by enforcement of a violating non-Member State decision being left to the national law of each Member State.

Art. 45 Brussels Ibis can be viewed as an 'insurance' provision, providing an extra layer of protection at the enforcement stage to address circumstances where the jurisdictional rules in Section 4 Brussels Ibis are not followed. However, it is noteworthy that s26 CJJ has not incorporated an equivalent provision of Art.45 (1)(e) Brussels Ibis into domestic law. The absence of this equivalent protection is not a detriment as it appears. Arguably, the common law rules on enforcement elucidated above, will operate to curtail the effect of the absence of this provision. In particular, it could be argued that failure of an EU trader to sue the UK consumer in the consumer's domicile, negates a finding that the foreign court hearing the EU claimant's claim had 'international jurisdictional' competence to give a judgement. Additionally, the potential for abuse of intra-UK jurisdictional arrangements is mitigated by the combined operation of s. 15(D)(5) and s.15(D) (6) which create a jurisdictional shield for the consumer where that consumer has not entered an appearance when it is sued by an unscrupulous EU trader in a court of a part of the United Kingdom other than the part in which it [consumer] is domici-

⁷³ The UK legislator sought to retain the approach inherent under the Brussels Ibis section 4 rules so that the protective rule on suing the consumer in his domicile is continued irrespective of the domicile of the trader. Additionally, with the exception of the operation of CJJ, the same risk of non-enforcement of a judgement from an EU Member State judgement is present where EU consumers commence claims in their domicile against a UK trader.

⁷⁴ See AG Lenz in Case C-129/92 *Owens Bank v Bracco (No.2)* [1994] QB 509 at para. 22-23.

led. In such cases, subject to narrow exceptions,⁷⁵ a court other than a court in the defendant consumer's domicile *must declare of its own motion* that it has no jurisdiction. This approach is analogous to Article 28 Brussels Ibis and its effect is the incorporation into domestic law of a natural justice threshold where intra-UK jurisdictional consumer matters are concerned. Whilst this level of protection at the outset is to be welcomed, there was an opportunity to go further and expand the scope of the obligation imposed on the courts to decline jurisdiction. A consumer who wishes to contest jurisdiction before a court in a part of the United Kingdom other than the part in which it is domiciled is likely to be pulled into making an appearance before that court. This is not without costs and inconvenience to the consumer, the burden of which can be challenging for a weaker party in a dispute. Arguably, the consumer should be given greater protection. As such, the creation of a similar provision to s. 15(D) (6) to require courts other than those in the consumer's domicile to declare *of their own motion that they have no jurisdiction* should be considered wherever the consumer's evidenced response to a claim is that their domicile is in another part of the United Kingdom. This would protect the consumer from the costs associated with entering an appearance, even if to contest jurisdiction.

2.2. Extrajudicial tools

2.2.1 ADR Directive

The ability of EU and UK consumers to take advantage of ADR regimes to resolve UK-EU cross border complaints largely depends on the type of ADR provider and the implementation of the ADR Directive in each Member State.

As a matter of principle, the ADR Directive has a specific jurisdictional scope and applies to procedures for the out-of-court resolution of domestic and cross-border disputes between a trader established in the Union and a consumer resident in the Union.⁷⁶ Operationally, the Directive's obligations are imposed on Member States. Member States are required to 'facilitate' access for EU consumers to ADR and to 'ensure' an ADR procedure is available for the resolution of a dispute where such dispute involves a trader established on their respective territories.⁷⁷ The trigger for a Member State's adherence to the ADR Directive's requirements is not the location of the consumer but on the location of the trader. Additionally, a Member State's obligation to facilitate access to an ADR process for the resolution of 'cross border' disputes under Art.5 is tied to an ADR entity that has been certified.⁷⁸

⁷⁵ For example, in proceedings brought in relation to movable property.

⁷⁶ Art 2(1) of the ADR Directive.

⁷⁷ Art.5(1) of the ADR Directive.

⁷⁸ Art 4(1)(h) of the ADR Directive defines an 'ADR entity' as 'any entity, [...] that is listed in accordance with Article 20(2)'.

