

# CONSUMER CONTRACTS IN THE EUROPEAN COURT OF JUSTICE CASE LAW. LATEST TRENDS

## LOS CONTRATOS DE CONSUMO EN LA JURISPRUDENCIA DEL TJUE. ÚLTIMAS TENDENCIAS

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**Abstract:** The concept of “consumer” is, in theory, a restrictive concept. However, the ECJ has now extended it to cases in which a private individual has gone on to practice as a professional in an manifest, public and conspicuous manner. Judgment ECJ 25 January 2018, C-498/16, *Facebook* proves it. In relation to consumers of financial products, the ECJ skillfully pulls strings in the context of art. 7.2 BR I-bis; however, that norm is totally insensitive with regards to the consumer. The future is stepping forward towards online mass consumption, and in the present virtual social landscape it is necessary for the ECJ to open up new ways of protecting the consumer that keep up with times. In this context, it is necessary that future amendments to the Brussels I-bis Regulation incorporate the concepts that the ECJ has created in relation to jurisdiction in the cross-border consumer sector: the concepts of “act of consumption”, “consumer”, “professional”, and “directed activity”, for example, should stop being jurisprudential concepts to become legal concepts.

**Keywords:** act of consumption, consumer, consumer contract, cross-border consumer sector, directed activity, dual contracts with both private and professional purpose, (international) jurisdiction, Private International Law, professional.

**Resumen:** El concepto de “consumidor” es, en teoría, un concepto restrictivo. Sin embargo, el TJUE lo ha extendido a casos en los que un particular, en el momento presente, ha pasado a ejercer como profesional de manera evidente, pública y notoria. La STJUE 25 enero 2018, C-498/16, *Facebook*, es la prueba. En relación con los consumidores de productos financieros, el TJUE mueve sus hilos con destreza en el contexto del art. 7.2 RB I-bis, pero este precepto es totalmente insensible al consumidor. El futuro camina digitalmente hacia un consumo masivo online y en dicho paisaje social virtual es necesario que el TJUE abra vías de protección al consumidor de un modo evolutivo. En dicho contexto, es preciso que futuras reformas del Reglamento Bruselas I-bis incorporen los conceptos que el TJUE ha creado en relación con la competencia judicial en el sector del consumo transfronterizo: los conceptos de “acto de consumo”, “consumidor”, “profesional”, y “actividad dirigida”, por ejemplo, deberían dejar de ser conceptos jurisprudenciales para pasar a ser conceptos legales.

**Palabras clave:** acto de consumo, competencia judicial internacional, consumidor, consumo transfronterizo, contrato de consumidores, contratos con doble finalidad profesional y privada, Derecho internacional privado, profesional, actividad dirigida.

**Sumario:** I. Introduction. Private International Law, consumers and jurisprudential dyads. II. Cross-border financial damage. The dyad constituted by Judgment ECJ 28 January 2015, C-375/13, Kolassa and Judgment ECJ 12 September 2018, C-304/17, *Helga Löber vs. Barclays Bank plc*. 1. Cross-border financial damage and international jurisdiction forum in the matter of damage. 2. Determination of the place of the causal event and cross-border financial damage. 3. Determination of the place where the cross-border financial damage occurred. III. Determination of the quality of “consumer”. The dyad made up by Judgment ECJ 20 January 2005, C-464/01, *Gruber*, and Judgment ECJ 25 January 2018, C-498/16, *Facebook*. 1. The individual consumer. 2. Dual contracts with both private and professional purpose. IV. Final considerations.

## I. Introduction. Private International Law, consumers and jurisprudential dyads

1. In the extensive scientific production of Professor Dr. JOSÉ CARLOS FERNÁNDEZ ROZAS, his publications concerning the international unification of Law and, in particular, the development of European standards of private international law occupy a prime place<sup>1</sup>. May the lines that follow, focussed on certain jurisprudence of the ECJ on the Brussels I-bis Regulation in regard to consumers, serve to pay a sincere tribute to the vast research work of Professor Dr. JOSÉ CARLOS FERNÁNDEZ ROZAS in that sector.

2. It is well known that Private International Law when dealing with cross-border consumer contracts must face a triple challenge constituted by mass consumption, the small economic amounts involved in consumer disputes when considered individually, and online consumption. In this context, in private international law the legal protection of the consumer is built on three fundamental ideas<sup>2</sup>. In the first place, the consumer must be able to sue before the courts of the place of his domicile (Article 18 BR I-bis). The consumer has, as A. STAUDINGER says, a *forum actoris*<sup>3</sup> – in other words, he benefits of a privilege of jurisdiction, as G. RÜHL observes<sup>4</sup>–; secondly, the Law regulating the contract concluded by consumers must be the Law of the country of habitual residence of the consumer, unless the parties have chosen another national Law that protects the consumer to a greater extent (Article 6 RR-I)<sup>5</sup>. This protects the consumer from mass contracts stipulated by the company and re-introduces transparency in the contract, as affirmed by W.-H. ROTH<sup>6</sup>. Thirdly and finally, the company that imposes certain clauses in a consumer contract can be punished with sanctions under public law, such as fines. In these cases, Spanish administrative law is applied if the contract is performed in Spain (Article 8 Spanish Civil Code), for example if the contract includes unfair terms of choice of court and choice of law stipulated by the company (Article 90 Spanish law on consumer protection) (see Judgement of the Juzgado de lo Contencioso administrativo n.12 of Sevilla of 23 January 2019 that delas with some penalties against the North American company Twitter for including jurisdictional and applicable law clauses in their contracts)<sup>7</sup>. It is true that there are also new alternatives for the legal resolution of disputes with consumers, such as those covered by Regulation 524/2013 of 21 May 2013 on online dispute resolution for

<sup>1</sup> *Vid.* <https://fernandezrozas.com/curriculum/>

<sup>2</sup> A.-L. CALVO CARAVACA / J. CARRASCOSA GONZÁLEZ, "Contratos internacionales de consumo", in A.-L. CALVO CARAVACA / J. CARRASCOSA GONZÁLEZ (Directores), *Derecho internacional privado*, vol. II, 18ª ed., Comares, Granada, 2018, pp. 1115-1130.

<sup>3</sup> A. STAUDINGER, "Wer nicht rügt, der nicht gewinnt – Grenzen der stillschweigenden Prorogation nach Art. 24 EuGVVO", *IPRax*, 2011-VI, pp. 548-553.

