

**The private International law Regime of Alternative and Online
Cross-Border Consumer Dispute Resolutions after the new
European Legal Frame and the Spanish Act 7/2017**

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THE PRIVATE INTERNATIONAL LAW REGIME OF ALTERNATIVE AND ONLINE CROSS-BORDER DISPUTE RESOLUTION AFTER THE NEW EUROPEAN LEGAL FRAME AND THE SPANISH 7/2017

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SUMMARY: I. Introduction. II. The new European Rules on Alternative and Online Consumer Dispute Resolution. 1. General Description. 2. Functions (and Dysfunctions) of the European Online Dispute Resolution Platform. 3. The Certified ADR Entities of the Member States. III. Material and Spatial Scope of Application of the CDR Directive and the ODR Regulation. IV. Keeping Access to Courts in the 2.0 Consumer Alternative Dispute Resolution: the Relationship of CADR with the Special International Jurisdiction Criteria for Consumer Contracts. 1. Procedures which end with a Non-binding Decision. 2. Procedures that end with a Binding Decision: the Indirect Effects of the CDR Directive on Cross-Border Consumer Arbitration. V. Questions of Applicable Law. 1. The ways of Providing Consent for the Initiation of Proceedings Before an ADR Entity. 2. The Submission to ADR Entities Whose Procedure ends with a Non-binding Decision. 3. The Submission to ADR Entities Whose Procedure ends with a Binding Decision. 4. Law Applicable to the Enervation of the Binding Nature of the Consumer Arbitration Agreement for the Consumer. 5. Conflict of laws and Material Regime of the Informed Consent. 6. Relations Between the Regime of Article 10 CDR Directive and the Regime on Unfair Terms 7. Law Applicable to the Procedure Before ADR Entities. 8. Law Applicable to the Consumer Dispute in Proceedings that end with a Binding Decision. IV. Conclusions.

I. Introduction

On the 5 November 2017, with a delay of more than two years from the original deadline —9 July 2015 — the Act 7/2017 of 2 November transposing into the Spanish legal system the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes (hereafter, SATD) entered into force.¹ The objective of the SATD is the transposition of the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes (hereafter, CDR Directive).² However, after reading the new Act, it becomes clear that it goes beyond this purpose, since some of its provisions serve as legislative development of the Regulation 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes (hereafter, ODR Regulation).³ This is an Act of programmatic character which establishes the requisites that the entities for the alternative dispute resolution of consumer contracts (hereafter, ADR entities) and their procedures must comply to receive the European certification and designates which will be the competent authorities for the evaluation of the applications and, given the case, the withdrawal of such certification.

¹ BOE n. 268, 4.11.2017.

² OJ L 165/1, 18.6.2013.

³ For an analysis on the principal elements of the new European set of rules, see Fernando Esteban de la Rosa & Pablo Cortés, *Un nuevo Derecho europeo para la resolución alternativa y en línea de litigios de consumo*, 514—563 (Fernando Esteban de la Rosa (ed.), *La Protección del Consumidor en Dos Espacios de Integración – Una Perspectiva de Derecho Internacional, Europeo y Comparado*, Tirant lo Blanch, 2015).

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The CDR Directive and the ODR Regulation are applicable to both domestic and cross-border disputes. This paper aims at assessing the impact of the new European legal frame and of the SATD on private international law solutions in the field of ADR of cross-border consumer contracts. We will concentrate our attention on the relations of consumer ADR with international jurisdiction and the questions regarding applicable law. To achieve these goals, the variety of the methods of solution used by the ADR-entities of the Member States as well as the possible coexistence of certified and non-certified ADR-entities must be taken into consideration.

Neither the new European law nor the SATD have numerous special rules for cross-border disputes. Moreover, they do not contemplate the possible existence of connexions between the alternative dispute resolution and the aim of the rules on international jurisdiction, especially on consumer contracts, nor contain a complete regime for the applicable law questions that the new rules are making surface. Therefore, it is necessary to build a system that brings clarity on the coupling of especial and general solutions. To fulfil this task, it will be most interesting to count on the hermeneutic aid of the principles informing this sector and, especially, on the demands resulting from the proclamation to the right to effective judicial protection arising from Art. 47 of the European Human Rights Charta (hereafter, EUCFR) and Art. 19 of the Treaty of the European Unions (hereafter, EUT).