With regards to UK consumers utilisation of EU based ADR schemes to resolve their dispute with an EU based trader, the question is whether Member States have inserted the jurisdictional limitation on 'cross border' and adopted the full meaning of 'ADR entity' when transposing the ADR Directive into their domestic law so as to preclude the benefit of the schemes in its territory by non-EU consumers. If not, the issue is determined by competence - which ADR schemes in that Member State considers itself competent to deal with a case.⁷⁹ If the law transposing the ADR Directive does not contain any limitation, then non-EU users of ADR schemes in Member States can indirectly benefit from the quality and information requirements imposed by the ADR Directive, even though they were designed for EU consumers.

It is also noteworthy that in line with the minimal harmonisation approach, the Directive does not preclude Member States from adopting or maintaining rules that go beyond what is provided for in the Directive⁸⁰, neither does it preclude Member States from fulfilling their obligations under the ADR Directive by building on existing properly functioning ADR entities and *adjusting their scope of application*. Accordingly, Member States do have the freedom to enable non-EU consumers to benefit from ADR procedures in their jurisdiction should this be required.

However, within the UK, the obligation in Art 5(2) of the ADR Directive was given effect in national law through s.9(4) and Sch. 3(1) of the ADR Regulations 2015. In its transposition of the ADR Directive, the UK legislature adopted the 'copy out' approach, albeit with modification. Whilst the 'copy out' method of transposition meant that capacity to act in 'cross border'⁸¹ cases is linked to certification, it is notable that under the ADR Regulations 2015, 'cross border' is given a narrower scope than that used in the ADR Directive. Whereas the ADR Directive defined 'cross border' as dispute arising between a "...consumer ...resident in a Member State *other than the Member State in which the trader is established* [emphasis added]"⁸², the ADR Regulations 2015 adopted a definition restricting 'cross border' to disputes where "...the trader is established in the United Kingdom [emphasis added] and the consumer is resident in another member State..."⁸³.

Under the Brexit SI⁸⁴, a 'strike out' approach has been taken which removes the references of 'cross border' throughout the ADR Regulations 2015.

⁷⁹ See Gascón Inchausti F, 'Transplanting Best Practices from ADR Mechanisms to Court Proceedings in Cross-border Litigation?' in Hess B., Kramer X., (eds.) *From common rules to best practices in European Civil Procedure*, (2017) 8 Studies of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law. Gascón Inchausti argues that international procedural law is not applicable in the consumer cross border ADR context as a State's powers are not at stake.

⁸⁰ Recital 38 of the ADR Directive.

⁸¹ Defined as 'a dispute concerning contractual obligations arising from a sales contract or a service contract where, at the time the consumer orders the goods or services, the trader is established in the United Kingdom and the consumer is resident in another member State'.

⁸² ADR Directive, Art. 4(1)(f).

⁸³ Part 1, s.5 of the ADR Regulations 2015.

⁸⁴ See fn. 47.

The consequence is that 'certified' UK ADR entities are no longer able to act in disputes where a UK trader and EU resident consumer is concerned. Arguably, the strike out approach has been much more drastic than required. The Explanatory Memorandum⁸⁵ to the Brexit SI justifies the 'strike out' approach on the basis that "...it will no longer be appropriate for ADR entities to be required to resolve cross-border disputes involving residents of other member states."⁸⁶ Unfortunately, the memorandum does not give a rationale as to why it would be inappropriate for an ADR entity to resolve disputes involving a UK trader and an EU consumer. Given that the ADR Regulations 2015 are designed to govern questions of quality of ADR schemes and do not address aspects of enforcement of ADR decisions, the UK's strike out approach is surprising.

The aforementioned consequence does not mean that all UK based ADR schemes are precluded from resolving disputes between a UK trader and EU consumer. As mentioned earlier, the Directive did not make certification compulsory for all ADR entities. Therefore, it is theoretically possible that non-certified ADR entities can act in the resolution of disputes between UK traders and EU consumers. The use of non-certified ADR entities is not a new phenomenon and there is evidence of their growth and operation in the UK and some EU countries.⁸⁷ Whilst the use of these non-certified entities may not be a problem where they practically fulfil the quality requirements as listed in the ADR Directive, it will be a problem where they do not. The absence of certification leaves the long-term continuous adherence to quality standards to chance. It is not an ideal solution for the protection of weaker parties in a dispute. Should a better solution not be found to enable EU-UK cross border ADR, consumers will be pushed into the deregulatory space where these schemes operate with little guarantees of quality.