<sup>4</sup> G. RÜHL, "The consumer's jurisdictional privilege: on (missing) legislative and (misguided) judicial action", in F. FERRARI/F. RAGNO (Ed.), *Cross-border litigation in Europe: the Brussels I Recast Regulation as a panacea?*, Padova, CEDAM, 2015, pp. 67-96.

<sup>5</sup> G. RÜHL, "The unfairness of choice-of-law clauses, or, The (unclear) relationship between Article 6 Rome I Regulation and the unfair terms in Consumer Contracts Directive: VKI v. Amazon: case C-191/15, Verein für Konsumenteninformation v. Amazon EU Sàrl, judgment of the Court of (Third Chamber) of 28 July 2016, EU:C:2016:612", *CMLR*, 55, 1, 2018, pp. 201-224.

<sup>6</sup> W.-H. ROTH, "Rechtswahlklauseln in Verbraucherverträgen – eine schwierige Sache? (BGH, S. 557)", *IPRax*, 2013-6, pp. 515-52.

<sup>7</sup> ECLI:ES:JCA:2019:58. *Vid.* P. KINSCH, "Un exemple d'ambivalence politique en droit international privé européen: la question de l'admissibilité de la protection unilatéraliste, par des lois de police, des parties faibles aux contrats", en B. HESS/E. JAYME/H.-P. MANSEL (HRS.), *Europa als Rechts- und Lebensraum: Liber amicorum für Christian Kohler zum 75. Geburtstag am 18. Juni 2018*, Bielefeld, Gieseking, 2018, pp. 215-227.

consumer disputes and in Directive 2013/11 /UE of 21 May 2013 (alternative dispute resolution for consumer disputes), as well as different types of consumer arbitration<sup>8</sup>. Such initiatives are not only useful, but also altogether necessary in relation to small claims procedure, as N. MARCHAL ESCALONA points out<sup>9</sup>.

3. Many, then, are the interesting, controversial and suggestive legal aspects of Private International Law in consumer contracts, both in terms of international jurisdiction and in relation to the law applicable to such contracts<sup>10</sup>. The present, brief reflections will exclusively focus on the normative

<sup>8</sup> *Vid.* on such initiatives, *inter alia*, D. CARRIZO AGUADO, "Asistencia extrajudicial al consumidor transfronterizo europeo", *CDT*, 10, 1, 2018, pp. 45-69; D. COESTER-WALTJEN, "Schiedsgerichtsbarkeit und Verbraucher", in B. HESS (HRSG.), *Der europäische Gerichtsverbund: Gegenwartsfragen der internationalen Schiedsgerichtsbarkeit: die internationale Dimension des europäischen Zivilverfahrensrechts*, Bielefeld, Gieseking, 2017, pp. 81-100; P. CORTÉS, *The law of consumer redress in an evolving digital market: upgrading from alternative to online dispute resolution*, Cambridge, Cambridge University Press, 2018; S. DÍAZ ALABART (DIR.), *Resolución alternativa de litigios de consumo a través de ADR y ODR (Directiva 2013/11 y Reglamento (UE) No 524/2013)*, Madrid, Reus, 2017; F. ESTEBAN DE LA ROSA, "Principios de protección del consumidor para una iniciativa europea en el ámbito de la resolución electrónica de diferencias (ODR) de consumo transfronterizas", *Revista General de Derecho Europeo*, n° 25, 2011; F. ESTEBAN DE LA ROSA, "Régimen de las reclamaciones de consumo transfronterizas en el nuevo Derecho europeo de resolución alternativa y en línea de litigios de consumo", *REDI*, 2017, pp. 109-137; L.-M. KAHL, "Verbraucherschutz in der Schiedsgerichtsbarkeit: Schutzmängel im deutschen Prozessrecht", *ZJP Int.*, 22, 2017, pp. 361-383; J. KOTZUR, *Die außergerichtliche Realisierung grenzüberschreitender Verbraucherforderungen: eine rechtsvergleichende Untersuchung zur Bedeutung der Verbraucherschlichtung*, Tübingen, Mohr Siebeck, 2018; Y. MENECEUR, "Règlement en ligne des litiges: (re)faîtes entrer le juge!", *La semaine juridique. Édition générale, Supplément au no. 51*, 2018, pp. 40-44; N. SCANNICCHIO, "La risoluzione non giurisdizionale delle controversie di consumo: rimedi alternativi o diritti senza rimedio?", *Foro it.*, CXLII, 2017, núm. 11, parte IV, col. 570-576; M. STEGNER, "Online dispute resolution: the future of consumer dispute resolution?", *Yearbook on International Arbitration and ADR*, 5, 2017, pp. 347-360; F. VALBUENA GONZÁLEZ, "Resolución alternativa de litigios en materia de consumo", en *Aproximación legislativa versus reconocimiento mutuo en el desarrollo del espacio judicial europeo: una perspectiva multidisciplinar*, Barcelona, Bosch, 2016, pp. 117-147.

<sup>9</sup> N. MARCHAL ESCALONA, "¿Hacia un nuevo derecho procesal europeo de protección del consumidor?: La nueva iniciativa europea sobre la resolución de litigios de pequeña cuantía", *REEI*, 2014, 43 p.