Discovering the regime that has been developed for cross border consumer arbitration will be particularly interesting since the new European system poses new regulatory challenges. We will also evaluate the solutions offered for language problems linked with the use and the management, respectively, of the European platform and the national platforms of alternative resolution of consumer disputes.

In the light of this approach, this paper includes proposals de lege ferenda to achieve a more satisfactory regime for the online resolution of cross-border consumer disputes. Before exposing the questions of applicable law, the principal element of the new European regulation as well as their scope of application must be, although briefly, described.

II. The new European Rules on Alternative and Online Resolution of Consumer Contracts

1. General Description

The new European law assigns obligations, mainly, to the European Commission, to the Member States and to the traders. The set of rules is based on the creation of the European Online Dispute Resolution Platform for consumer disputes, on one side, and on the need that the States have ADR-entities adapted to European law, on the other. The demands encompass the need of ADR-entities to cover particular disputes, the fulfilment of minimal quality standards in their configuration and in the procedures they follow and the establishment of obligations for traders and public administrations to guarantee the knowledge of the existence of these entities.⁴ Every state, through the competent authorities it must designate,⁵ must evaluate the applications for

⁴ See Art. 13 and CDR Directive as well as arts 40, 41 and 42 SATD.

⁵ The competent authorities in Spain are the ones specified in Art. 26 SATD. Along with the Presidency of the Spanish Agency of Consume, Food Safety and Nutrition, specific authorities for certain sectors of complaints and authorities established by the autonomous communities are contemplated.

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certification of the ADR entities and supervise the fulfilment of the established requirements. The states must adapt the rules on caducity and the statute of limitations in order to ensure that the exercise of judicial actions is not hindered by the passing of time.⁶ Through national legislation, European law seeks to promote the cooperation and the exchange of experiences among ADR- entities as well as the cooperation between ADR entities and national authorities in charge of the application of the European rules on consumer protection.⁷

The ODR Regulation came into force on 8 July 2013 and the European platform was put into operation on 15 February 2016.⁸ Since that date, traders, also the ones established in Spain, must offer in their Internet sites an electronic link to the online dispute resolution platform. At present, Spain and Rumania are the only countries in the European Union that have not notified their certified entities to the European Commission.⁹ Until October 2017, 29,478 complaints had been submitted. 4,589 were submitted by consumers with residence in Spain and among them there were 2,582 complaints against traders established in Spain. On the whole, 61.83 % of the complaints received by the platform were domestic, and the rest (38.17 %) were cross-border complaints.¹⁰ In order to facilitate the access to every certified entity established in another Member State and with the competence to solve the complaint, Art. 43 SATD attributes the function of assisting the consumer to the European Consumer Centre in Spain. The SATD also appoints the European Consumer Centre Spain as a contact point with the functions that are specified in Art. 7(2) ODR Regulation. These consist essentially in facilitating the communication between the parties and the competent ADR entity and submitting every two years to the Commission and the Member States an activity report based on the practical experience gained from the performance of their functions.

2. Functions (and Dysfunctions) of the European Online Dispute Resolution Platform

One of the biggest innovations of the European legislation is the creation and starting up of the European Online Dispute Resolution Platform. Consumers residing in a Member State of the European Union can submit their complaints via Internet on the site managed by the European Commission and they will be transmitted to the trader and, where appropriate, to a competent ADR entity of a Member State in order to be processed.

The ODR Regulation contains uniform procedure rules which regulate, among other questions, the submission of the complaint, communication to the respondent party, the agreement on the ADR entity that will deal with the complaint or the grounds for the refusal of the complaint or for not further processing the complaint (arts 8 and 9 ODR Regulation). The procedure rules are rather sparse in the regulation of some questions. For instance, even though it is assumed that the parties must agree on the ADR entity that must deal with the complaint, there is no regulation on the technical means that must be used to facilitate the expression of the consent

⁶ For the Spanish sector, see Art. 4 SATD.