2.2.2. ODR

Despite its predominant case management function, there is growth in the use of the EU's ODR platform. 50% of the complaints on the ODR platform are cross-border in nature⁸⁸. Interestingly, consumers and traders from Germany and the UK make up the largest proportion of cases lodged on the

⁸⁵ Explanatory Memorandum to The Consumer Protection (Amendment Etc.) (EU Exit) Regulations 2018 No. 1326.

⁸⁶ *Ibid.*, para. 2.11.

⁸⁷ See Citizen's Advice, *Confusion, gaps, and overlaps. A consumer perspective on alternative dispute resolution between consumers and businesses for a UK perspective* < <https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Gaps%20overlaps%20consumer%20confusion%20201704.pdf> > accessed 2 May 2021 and Miquel, R. 'The implementation of the consumer ADR directive in Germany' in Cortés P. (Ed.), *The new regulatory framework for consumer dispute resolution* (Oxford University Press 2016) pp. 169.

⁸⁸ Functioning of the European ODR Platform, Statistical report, December 2020. pg.3. Accessed via: https://ec.europa.eu/info/alternative-dispute-resolution-reports_en

platform.⁸⁹ However, despite the large number of cases lodged, the platform is underachieving its goals and the efficacy of the platform requires improvement. The success rate of a dispute being referred to an ADR entity is approximately 2% and 83% of the complaints lodged have been automatically closed after the 30-day legal deadline.⁹⁰ Nonetheless, the ODR platform seems to be practically working through the use of soft pressure to facilitate resolution of consumer disputes. 20% of the consumers who initiated complaints (or direct talks with the trader) expressed the view that their dispute had been resolved through the platform or outside of it. Furthermore, 18% of respondents were still in discussions with the trader with a view to resolve their dispute.⁹¹ As such, the inability to use the platform for cross border consumer dispute resolution between EU-UK parties will be a loss for consumers from both jurisdictions. This is particularly so for those at the weaker end of the spectrum as consumers. The platform seems to be particularly useful in facilitating the resolution of everyday retail cases in the airline (14.8%), clothing and footwear (10.6%) and ICT goods (6.2%) sectors.⁹²

3. POTENTIAL OPTION FOR THE FUTURE

In the light of the preceding discussion, it is arguable that there is one feasible option for the UK and EU to mitigate the impact of the impediments to effective consumer dispute resolution between EU and UK entities: Accession to the Lugano II Convention + Bilateral Agreements (Swiss Model). It is this author's view that the Swiss Model approach is the most appropriate given the policy positions of the UK and the nature of the legal and regulatory architecture required for effective consumer dispute resolution between EU and UK parties.

3.1. Swiss Model

3.1.1. *The Lugano Convention*

The Lugano II Convention ('the Convention') is in effect, a mirror of the Brussels I Regulation⁹³ for matters of jurisdiction and recognition and enforcement of judgments. However, the Convention does not contain the same degree of protective jurisdiction for consumers as Brussels Ibis, nor does it contain the same enforcement process. Nonetheless, it is argued that the di-

⁸⁹ Functioning of the European ODR Platform, Statistical report, December 2020. Accessed via: https://ec.europa.eu/info/alternative-dispute-resolution-reports_en

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ Brussels I Regulation (EC) No 44/2001 of 22nd December 2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters.

fference is not as detrimental as it appears. With regards to the special jurisdictional privilege granted to consumers, a major shortfall of the Convention lies in the narrower scope of the jurisdictional privilege offered. In particular, there is an absence of the ability for the consumer to sue in the court of its domicile where the dispute is with a trader from a third country.⁹⁴ However, the absence of this privilege will have no bearing on the resolution of disputes between EU and UK parties if the UK becomes a party to the Convention in its own right. With regards to the protection offered to the special jurisdictional bases in enforcement, Art 35 of the Convention offers a similar level of protection as Art 45 1(e) Brussels Ibis.

Given the current absence of any agreement on judicial cooperation in civil and commercial matters, accession to the Convention should be a palatable compromise for both the EU and UK in the absence of a readily available, suitable alternative. From a UK political perspective, accession to the Convention is attractive as it offers an indirect avenue for the UK to influence interpretative matters in both the Lugano and Brussels regimes. As a party to the Convention, Protocol 2 would entitle the UK to make written submissions to the CJEU if an EU Member State refers a question on the interpretation of the Lugano Convention to it. However, the scope of this entitlement extends beyond the Convention, and the UK will also be able to make submissions when a question on the interpretation of the Brussels I Regulation is submitted. Given the continued relevance of the Brussels I Regulation case law to the interpretation of the Brussels Ibis regime, this offers an indirect, albeit limited, avenue for the UK to influence EU jurisprudence in this field.