<sup>10</sup> Academic contributions on international jurisdiction in consumers litigation are extraordinarily abundant. Among the most recent ones, see, A. ADDANTE, *Tutela del consumatore nei contratti telematici e nuove frontiere del diritto europeo della vendita*, Padova, CEDAM, 2017; O. BOSKOVIC, "Note CJUE 17 October 2013, *Emrek*", *RCDIP*, 2014, pp. 630-639; O. CACHARD, "Note à l'arrêt ECJ 7 décembre 2010, *Pammer*", *JDI Clunet*, 2011, pp. 414-438; D. CARRIZO AGUADO, "La relación de causalidad como indicio justificativo de la 'actividad dirigida' en el contrato internacional de consumo: análisis del foro de protección de la parte débil", *CDT*, 2016, pp. 301-317; D. COESTER-WALTJEN, "Schiedsgerichtsbarkeit und Verbraucher", in B. HESS (HRSG.), *Der europäische Gerichtsverbund: Gegenwartsfragen der internationalen Schiedsgerichtsbarkeit: die internationale Dimension des europäischen Zivilverfahrensrechts*, Bielefeld, Gieseking, 2017, pp. 81-100; A. COISNE, "Contrat avec un consommateur et activité transfrontalière: commentaire de l'arrêt ECJ 28 juillet 2016 aff. C-191/15 'VKI c/ Amazon EU' sur le caractère abusif d'une clause de choix de loi se référant uniquement au droit du pays d'établissement du professionnel", *Bulletin droit et banque*, n° 60, 2017, pp. 71-77; A. ESPINIELLA MENÉNDEZ, "Contratos de consumo en el tráfico comercial UE-terceros Estados" *AEDIPr*, T. XIV-XV, 2014-2015, pp. 277-303; W. FABER/E. KLAMPFERER, "Zivilrecht und internationale Privatrecht, Schwerpunkt Verbraucherschutz", *Europarecht: Jahrbuch 2017*, 2017, pp. 301-362; E. FERNÁNDEZ MASÍA, "Contratos de consumo y competencia judicial internacional en el Reg. 44/2001", *Estudios sobre consumo*, no. 63, 2002, pp. 9-24; E. GAMBARO/N. LANDI, "Consumer Contracts and Jurisdiction, Recognition and Enforcement of Judgments in Civil and commercial Matters", *European Business Law Review*, 2006-5, pp. 1355-1371; C. GRAMLICH, "Gerichtsstände der EuGVVO in Verbrauchersachen: Probleme bei Umzug einer Partei", *EuZW*, 28, 6, 2017, pp. 213-218; R. GREGER, "Verbraucherstreitbeilegung: kein Durchbruch, viele Fragen", *Verbraucher und Recht*, 34, 2, 2019, pp. 43-47; W. HAKENBERG/E.-M. KOWOLLIK, "New Deal for Consumers: europäische Kollektivklage und andere Wege moderner Durchsetzung von Verbraucherrechten", *EWS*, 30, 2, 2019, pp. 61-69; F. HEINDLER, "Internationale Zuständigkeit und anwendbares Recht bei Vertrieb von Finanzdienstleistungen im Fernabsatz", in F. HEINDLER/B. VERSCHRAEGEN (HRSG.), *Internationale Bankgeschäfte mit Verbrauchern*, Wien, Sramek, 2017, pp. 155-199; C. HEINRICH, "Vorbild Europa/Mehr Wohnsitzgerichtsstände in der ZPO?: braucht der Verbraucher mehr Schutzgerichtsstände an seinem Wohnsitz?", *Deutsches Autrecht*, 88, 3, 2018, pp. 127-133; C. HEINZE / B. STEINRÖTTER, "Wann fällt ein Vertrag in den Bereich der ausgerichteten Tätigkeit des Unternehmers i.S.d. Art. 17 Abs. 1 lit. c EuGVVO? (EuGH, S. 583)", *IPRax*, 2016, pp. 545-550; A. KLEINKNECHT, *Die verbraucherschützenden Gerichtsstände im deutschen und europäischen Zivilprozessrecht*, Münster, 2007; G.E. KODEK, "Internationale Zuständigkeit und anwendbares Recht bei arbeitsteiligem Vertrieb von Finanzprodukten", in F. HEINDLER/B. VERSCHRAEGEN (HRSG.), *Internationale Bankgeschäfte mit Verbrauchern*, Wien, Sramek, 2017, pp. 75-95; V. LAZIĆ, "Procedural position of a 'weaker party' in the Regulation Brussels I-bis", in V. LAZIĆ/S. STUIJ (EDS.), *Brussels I-bis Regulation: changes and challenges of the renewed procedural scheme*, The Hague, T.M.C. Asser Press, 2017, pp. 51-70; N. PITKOWITZ, "Verbrauchergerichtsstand 2.0: der dynamische, aber vorhersehbare Verbrauchergerichtsstand", *Ecollex*, 29, 5, 2018, pp. 418-422; S. RÖSS, "Rügelose Einlassung bei grenzüberschreitenden Verbrauchersachen: richterliche Belehrungspflichten nach Art. 26 II EuGVVO und § 504 ZPO", *NJW*, 71, 52, 2018, pp. 3745-3750; P. WAUTELET, "Le consommateur, le réseau social et l'action collective", *Journal de droit européen*, 26, n° 251, 2018, pp. 260-265.

impact –which has not been small– of several judgments delivered by the ECJ between 2015 and 2018 in matters of international jurisdiction. This sector operates as an essential legal link that connects procedural law with the rules of conflict of laws, as P. MANKOWSKI observes<sup>11</sup>. In particular, we offer a modest analysis of two dyads of judgments. The first is formed by Judgment ECJ 28 January 2015, C-375/13, *Kolassa* [ECLI: EU: C: 2015: 37] and Judgment ECJ 12 September 2018, C-304/17, *Helga Löber vs. Barclays Bank plc* [ECLI:EU:C:2018:701]; the second is composed by Judgment ECJ 20 January 2005, C-464/01, *Johann Gruber vs. Bay Wa AG*, and Judgment ECJ 25 January 2018, C-498/16, *Facebook* [ECLI:EU:C:2018:37]. In spite of some inevitable criticism, the ECJ has taken the lead in a really remarkable way and has proven to be effective in operating as an efficient court in the context of a real economic integration of the Member States, as E.A. POSNER / J.C. YOO write<sup>12</sup>.

## II. Cross-border financial damage. The dyad constituted by Judgment ECJ 28 January 2015, C-375/13, *Kolassa* and Judgment ECJ 12 September 2018, C-304/17, *Helga Löber vs. Barclays Bank plc*

### 1. Cross-border financial damage and international jurisdiction forum in the matter of damage

4. Since the days of the Ponzi scheme, one hundred years ago, international financial frauds have been common and private investors have suffered high losses in these sophisticated markets. The case of the “Madoff scheme” is also paradigmatic. The vast majority of international financial damages are cases of “remote damages”, as P. MANKOWSKI points out, and are preceded by an investment offer inserted into a “Stream-Of-Commerce” that flows from the country where the management company is located toward the country where the investor usually resides<sup>13</sup>. Now, the dyad of ECJ judgments made up by Judgment 28 January 2015, C-375/13, *Kolassa*, and Judgment 12 September 2018, C-304/17, *Helga Löber vs. Barclays Bank plc* [ECLI: EU: C: 2018: 701] has provided very clear guidelines to be followed.