⁷ See arts 16 and 17 CDR Directive as well as Art. 45 SATD.

⁸ The platform is available on the following website <https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.home2.show&lng=ES> (accessed 5 Febr. 2018).

⁹ The list of the certified ADR entities of the Member States can be reviewed on the following website <https://ec.europa.eu/consumers/odr/main/?event=main.adr.show> (accessed 5 Febr. 2018).

¹⁰ The information is available on the following website: <https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.statistics.show> (accessed 5 Febr. 2018).

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and on the amount of information that the consumer must be given in that moment. Once it has taken place, this agreement does not need to be reproduced before the ADR entity which has received the complaint and which, for instance, is dealing with the procedure online.

The European platform does not incorporate tools for online negotiation such as assisted negotiation or automated negotiation. It operates basically as a single point of entry for the consumers and traders seeking to submit a complaint. For that purpose, the interested parties can fill out their complaint online, free of charge and in all the official languages of the EU. It must be noted that, even if filling in the complaint is free of charge, the CDR Directive allows that the Member States authorize their certified ADR-entities to charge a fee for the provided service. The European platform has also an electronic case management tool which allows for the communication of the parties with the competent and makes the submission of documents possible. This tool is available not only for cross-border disputes, but also for domestic ones. The website contains information on the ADR-entities that have been certified by the Member States and included in the platform and will also include future comments of the parties, with opinions on its functioning and on the ADR entity having dealt with the dispute.

The language of the proceeding before an ADR entity represents a key question in cross-border cases. In this point, the European regime shows lights and shadows. On the one hand, the complaint can be submitted in all the official languages of the European Union and there is also an electronic translation function with the logistical support of all national contact points. The main goal of these measures is to help the parties and the ADR-entities exchange information. However, the possibility of filling in the form in every language of the European Union does not mean that the selected ADR entity has to process the complaint in that language. According to the established operating system, once the complaint is submitted to an ADR entity, the platform only has to inform the consumer of the language in which the procedure will take place, even if the consumers may have been under the impression that they will be able to use their language during the whole processing of the complaint.

The current regulation of the European platform generates an additional dysfunction. Nowadays, in more than half of the cases, if the trader simply does not answer to the invitation to participate in a procedure before an ADR entity, the complaint is not processed, even if the trader is legally obliged or if he has committed to participate in the procedure. In the cases in which the complaint is not processed, the ODR Regulation only establishes that the complainant party must be informed of the possibility of contacting an ODR-advisor in order to obtain information on other means of redress. In our opinion, both solutions are insufficient and they suppose a setback in the effectivity of the consumers' rights in comparison with the existing system.

On the other hand, when the trader is adhered by law or because of an agreement to an ADR entity, the start of the procedure before that ADR entity cannot depend on the existence of the trader's answer. Given that, in those cases, the trader is already obliged to take part in the procedure, if the respondent trader does not answer after 30 calendar days after the submission of the complaint form, the platform, instead of not processing the complaint, could submit the complaint to the ADR entity chosen by the consumer. Logically, the consumer should be given the opportunity to decide on the intervention of a particular ADR entity. And if there are various competent ADR-entities, the consumer should be given the possibility of making a selection among the ones that can deal with a complaint without the express consent of the trader.