The UK has applied to accede to the Convention as an independent member.⁹⁵ Accession would require the agreement of all signatories, including the EU. However, at the date of writing, unanimous agreement has not been reached on the UK's application⁹⁶ and the EU Commission has recommended that the UK's application for accession should be rejected.⁹⁷ The crux of the EU Commission's objection lays in its perspective that the Convention is a "flanking measure for the EU's economic relations with the EFTA/EEA countries... [and] supports the EU's relationship with third countries which have a particularly close regulatory integration with the EU, including by aligning with (parts of) the EU *acquis*"⁹⁸ The Commission took the view that "[t]he United Kingdom is a third country without a special link to the internal market. ..."⁹⁹

⁹⁴ Arts. 15 and 16 of the Convention.

⁹⁵ See: https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-conventions/Lugano2/200414-LUG_en.pdf

⁹⁶ Whilst the non-EU countries have backed the UK's accession, the EU has not given its consent at the date of writing.

⁹⁷ See EU Commission, Communication From The Commission To The European Parliament And The Council Assessment On The Application Of The United Kingdom Of Great Britain And Northern Ireland To Accede To The 2007 Lugano Convention, Com (2021) 222 Final.

⁹⁸ *Ibid.*, section 2.1.

⁹⁹ EU Commission Communication (fn. 105), section 3.

The basis for the EU Commission's recommendation is to be questioned. Arguably, the occurrence that Contracting Parties to the Convention are in some form of regulatory integration with the EU is a matter of coincidence rather than what is required by the Convention itself. Indeed, the wording of Art 70(1) of the Convention demonstrates that the Convention envisages the accession of countries with varying degrees of connection to EFTA/EEA states, including no connection at all. In particular, the wording of Art 70(1) (c) seems to provide for "any other State" to apply to become a Contracting Party of the Convention. Arguably, what should be the key basis for admittance to the Convention is the potential for synergy between the Convention, the internal law concerning civil procedure and enforcement of judgments of the applicant state as well as the private international law relating to civil procedure in that state.¹⁰⁰

In its Communication, the Commission was of the view that the Hague Conventions (particularly, the Hague Judgments Convention¹⁰¹) should provide the framework for future cooperation between the European Union and the UK in the field of civil judicial cooperation.¹⁰² It is argued that this approach would not offer the optimum basis of protection for the cross-border protection of consumer interests. The advantage of the Brussels and Lugano systems lies in the duality and complementarity of the protection offered to consumers in jurisdiction and recognition and enforcement matters in those instruments - for example, the relationship between Section 4 and Art 45 Brussels 1 bis. On the other hand, the Hague Judgments Convention only governs enforcement and so, by itself, would be a half measure for the adequate protection of consumers in cross border disputes.¹⁰³

Substantively, it is argued that the provisions of the Hague Judgments Convention will offer less protection to consumers seeking to enforce judgments against foreign traders.¹⁰⁴ Where the consumer is a judgment *creditor*, the provisions of Arts. 5(1), 5(3) and 6 will apply and the consumer will need to satisfy the gateway provisions contained in those articles.¹⁰⁵ Of note are

¹⁰⁰ See Art 72(1)(c) of the Convention which provides: "Any State referred to in Article 70(1)(c) wishing to become a Contracting Party to this Convention: [...] (c) shall provide the Depositary with information on, in particular: (1) their judicial system, including information on the appointment and independence of judges; (2) their internal law concerning civil procedure and enforcement of judgments; and (3) their private international law relating to civil procedure".

¹⁰¹ Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, 2019.

¹⁰² See Section 3 of the Communication.

¹⁰³ For further comment on the Hague Judgments Convention and consumer protection (particularly on the consumer as a *judgment debtor*), see de Araujo, N. and De Nardi, M., 'Consumer Protection Under the HCCH 2019 Judgments Convention' (2020) *Netherlands International Law Review* 67. It is noteworthy that the Hague Convention on Choice of Court Agreements (which is envisaged as complementing the Hague Judgments Convention) expressly excludes consumer matters from its scope - see Article 2(1)(a).

¹⁰⁴ At a basic level, the Hague Judgments Convention enables broader grounds than Brussels 1bis and the Convention for the refusal of recognition and enforcement of judgements. (Art.7).