5. First, these financial torts involve criminal and administrative sanctions, but also civil penalties; that is to say, they are acts giving rise to “civil liability for damages”. Very frequently financial instruments are offered in the secondary securities market: in such cases there is no contract between the issuer of the securities and the victim/frustrated investor (Judgment ECJ 28 January 2015, C-375 / 13, *Kolassa*, n. 45). The possible liability arises from acts perpetrated by investment companies, managers, holding companies, intermediaries, etc., that cause damage to the assets of an investor. Therefore, it is liability for damage that is purely extra-contractual.

Most of the “financial damages”, in fact, derive from acts of misinformation, falsification, appropriation of goods and deception in general, carried out in such investment operations by companies and entities (= financial advisors, depositaries or other intermediaries), with whom the investor has not concluded any contract. In these cases there is no “*freely assumed commitment*” of the alleged perpetrators

<sup>11</sup> P. MANKOWSKI, "Über den Standort des Internationalen Zivilprozessrechts", *RabelsZ.*, 2018-3, pp. 576-617.

<sup>12</sup> E.A. POSNER/J.C. YOO, "A Theory of International Adjudication", John M. Olin Law & Economics Research Paper Series Working Paper No. 206 / Public Law and Legal Theory Research Paper Series Research Paper No. 146, 2018, available in: <http://www.law.uchicago.edu/Lawecon/index.html> / <http://ssrn.com/abstract=507003>.

<sup>13</sup> P. MANKOWSKI, "Autoritatives zum „Ausrichten“ unternehmerischer Tätigkeit unter Art. 15 Abs. 1 lit. c EuGVVO", *IP-Rax*, 2012-II, pp. 144-156. *Vid.* también R. LAFUENTE SÁNCHEZ, "El criterio del International Stream-of-Commerce y los foros de competencia en materia de contratos electrónicos celebrados con consumidores", *Cuadernos de Derecho Transnacional CDT*, 2012, pp. 177-201; A. LÓPEZ-TARRUELLA MARTÍNEZ, "El criterio de las actividades dirigidas como concepto autónomo de DiPr de la Unión Europea para la regulación de las actividades en internet", *REDI* 2017, pp. 223-256; E. CASTELLANOS RUIZ, "El concepto de actividad profesional ‘dirigida’ al Estado miembro del consumidor: stream-of-commerce", *Cuadernos de Derecho Transnacional CDT*, 2012, pp. 70-92; M.J. MATIAS FERNANDEZ, "O conceito de ‘Actividad Dirigida’ inscrito no artigo 15.º, numero 1 alinea c). Do Regulamento ‘Bruxelas I’ e a Internet: subsidios do Tribunal de Justiça por ocasião do acórdão Pammer/Alpenhof", *CDT*, 2012-II, pp. 302-315; V. PIRONON, "Dits et non-dits sur la méthode de la focalisation dans le contentieux contractuel et délictuel du commerce électronique", *JDI Chunes*, 2011, pp. 915-941; S. STOYAN, "Just a click away? Jurisdiction and virtually carrying on business in Canada", *Journal of Private International Law*, vol. 13, issue 3, 2017, pp. 602-632.

and investors. These are subjects and entities that operate in and/or in relation to the securities markets and that, with their performance, cause damage to the investors' assets. Therefore, these acts give rise to extracontractual civil liability, be it an objective liability or through fault or fraud, by action or omission.

6. Secondly, it should be stressed that the Brussels I-bis Regulation of 12 December 2012 lacks a specific forum for "financial damage". Simply, art. 7.2 RB I-bis is to be applied, given the extra-contractual nature of the vast majority of cases. In particular, claims for damages arising from errors or deception contained in brochures or prospectuses that are issued to inform potential investors about the acquisition of certain financial securities, have a non-contractual nature, as S. ARNOLD and M. LEHMANN<sup>14</sup> have explained. However, A. TENENBAUM has pointed out that the jurisprudence of the ECJ provides very valuable elements in various rulings (Judgment ECJ 30 November 1976, 21/76, *Mines de Potasse d'Alsace*, Judgment ECJ 19 September 1995, C-364/93, *Marinari*, and Judgment ECJ 10 June 2004, C 168/02, *Kronhofer*).

## 2. Determination of the place of the causal event and cross-border financial damage

7. The importance of Judgment ECJ 28 January 2015, C-375/13, *Kolassa*, and of Judgment ECJ 12 September 2018, C-304/17, *Helga Löber vs. Barclays Bank plc.* lies, in the first place, in defining the "causal event" of the damage. To be able to file a claim with extra-contractual grounds in the place where the "causal event" occurred (*Handlungsort*), it is necessary that such causal event is, in fact, the direct cause of the damage (Judgment ECJ 16 July 2009, C-189/08, *Zuid-Chemie BV*, n. 13). Therefore, the existence of a "direct causal link" between the "causal event" and the alleged "damage" must be verified. In this regard, the following should be stressed: (a) Advertising of financial investments, their promotion and acts of incitement to subscribe to financial instruments do not directly cause financial damage. These acts are "merely preparatory", therefore, they are not the direct cause of the financial damage, but its mediate or indirect cause; they are the first of a "chain of events" that will end in the financial damage. Although a first reading of Judgment ECJ 10 June 2004, C 168/02, *Kronhofer*, n. 17-18, seems to suggest that, even if *en passant* and in an elliptical manner, the ECJ understands that the place of the causal event could be considered to be located in the country where the false financial information that prompts the subscription of risky instruments is disseminated, this should not be misleading. The ECJ only indicated, *obiter dicta*, that that was the interpretation of the court that heard the specific case (*Oberster Gerichtshof*). Actually, the question of determining where the place of the causal event was in that case of financial damage was never raised, so, in truth, the ECJ has never ruled on this specific matter; (b) The decision of the investor to transfer funds to an account opened in another country, a decision that is usually taken in the State of domicile of the investor, is not the "direct cause of the damage". This "financial decision" of the investor has not caused the damage. It does not constitute, therefore, a place of the "causal event" for the purposes of art. 7.2 BR-I (S. COURNELOUP)<sup>15</sup>. The "investment request" that the investor sends from the country of his domicile to the country of subscription of the financial securities is not the cause of the tort either. In fact, such "request" is not the same thing as the "subscription" of the securities, and it is the subscription that causes the damage; (c) In cases of allegedly false information contained in the investment prospectus, the place of the causal event is located in the State where such prospectuses have been "initially drafted and distributed", which is usually the State of the bank's or entity registered office (Judgment ECJ 28 January 2015, C-375/13, *Kolassa*, n. 53); (d) The place of the causal event is not the place where the securities object of the investment have been commercialized;