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Moreover, when the complaint is not processed, just informing the consumer of the need to contact another organism (the ODR-advisor) in order to obtain information on other means of redress is not sufficient. Firstly, this implies that the consumer must initiate a different path simply to obtain an information that the platform should be able to provide. Secondly, this option is not available in all cases. For example, Art. 7(3) ODR Regulation allows that the States relieve the points of contact for the online resolution of disputes of the duty to perform their functions when the parties of the complaint have their residence in the same Member State. For these reasons, we believe that when the complaint is not processed because the trader has not submitted an answer, the consumer should be informed of the further available means of redress. Otherwise, the implementation of the platform will mean a setback in relation to the system of European Consumer Centres.¹¹

The CDR Directive contains dispositions that serve the special needs of cross-border complaints, such as the duty to provide information on the membership of the ADR entity in networks of ADR entities facilitating cross-border dispute resolution¹² and the languages in which complaints can be submitted to the ADR entity and in which the ADR-procedure is conducted.¹³ Given that in some Member States the ADR-entities can deal with complaints submitted by the traders against the consumers, the ODR Regulation establishes that the platform can be used for this kind of complaints in so far as the legislation of the Member State where the consumer is habitually resident allows it.¹⁴

3. The Certified ADR Entities of the Member States

The resolution of consumer disputes is responsibility of the ADR entities that have been certified in every Member State. The states assume the duty of making available enough ADR entities to provide complete coverage of the disputes falling into the scope of application of both instruments. The certified ADR entities must have a website with information on their procedures which, among other things, must allow the electronic submission of complaints. Likewise, they must comply with minimal quality standards, namely the exigence of specialized knowledge for the personal in charge of dealing with the complaint and the ones arising from the principles of independence and impartiality, transparency, equity, liberty and legality.¹⁵

Given that the CDR Directive is conceived as a minimum harmonisation directive, the standards applying to the ADR entities can, in turn, be risen in every Member State. When fulfilling the transposition of the CDR Directive, almost all states have chosen to incorporate the innovations of European law while maintaining the existing structures of ADR entities.¹⁶ This modus operandi

¹¹ See the Protocol on case handling for the European Consumer Centres Network.

¹² See Art. 7(1) e) CDR Directive and Art. 38(1) g) SATD.

¹³ See Art. 7(1) h) CDR Directive and Art. 35(1) f) SATD.

¹⁴ See Art. 2(2) ODR Regulation.

¹⁵ See Ángeles Cuenca García, *Los principios de transparencia, eficacia, libertad y legalidad en la Directiva 2013/11/UE del Parlamento Europeo y del Consejo de 21 de mayo de 2013, relativa a la resolución alternativa de litigios de consumo, y su incidencia en el sistema de arbitraje de consumo español* 37—79 (Guillermo Palao Moreno, *Los nuevos instrumentos europeos en materia de conciliación, mediación y arbitraje de consumo, su incidencia en España, Irlanda y el Reino Unido*, Tirant lo Blanch, 2016).

¹⁶ For an approximation to some of the models followed for the transposition of the CDR Directive, see the report prepared by Pablo Cortés and Fernando Esteban de la Rosa, *La normativa europea de resolución de conflictos de consumo y su transposición en España: una oportunidad para mejorar los derechos de los consumidores aprovechando las experiencias positivas en el Derecho comparado* (ADICAE, 2016).

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has been possible as a consequence of the wide margins that the CDR Directive and the ODR Regulation grant the states for the development of such structures. From this perspective, both instruments are informed by a principle of respect for the legal culture and minimal invasion of the traditions of the Member States.

For the compliance of the CDR Directive, it is indifferent that the Member States guarantee the complete material and territorial coverage defined in its scope of application through a single, various or multiple ADR entities. There also are no options regarding the type of entities, public or private, even with profit motive, with which the complete coverage will be guaranteed, nor a procedure that must be followed. For instance, Member States are given a large degree of freedom in the transposition of procedural questions contemplated in Art. 5(4) CDR Directive. Most of them have been echoed in Art. 18 SATD. In turn, it is possible that, within every state, the certified ADR-entities have different procedural rules. In this aspect, the European regulation distances itself from the legislation that was initially drafted within UNCITRAL and from the system followed by the ECODIR-platform, which conceived a special single procedure for cross border disputes.

European law does not obligate the Member States to require the mandatory participation in procedures before ADR entities from traders or consumers. However, as contemplated in its Recital 49, the CDR Directive 'should be without prejudice to any national rules making the participation of traders in such procedures mandatory or subject to incentives or sanctions or making their outcome binding on traders, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system as provided for in Article 47 of the Charter of Fundamental Rights of the European Union.'