¹⁰⁵ Art 5(2) applies where the consumer is a defendant. It is noteworthy that the Hague Judgments Convention confines its applicability to consumers in a contractual relationship with the trader.

the indirect jurisdictional bases of recognition and enforcement under Art 5(1). The trend in the wording of 5(1)(a),(b),(d) and (g) is that a close, strong nexus between the defendant and the court of origin of the judgment is to exist in order for the judgment to be enforced in a contracting State. This is noticeably more substantial/concrete test than the one used under Art 17(1) (c) Brussels 1bis i.e. ‘positive conduct’ and ‘directed activities’. Given the preference for the connection to be based on “habitual residence” (Art. 5(1) (a), “principal place of business” (Art. 5(1)(b)) and “purposeful and substantial connection” (Art 5(1)(g), it is doubtful whether judgments given at the consumer’s domicile pursuant to the *forum actoris* provisions of Art 17(1) (c) Brussels 1bis and s.15 of the Civil Jurisdiction and Judgments Act 1982 would be recognised under the Hague Judgements Convention.¹⁰⁶ This is particularly the case where the consumer has obtained judgment in their domicile, which is not also coincidentally a place listed under Art 5(1)(a)–(g). Whilst Art 5(1)(g) of the Hague Judgements Convention may provide some relief to consumers where the place of performance is in their domicile. It is noteworthy that Art. 5(1)(g) imposes the ‘safeguard’¹⁰⁷ requirement of a substantial presence/connection of the defendant in the jurisdiction of the court giving judgment. As such, consumers with disputes involving traders of occasional presence/marginal connection to the place of performance of the contract may find it difficult to enforce a judgment in their favour. This is likely to be the case where the trader does not actively direct their activities to the place of performance under the contract with the consumer.¹⁰⁸ Additionally, the safeguard will also work to preclude the enforcement of judgments based on disputes arising from consumer contracts performed online as the “connection with the State of origin may be merely virtual and therefore insufficient to justify circulation of the judgment under the Convention.”¹⁰⁹

In light of the above, it is argued that accession to the Convention is the optimum option for the cross-border jurisdiction and enforcement matters. However, even if accession is granted, the delay in the UK’s accession will create a lacuna in the temporal scope of application of the Convention¹¹⁰, creating even further complexities for consumers to navigate. On the assumption that consent is eventually granted,¹¹¹ the question arises as to whether a

¹⁰⁶ It is noteworthy that Art. 5(1) (g) requires a connection between the place of performance of an obligation and the court giving judgement. Therefore, enforcement is unlikely to be an issue where a consumer’s domicile coincides with the place of performance. It will be when it does not.

¹⁰⁷ See Explanatory Report, Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, para. 187.

¹⁰⁸ An example is where the consumer is domiciled in England, enters into a contract with a German domiciled trader whose main activities are directed to Spain with occasional activity directed to England and the place of performance of contract is France.

¹⁰⁹ See Explanatory Report, Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, para. 187.

¹¹⁰ In order for the Convention to have entered into force after the end of the Brexit transition period, the UK had to have received the EU’s approval and deposited its instrument of accession by 1 October 2020. Neither have occurred.

¹¹¹ Art. 69(5) of the Convention provides that it “shall enter into force in relation to any other Party on the first day of the third month following the deposit of its instrument of ratification”.

retrospective application of the Convention from 1st January 2021 onwards is possible to provide protection for consumers commencing claims in that temporal lacuna.

Arguably, the effect of the wording of Article 63 (1) of the Convention is that its rules will apply only to cases commenced after the UK has re-joined. As such, cases commenced prior the UK's re-joining will not benefit from the Convention's jurisdiction and enforcement rules. However, Art. 63 2(b) somewhat mitigates the danger for consumers and seems to provide an exception to this provision. It enables claims instituted before the UK re-joined to be subsequently enforced if a decision in the proceedings is given after the entry into force of the Convention when the UK re-joins. In particular, the wording of Art. 63(2)(b) seems to provide for alternative bases for this, either: 1) "if jurisdiction was founded *upon rules which accorded* [emphasis added] with those provided for either in Title II or, 2) in a convention concluded between the State of origin and the State addressed which was in force when the proceedings were instituted." It is arguable that the wording of the first provision seems to be a test of similarity - whether jurisdiction was founded upon rules similar to/the same with those in Title II. Accordingly, it is argued that, as the new sections 15A-15E of the Civil Jurisdiction and Judgments Act 1982 are adopted provisions of Brussels Ibis (which are, subject to minor changes in wording - substantially the same wording under the Brussels 1 Regulation), these rules are similar to that of Section 15-17 of the Convention. Thus, it is argued, would inherently 'accord with those provided for ... in Title II' of the Convention. As such, upon the date of re-joining, it is arguable that decisions given by a UK court after entry into force would be enforceable under the Convention. Given the current precarious position of consumers and the legal complexities for consumers to resolve cross border disputes, it is submitted that a retrospective application of the Convention would be the better option.