<sup>14</sup> M. LEHMANN, "Prospectus liability and private international law – assessing the landscape after the ECJ's *Kolassa* ruling (Case C-375/13)", *Journal of Private International Law*, vol. 12, 2016, pp. 318-343; S. ARNOLD, "Kollisionsrechtliche und international-verfahrensrechtliche Aspekte bei Schadensersatzansprüchen privater Auslandsfonds-Anleger (BGH, S. 563)", *IPRax*, 2013-6, pp. 525-530. The matter, however, is far from being universally accepted. *Vid.* S. ARNOLD, "Kollisionsrechtliche und international-verfahrensrechtliche Aspekte bei Schadensersatzansprüchen privater Auslandsfonds-Anleger (BGH, S. 563)", *IPRax*, 2013-6, pp. 525- 530.

<sup>15</sup> S. COURNELOUP, "Note: Cour Cass Com. 7 janvier 2014", *RCDIP*, 2014, pp. 432-445.

(e) The place of the causal event must be located in the country where the capital of the investor is used by the holding/management company to subscribe for financial securities. That is the place where the investment request is accepted by the holding company, as A. ENGERT/G. GROH explain<sup>16</sup>.

### 3. Determination of the place where the cross-border financial damage occurred

8. The relevance of Judgment ECJ 28 January 2015, C-375/13, *Kolassa*, and of Judgment ECJ 12 September 2018, C-304/17, *Helga Löber vs. Barclays Bank plc* also resides in the determination, at a latter time, of the place where the (financial) “damage” occurred. As a matter of fact, these financial torts arise when a mere mathematical operation is carried out on a computer and, as a consequence, a patrimonial loss occurs. The legal problems caused by financial torts are particularly significant precisely because it is very complex to locate the damage produced (= the “loss of assets”) in a given “point of space”, in a specific “place of the planet”. Such damage, in fact, is not physical damage to a bodily reality, but consists of a “patrimonial loss”. Hence the difficulty of locating the damage in the geographical space (M. LEHMANN).

Now, according to the ECJ, the real “place of financial damage” (= “*le lieu du préjudice financier*”) is where the investor has placed the capital in order to make it available for the entity or company that will manage the investment (= “*lieu de la partie du patrimoine endommagé*”). This is the place where the capital is used to subsequently be invested in other markets and countries. This is the place where the capital is lost or diminished (= place where the investor’s assets shrink). The place of financial damage is the place where the capital has been deposited and subsequently withdrawn for its final investment<sup>17</sup>. In short, “*as regards the place where the loss occurred (...) the loss occurs in the place where the investor suffered it*” (Judgment ECJ 28 January 2015, C-375/13, *Kolassa*, n. 52-53). Taking all of the above for granted, it is nevertheless necessary to give a few further details.

(i) If the investor deposits his money in the current accounts of a bank located in the country of his own domicile, then the investor may sue before the courts of that Member State, because it is in that country that the “loss” has taken place for the purposes of art. 7.2 BR I-bis. The ECJ states that “[*t*]he courts where the applicant is domiciled have jurisdiction, on the basis of the place where the loss occurred, to hear and determine such an action, in particular when that loss occurred itself directly in the applicant’s bank account held with a bank established within the area of jurisdiction of those courts (...) the issuer of a certificate who does not comply with his legal obligations in respect of the prospectus must, when he decides to notify the prospectus relating to that certificate in other Member States, anticipate that inadequately informed operators, domiciled in those Member States, might invest in that certificate and suffer loss”. (Judgment ECJ 28 January 2015, C-375/13, *Kolassa*, n. 55-56, Judgment ECJ 12 September 2018, C-304/17, *Löber*, n. 28). This statement does not imply that the damage consists of the dissemination of the prospectus in the Member State of residence of the investor or that the causal event is the dissemination of the prospectus in that Member State. In the case of Judgment ECJ 12 September 2018, C-304/17, *Löber*, Ms Löber, residing in Austria, made various investments from Austrian bank accounts. As a result, Austria was the place where the loss occurred. It is the place where the bank was established in which the applicant opened the account where the loss occurred. The possibility of locating the place where the loss occurs reinforces the legal protection of persons established in the EU, since it allows the complainant to easily identify the court to which he may turn and the defendant reasonably foresee the one before which he can be sued. In this case, the German branch of Barclays Bank, whose registered office is located in London, issued “certificates” (= bearer bonds), which were subscribed by institutional investors, who subsequently resold them in the secondary market, specifically to consumers in Austria. The money invested in the certificates was lost largely because it was used

<sup>16</sup> A. ENGERT/G. GROH, “Internationaler Kapitalanlegerschutz vor dem Bundesgerichtshof”, *IPRax*, 2011-V, pp. 458-468.

<sup>17</sup> *Vid.* Ord. Corte di Cassazione, Italy, 8 April 2001, *RDIPP*, 2011, p. 1103 (financial instruments subscribed in Italy), Ord. Corte di Cassazione, Italy, 5 July 2011 (future damage arising from a transaction in the UK that entails property damage to an Italian company), *RDIPP*, 2012, p. 432; Judgment Cour de Cassation Com. (France) 7 janvier 2014 (financial damage), *RCDIP*, 2014, pp. 432-445.

in a pyramid fraud scheme, so the certificates no longer had any value. Mrs Löber, domiciled in Vienna (Austria), invested certain amounts in the certificates through two different Austrian banks. As an investor having suffered loss, Ms Löber brought an action against Barclays Bank before the courts of Austria seeking the declaration of contractual and delictual or quasi-delict liability of Barclays Bank and argued that the information contained in the prospectus relating to the certificates was vitiated by information gaps. The damages derived from a lack of information in the brochures occur in the place where the current account of the investor suffering the loss of money is located.

(ii) In certain cases, the investor is lured by deceit or tricks or decoys to transfer the money from the country of his domicile to another country, but not to be invested in a subscription of securities that turns up to be ruinous  $\frac{3}{4}$  the transfer occurs directly from the account of the individual investor to the account of the perpetrator. In such cases, it must be considered that the damage has occurred in the country from which the money is sent, because that is the country where the money is lost.