The CDR Directive does not oblige to choose a particular option among the different available dispute resolution methods either. Therefore, both procedures finalizing with a non-binding decision or with a decision whose binding nature follows from its acceptance are admitted.¹⁷ The states can also opt for making the decision from the ADR entity binding only for the trader.¹⁸ The CDR Directive also supports systems of consumer arbitration, and also the systems in which the binding nature of the decision follows from its contractual nature.¹⁹ This follows from Art. 2(4) CDR Directive, which allows the Member States to admit that the proceedings before ADR entities end with a binding decision. In the CDR Directive there is also place for ADR entities which opt for mixed methods of conflict resolution combining consensual and adjudicative methods. European law only excludes the methods of dispute resolution in which two circumstances converge, namely the mandatory participation before an ADR entity and the binding character of the decision or, more exactly, the fact that the decision excludes access to court.²⁰ In the Spanish system this principle has been proclaimed by Art. 9 SATD.²¹ No every

¹⁷ For example, the system of representative negotiations carried out in Italy through the *conciliazione paritetica*, or the decisions of the French *mediateurs d'entreprise*.

¹⁸ This is the case of the decisions of the ombudsmen in the United Kingdom and in Ireland.

¹⁹ This is the system followed by Dutch ADR entities.

²⁰ This interpretation follows from Art. 1 *in fine* and Art. 10 (2) CDR Directive.

²¹ For this reason, in the extent in which the access to court procedures can be precluded, the compatibility of systems like with the one defined in the second section of the second additional provision SATD for complaints in the field of air transportation or the compulsory arbitration introduced in the Portuguese system for essential services (see lei 6/2011, dos serviços públicos essenciais, de 10 de marzo.

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method of dispute resolution has been embraced by the Member States for its use by certified entities. States such as Germany or Italy, where consumer arbitration is well known, only grant access to the certification procedure to ADR entities that do not impose a solution. This explains why the legislators have not carried out the transposition of Art. 10 and 11 CDR Directive. Instead, in other countries, consumer arbitration has been expressly contemplated for certified entities (for instance Belgium, Portugal, Ireland, United Kingdom). Not every existing ADR entity in the Member States has obtained or is in the way of obtaining the European certification.

One of the most significant changes in the treatment of cross-border complaints is due to the fact that the new certified ADR entities cannot refuse to deal with a cross-border dispute and send it, for example, to the ECC.²² In fact, this is the *modus operandi* that is being followed by most Spanish ADR entities, including the Municipal Consumer Information Boards (hereafter, OMIC), when facing such a complaint. Through the ECC, it is possible to identify the ADR entity in the state of the trader which is competent for dealing with the complaint and even to carry on some kind of mediation. For the new certified ADR entities, the assimilation between cross-border and domestic complaints proposed by the CDR Directive implies the more complex obligation of dealing with cross-border complaints. This bigger complexity is presented as a consequence of the fact that, in multiple occasions, the consumer will not master the language in which the procedure takes place, and the third party neutral will also have to face documents in a foreign language. However, the CDR Directive does not oblige the public ADR entities to use all languages, but simply to make public the language in which the complaints can be dealt with. In the Spanish case, the SATD does not establish the obligation of the certified ADR entities to allow the procedure to be completed in a particular language. The only obligation included is the duty of the ADR entities to inform of 'the Spanish official languages and the [foreign] languages in which the complaints can be submitted and in which the procedure is carried out' (Art. 38(1) f) SATD).

III. Material and Spatial Scope of Application of the CDR Directive and the ODR Regulation

The CDR Directive has incorporated the standards already established in the Recommendations of 1998 and 2001 as minimal quality standards for ADR entities.²³ Since they were destined to serve as soft law, the Recommendations do not lay out the scope of application of their principles. In the extent in which obligations for the states arise from them, the CDR Directive and the ODR Regulation define the material and spatial scope of their dispositions. However, the CDR Directive and the ODR Regulation provide direct solutions for the possible problems regarding the applicable law (some of them new) only in rare occasions.