However, the operation of the Convention on its own will be an inadequate tool to facilitate the provision of effective consumer dispute resolution. The use of an additional bilateral agreement on extrajudicial measures (such as on cross border ADR and mediation) and regulatory cooperation is to be encouraged. The latter is particularly important given the break in consumer protection cooperation arrangements between UK and other EU member state authorities after Brexit. To future proof the bilateral agreements, it is recommended that 'ratcheting provisions' are included to adequately cater for future progression in the standards in consumer protection between the EU and UK. This can include future improvements in the standards ADR entities need to hold to be certified to act in the resolution of cross border disputes between parties within the UK and EU Member States. These ratcheting provisions will also enable each party to make updates to any agreement in a timely and uncomplicated manner. Indeed, the need for cooperation between UK and EU Member State regulatory bodies is touched upon in the TCA. In digital trade, the importance of 'entrusting consumer protection agencies

with adequate enforcement powers and the importance of cooperation between these agencies in order to protect consumers...’ was recognised.¹¹² Bilateral agreement(s) facilitate the achievement of that envisioned cooperation.

CONCLUDING REMARKS

EU judicial cooperation in civil matters is based upon the concept of mutual trust. Third States who do not fully and comprehensively subscribe to these principles cannot expect to be given the same level of deference and involvement as a Member State. Irrespective of the post-Brexit route it takes, cross border consumer dispute resolution will not be the same between the UK and EU Member States prior to Brexit. The overriding aim of the future relationship in this area should be to reduce as many hurdles as possible to enable effective consumer dispute resolution between parties in the UK and EU.

The UK’s Brexit legislation does not seem to adequately take into account the practical challenges for consumers in resolving their cross-border disputes. By focusing the support in Brexit legislation on judicial proceedings before the courts, it is likely that UK consumers will face hurdles such as increased costs and longer proceedings that will deter these consumers from enforcing their rights. Additionally, what seems to be underestimated is the value of efficient reciprocity in the enforcement of judicial decisions in consumer disputes between UK consumers and EU traders. Based on the Explanatory Memorandum for the CJJ, the focus of the UK legislature seems to have been on rules governing enforcement of foreign decisions within the UK, less so of need to mitigate the difficulties of weaker parties such as UK consumers enforcing judgments in EU Member States. Where EU and UK consumers need to navigate domestic law rules on enforcement for their judgement, the value of the jurisdictional protections offered to them as weaker parties is stymied.

As part of a coherent consumer dispute resolution framework, the development of an ADR framework between the EU and UK for properly functioning ADR is necessary to strengthen consumers’ confidence in each other’s market. From a UK perspective, the vast majority of consumers who used ADR were of the view that they would use these processes again should they experience a similar customer dispute in future.¹¹³ The utilization of high-quality ADR therefore remains a valuable tool for UK consumers. Should the likely restriction in the availability of cross border ADR remain addressed, the proliferation of non-certified ADR entities is likely. Given the volume of

¹¹² See Article DIGIT.13 (2) of the TCA which is geared towards online consumer trust. Article DIGIT.16 also mandates parties to exchange information on regulatory matters on the protection of consumers in the context of digital trade.

¹¹³ DBEIS, *Resolving Consumer Disputes, Alternative Dispute Resolution and the Court System*, Final Report, 2018.

ADR complaints between the UK and some EU Member States, this will leave consumers in a precarious position and will lead to greater fragmentation of the ADR landscape in each jurisdiction for consumers. As a consequence, efforts of protection to increase confidence will be undermined. Therefore, renewed consideration should be given to the facilitation of cross border ADR in the light of the removal of the use of ADR and ODR procedures for UK and EU consumers, perhaps utilising the benefit of bilateral arrangements in this area.

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