**9.** This thesis has several undisputable advantages: (a) The indicated place does not necessarily have to coincide with the domicile of the victim/applicant; as a consequence, it does not lead to *forum actoris*; (b) It is a known place and therefore it is predictable for both the plaintiff and the defendant, as A.F. CHRISTIE explains<sup>18</sup>; (c) In the country where the capital to be invested has been placed and from which the perpetrator has operated, damage has actually occurred because the capital was diminished or has disappeared in that country. This fits with a non-extensive interpretation of art. 7.2 BR I-bis; (d) This interpretation leads to affirm that, in financial torts, the place of the causal event and the place of the damage coincide. This enhances the clarity of the rule about international jurisdiction as well as its simple operation. In other words, it can be said that these financial damages constitute “instantant extra-contractual torts” and not “distance torts”. Said financial damages take place in the country where the investor’s capital employed as a financial investment is located, and in which another individual makes use of it; (e) It is a thesis that favours savers/investors, because they know very well the country where their savings are located.

**10.** However, and despite being followed by the ECJ, this thesis has also been criticized for several reasons: (a) It involves a multiplication of forums of international jurisdiction. In fact, the same causal event can produce losses in several different countries, which leads to the “jurisdictional dispersion of the litigation”. As an example: the same false financial information spread on the Internet by an English financial agency can make hundreds of investors decide to subscribe thousands of securities by depositing capital from accounts located in many different countries. In such a case, the courts of each of those States would have jurisdiction to hear the cases of loss of capital that has occurred in their own State only. This undermines the “good administration of Justice”. In fact, this thesis involves the intervention of numerous courts of different States, as well as the application of several different State Laws to one tort (Article 4 RR-II), an unlawful act derived from a single fact  $\frac{3}{4}$  spreading a specific false financial information; (b) This solution of private international law becomes unpredictable for the defendants, allegedly liable for the financial loss. As a matter of fact, these securities are traded on the secondary market without any knowledge or control whatsoever by the issuers of the securities and other individuals to whom liability is claimed. For this reason, art. 7.2 BR I-bis operates, in relation to these individuals, as an unpredictable forum and art. 4.1 RR-II would lead to the application of a Law that is unpredictable for them. In the example mentioned above, the UK agency could be sued in Lithuania by investors who have transferred their capital to bank accounts they have in that country so that a Polish holding company can invest it in securities in the secondary market. In addition, the English agency should answer for its “anti-market” behaviour (= “market manipulation”) before the courts of Lithuania and under Lithuanian law; (c) This situation would increase in an exorbitant manner the costs of the operators and agents that act in the financial markets, who must calculate the price of possible legal actions anywhere in the world and in accordance with totally unpredictable State laws. Faced with this situation, the operators and financial

<sup>18</sup> A.F. CHRISTIE, “Private international law principles for ubiquitous intellectual property infringement – a solution in search of a problem?”, *Journal of Private International Law*, vol. 13, 2017, pp. 152-183.

agents could logically decide to “cover” their backs *ex ante* by increasing the prices of their services and products. This could lead to the collapse of financial markets around the world; (d) The States could not punish with their Tort Law certain behaviours that have occurred in their territories (= such as the diffusion of false financial information, the commercialization and advertising of toxic financial assets in those countries), because the financial damage occurs in another country, whose Law is the only applicable Law. The so-called “*Regulation through Litigation*” fails, as M. LEHMANN writes<sup>19</sup>.

### III. Determination of the quality of “consumer”. The dyad constituted by Judgment ECJ 20 January 2005, C-464/01, Gruber, and Judgment ECJ 25 January 2018, C-498/16, Facebook

#### 1. The individual consumer

11. In order for Section 4 of Chapter II of the Brussels I-bis Regulation to be applied, and thus an individual be able to litigate before the courts of the Member State where his domicile is located, it must be possible to qualify that individual as a “consumer” contractor.

The concept of “consumer” used by art. 17 BR I-bis is autonomous, inherent to the Regulation and must be interpreted with reference to the system and the objectives of said Regulation. This, as J.P. SCHMIDT explains, guarantees the uniform application of section 4 of Title II of the Brussels I-bis Regulation in all Member States and reinforces EU policies (Judgment ECJ 14 February 2019, C-630/17, *Milivojević*, n. 86)<sup>20</sup>.

The concept of “consumer” outlined by the Brussels I-bis Regulation is a restrictive concept. This is what the ECJ itself makes clear. It is a concept that depends on the position of the person in a specific contract and on the nature and purpose of such contract: it is not a subjective quality of the person (Judgment ECJ 14 February, 2019, C-630/17, *Milivojević*, n. 87).

A “consumer” is a person who acquires goods or services “*for a purpose that can be regarded as being outside his trade or profession*” (article 17.1 BR I-bis); (Judgment ECJ 25 January 2018, C-498/16, *Facebook*, n. 30: “*the contract has been concluded between the parties for the purpose of a use of the relevant goods or services that is other than a trade or professional use*”; Judgment ECJ 14 February 2019, C-630/17, *Milivojević*, N. 88: “*contracts concluded outside and independently of any trade or professional activity or purpose, solely for the purpose of satisfying an individual’s own needs in terms of private consumption*”; Judgment ECJ 23 December 2015, C-297/14, *Hobohm*, n. 25: “*private final consumers*”, Judgment ECJ 14 March 2013, C- 19/11, *Feichter*, n. 34, Judgment ECJ 21 June 1978, 150/77, *Bertrand*, Judgment ECJ 19 January 1993, C-89/91, *Hutton*, Judgment ECJ 15 September 1994, C-318/93, *Brenner*, Judgment ECJ 3 July 1997, C-269/95, *Benincasa*, Judgment ECJ 27 April 1999, C-99/96, *Mietz*). Art. 17 BR I-bis does not require that a product or service have been purchased for a specific economic amount (Judgment ECJ 2 May 2019, C-694/17, *Hildur*, N. 32).

The concept of “consumer” contained in other rules of European law must coincide with that used by the Brussels I Regulation to ensure the coherence of EU law, T. RAUSCHER points out<sup>21</sup>. In this regard, both the sectoral regulations on consumption and the Brussels I-bis Regulation refer to the consumer as an individual who enters into a contract with a professional and whose purpose is the non-professional use of the good or service. However, certain Directives require for their application that the contract reach a certain amount. This limitation does not affect the Brussels I-bis Regulation, which does not make any reference to the matter at any time, precisely to protect all consumers by enhancing access to the courts of the Member State of their domicile (Judgment ECJ 2 May 2019, C -694/17, *Hildur*, n. 43).

<sup>19</sup> M. LEHMANN, “Prospectus liability and private international law – assessing the landscape after the ECJ’s Kolassa ruling (Case C-375/13)”, *Journal of Private International Law*, vol. 12, 2016, pp. 318-343.

<sup>20</sup> JAN P. SCHMIDT, “Übergreifende Begrifflichkeiten im europäischen Zivilverfahrens- und Kollisionsrecht - Grund und Grenzen der rechtsaktsübergreifenden Auslegung, dargestellt am Beispiel vertraglicher und außervertraglicher Schuldverhältnisse”, *RabelsZ*, 2013-I, pp. 1-30.

<sup>21</sup> T. RAUSCHER, “Ehegüterrechtlicher Vertrag und Verbraucherausnahme? – Zum Anwendungsbereich der EuVTVO”, *IP-Rax*, 2011-V, pp. 484-487.



Merely being a “natural person” is not enough for that person to be automatically considered as a “consumer” for the purposes of Brussels I-bis Regulation (Judgment ECJ 14 March 2013, C-19/11, *Feichter*, n. 37-38). The person in question must also perform a specific “act of consumption”. A person who suffers damage derived from a product and who claims against the manufacturer is not a “consumer” because he does not perform an act of consumption.

## 2. Dual contracts with both private and professional purpose

12. International contracts of sale of goods or contracts for the provision of services concluded by a natural person having both professional and private purposes are common. The ECJ has pronounced itself in relation to these contracts twice and has provided two different and opposite answers: it is the double face of Janus.

13. In Judgment ECJ 20 January 2005, C-464/01, *Gruber*, the case of a farmer, Mr. Gruber, owner of a quadrangular farm (*Vierkanthof*) located in Austria, near the German border, was raised<sup>22</sup>. Mr. Gruber used his farm as an economic exploitation for pig production, but also as a dwelling for himself and his family; the portion of the building used for residential purposes represented at least 60% of the building. Mr. Gruber bought some roof tiles from the German company Bay Wa, which had distributed advertising brochures in Austria, in order to renovate the roof of his farm. Mr. Gruber sued the German tile seller company, noting that not all the tiles were of the same colour. The ECJ was strict and stated that when the contract is aimed at both a private and a professional purpose, a distinction must be made between: (a) professional use of the good or service of a “slight, marginal or having a negligible nature in the context of the operation”; (b) professional use of the good or service of a “relevant” nature; and (c) professional use of the good or service of a “predominant or not negligible” nature. According to the ECJ, only in the first case, that is, when the good or service is the object of a professional use that can be described as “slight, marginal or negligible in the context of the operation”, will it be possible to qualify the contract as “concluded by a consumer”. Therefore, if the professional use of the good or service is “predominant” or “non-negligible”, the contract cannot be qualified as a “contract entered into by a consumer” (Judgment ECJ 20 January 2005, C-464/01, *Gruber*, n. 39, 42, 45, 46). This interpretation was also followed in Judgment ECJ 14 February 2019, C-630/17, *Milivojević*, n. 93).

14. In Judgment ECJ 25 January 2018, C-498/16, *Facebook*, Mr. Maximilian Schrems, a lawyer with habitual residence in Austria, opened an account for private use in the social network *Facebook* through a contract with the Irish company *Facebook Ireland Limited*<sup>23</sup>. Over time, he began to use his pri-

<sup>22</sup> B. AÑOVEROS TERRADAS, “Delimitación de los supuestos internacionales en los que se justifica el forum actoris a favor del consumidor. (A propósito de las sentencias del TJCE en los asuntos Johann Gruber y Petra Engler)”, *Diario La ley*, 2005, n° 6264, pp.1-10; R. CONTI, “La nozione di consumatore nella Convenzione di Bruxelles I. Un nuovo intervento della Corte di giustizia”, *Il Corriere giuridico*, 2005, pp. 1384-1392; V. CRESCIMANNO, “I ‘contratti conclusi con i consumatori’ nella Convenzione di Bruxelles: autonomia della categoria e scopo promiscuo”, *Europa e diritto privato*, 2005, pp. 1135-1154; E. GOTTSCHALK, “Verbraucherbegriff und Dual-use-Verträge”, *RIW*, 2006, pp. 576-578; P. MANKOWSKI, *Entscheidungen zum Wirtschaftsrecht*, 2005 pp. 305-306; ID., “‘Gemischte’ Verträge und der persönliche Anwendungsbereich des Internationalen Verbraucherschutzrechts”, *IPRax*, 2005, pp. 503-509; A. MARMISSE, “Commentaire de l’arrêt Gruber c/ Bay Wa AG - CJCE, 20 janvier 2005, aff. C-464/01”, *Revue de jurisprudence commerciale*, 2005, pp. 256-264; H. RÖSLER/V. SIEPMANN, “Gerichtsstand bei gemischt privat-gewerblichen Verträgen nach europäischem Zivilprozessrecht”, *EWS*, 2006, pp. 497-501.

<sup>23</sup> D. GUTIÉRREZ COLOMINAS, “Schrems v Facebook: the consumer definition in the framework of digital social networks”, *European Data Protection Law Review*, 4, 4, 2018, pp. 542-546; T. LUTZI, “‘What’s a consumer?’: (some) clarification on consumer jurisdiction, social-media accounts, and collective redress under the Brussels Ia Regulation: case C-498/16 Maximilian Schrems v. Facebook Ireland Limited”, *Maastricht Journal of European and Comparative Law*, 25, 3, 2018, pp. 374-381; H. MUIR-WATT, “Facebook face au consommateur ‘professionnel’ (Cour de justice de l’Union européenne, 3e ch., 25 janv. 2018, aff. C-498/16)”, *RCDIP*, 3, 2018, pp. 595-608; D. PAULUS, “Die Grenzen zivilprozessualen Verbraucherschutzes: zugleich Besprechung des Vorabentscheidungsersuchens des Obersten Gerichtshofs (Österreich) an den EuGH vom 19.09.2016, Rs. C-498/16, Maximilian Schrems vs. Facebook Ireland Limited”, *ZZP Int.*, 21, 2016, pp. 199-234; C. SCHMON, “Schrems vs Facebook: Internationale Zuständigkeit bei Forderungsabtretung”, *Ecolex*, 2018, pp. 248-249; M. STÜRNER/C. WENDELSTEIN, “Datenschutzrechtliche ‘Sammelklagen’ im Zuständigkeitsregime der Brüssel Ia-VO: zugleich Besprechung von EuGH, Urteil v. 25.1.2018, C-498/16, Maximilian Schrems vs. Facebook Ireland Ltd.”, *JZ*, 73, 22, 2018, pp. 1083-1092.

vate account for professional purposes in connection with the legal profession and, in particular, to acquire clients he then represented in suing *Facebook* for illegal use of personal data. He got more than 25,000 people to transfer him their rights to litigate against *Facebook*. Therefore, Mr. Schrems used his private Facebook account for private purposes and for professional purposes as well. The fundamental question was raised whether he could qualify as a “consumer” or not. The ECJ, on this occasion, overlooked the legal consequences of the clever triple division of professional use in “negligible”, “relevant” and “predominant” it had previously coined in Judgment ECJ 20 January 2005, C-464/01, *Gruber*; and changed its mind like a teenager in spring. In fact, according to the ECJ, an individual who contracts a service with a professional or economic operator –in this case, the social network *Facebook*– solely for private and personal purposes, is a “consumer”; if he subsequently uses such service for professional activities, even to the extent that they become “predominant” and “essential”, does not lose his “consumer” status. In other words, now the ECJ indicates that a “relevant” or even “predominant” professional use of the good or service does not prevent qualifying the contract as a “consumer contract” because the subject was a “consumer” when he contracted the service and continues being one even if only marginally or at a negligible level. The ECJ believes that this interpretation should prevail because it is the only one that allows an “effective defence of the rights that consumers enjoy in relation to their contractual partners who are traders or professionals”. Earlier, under the *Gruber* doctrine, a “relevant” or “predominant” professional use of the good or service prevented qualifying the contract as a “consumer contract”. With the *Facebook* doctrine, a contract cannot be described as a “consumer contract” only in case the professional use of the good or service is thorough and complete. If an individual hires the service as a consumer and remains a consumer –even if only in a slight or marginal way–, the ECJ understands that he is a “consumer” and that art. 17 BR I-bis applies: he can sue in the Member State of his domicile.

The ECJ has veered  $\frac{3}{4}$  without saying so, of course  $\frac{3}{4}$  from a restrictive interpretation of the concept of consumer to an expansive interpretation of that concept. This proves that a “uniform” concept of “consumer” has obvious limitations: the concept can change from one regulation to the other and can also vary over time, as A. STADLER already explained<sup>24</sup>. An excess of conceptual uniformity in this respect may damage the application of the rules of Private International Law in consistency with their purpose.

15. On the other hand, a “consumer association” or an “assignee of the rights of a consumer” are not “consumers” (Judgment ECJ 19 January 1993, C-89/91, *Hutton*; Judgment ECJ 1 October 2002, C-167/00, *Henkel*; Judgment ECJ 25 January 2018, C-498/16, *Facebook*, N. 44). Such “associations” or “assignees”, as S. BARIATTI recalls, have not concluded consumer contracts with a trader<sup>25</sup>. Art. 17 BR I-bis only protects the consumer as the party to the contract deemed to be economically weaker and less experienced in legal matters than its counterpart. The rule only protects the consumer when he himself is the plaintiff or the defendant in a judicial proceeding. If the consumer transfers his rights to an assignee, he himself is not a party to the contract and therefore cannot benefit from the protection forum provided for consumers.

Art. 17 BR I-bis only applies to litigation conducted by the consumer *in personam* against the other contracting party. If this were not the case, the company could be sued before courts whose jurisdiction is totally unpredictable, which is not in keeping with the legal certainty and predictability of the competent court, principles that inspire the Brussels I-bis Regulation. Example: Swedish consumers who have signed consumer contracts with *Facebook Ireland* transfer their rights to a Spanish lawyer, who decides to sue *Facebook Ireland* before Spanish courts. It is not possible, because art. 17 BR I-bis only applies, and  $\frac{3}{4}$  as a consequence  $\frac{3}{4}$  the forum of the consumer’s domicile is only operative, to the legal actions that each consumer personally brings against the trader.

On the other hand, such associations often claim in court that certain general contracting conditions stipulated by certain professionals be declared unlawful in general. In this case, the object of the process does not refer to a “contract”, but to a “non-contractual matter”.

<sup>24</sup> A. STADLER, “Die Einheitlichkeit des Verbrauchervertragsbegriffs im Europäischen Zivil- und Zivilverfahrensrecht – Zu den Grenzen rechtsaktübergreifender Auslegung (EuGH, S. 237)”, *IPRax*, 2015, pp. 203-207.

<sup>25</sup> S. BARIATTI, “Le azioni collettive dell’art. 140-bis del codice del consumo: aspetti di diritto internazionale privato e processuale”, *RDIPP*, 2011, pp. 19-54. *Vid.* also D. PAULUS, “Keine unechten Sammelklagen in Verbrauchersachen”, *NJW*, 71, 14, 2018, pp. 987-991.

#### IV. Final considerations

16. It is said that “law reigns and jurisprudence rules”; similarly, it can be said after our brief analysis of the two jurisprudential dyads mentioned above, that the ECJ has deployed an evolutive jurisprudence, not without contradictions. The concept of “consumer” is, in theory, a restrictive concept. However, the ECJ has now extended it to cases in which a private individual has gone on to practice as a professional in an manifest, public and conspicuous manner. Judgment ECJ 25 January 2018, C-498/16, *Facebook* proves it. In relation to consumers of financial products, the ECJ skillfully pulls strings in the context of art. 7.2 BR I-bis; however, that norm is totally insensitive with regards to the consumer. The future is stepping forward towards online mass consumption, and in the present virtual social landscape it is necessary for the ECJ to open up new ways of protecting the consumer that keep up with times. In this context, it is necessary that future amendments to the Brussels I-bis Regulation incorporate the concepts that the ECJ has created in relation to jurisdiction in the cross-border consumer sector: the concepts of “act of consumption”, “consumer”, “professional”, and “directed activity”, for example, should stop being jurisprudential concepts to become legal concepts. The future will tell.