Diário da República n.º 49/2011, Série I de 2011-03-10) with the methods admitted by the CDR Directive can be doubted.

²² It must be noted that this transmission to the ECC used to take place *de facto*, since most of the existing ADR entities in Spain did not specify the scope of their competence on cross-border disputes. One exception can be found in the Regulation of Confianza Online. See the website <https://www.confianzaonline.es/consumidores/guia-practica-de-consumidores-faq/> (accessed 5 Febr. 2018).

²³ See the Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, OJ L 115, 17.04.1998; and the Commission Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, OJ L 109, 19.4.2001.

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The determination of the scope of the CDR Directive is dealt with in Art. 2 and 4(1) h). According to the first one, the CDR Directive 'shall apply to procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts between a trader established in the Union and a consumer resident in the Union through the intervention of an ADR entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution.' Meanwhile, Art. 4(1) h) CDR Directive defines the ADR entity as 'any entity, however named or referred to, which is established on a durable basis and offers the resolution of a dispute through an ADR procedure and that is listed in accordance with Article 20(2).' In the ODR Regulation, attention must be paid to Art. 2 and Art. 4(1) i). As single distinguishing feature, the ODR Regulation only includes in its scope of application the complaints arising from e-commerce. In accordance with this delimitation, the SATD extends its application to 'ADR entities established in Spain, both public and private, which propose, impose or facilitate a solution between the parties in the field of alternative dispute resolution of national and cross border consumer disputes regarding contractual obligations arising of contracts of sales and contracts for the provision of services, and which voluntarily request their certification with the aim of being included in the national list of certified entities that will be elaborated by the Spanish Agency of Consume and Food Safety.'²⁴

This view on the scope on application of the CDR Directive has been corroborated by the recent decision released by the ECJ on 14 June 2017.²⁵ According to paragraph 40 of this decision: 'Directive 2013/11 does not apply to all disputes involving consumers, but only to procedures which satisfy the following cumulative conditions, that is to say, (i) the procedure must have been initiated by a consumer against a trader concerning contractual obligations arising from sales or service contracts, (ii) in accordance with Article 4(1) (g) of Directive 2013/11, that procedure must comply with the requirements laid down in that directive and, in particular, in that respect, be independent, impartial, transparent, effective, fast and fair, and (iii) that procedure must be entrusted to an ADR entity, that is to say, in accordance with Article 4(1)(h) of that directive, an entity, however named or referred to, which is established on a durable basis and offers the resolution of a dispute through an ADR procedure and which is entered on the list drawn up in accordance with Article 20(2) of Directive 2013/11, a list which is notified to the European Commission'.

However, without further specification, the ECJ points out that there can be provisions in the CDR Directive with a bigger scope of application. This follows from paragraph 51 of the decision, according to which the legislative autonomy of the States remains intact, on condition that the *effet utile* of the Directive 2013/11 is respected.²⁶ In absence of explanations, it is the responsibility of the interpreter to assess if, to guarantee its *effet utile*, the application of some

²⁴ Although the wording of Art. 2 i) SATD might lead to the conclusion that the ADR entities to which the Spanish comprised in the scope of application of the Spanish law are the ones established *in Spain on a lasting basis* [de manera duradera en España], this requirement does not refer to the establishment in Spain, but to the character of the ADR entity, and has the goal of excluding ADR entities created *ad hoc*. Art. 2 i) SATD must be interpreted this way, which is also in accordance with European law.

²⁵ Case C-75/16: 'Livio Menini, María Antonia Rampanelli and Banco Popolare Società Cooperativa'.

²⁶ Paragraph 75 of the Conclusions of Advocate General Henrik Saugmandsgaard OE, to which the Decision explicitly refers, states that 'so far as the detail and nature of ADR procedures not governed by Directive 2013/11 are concerned, Member States retain their full legislative autonomy, provided the directive remains effective.'

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provisions of the CDR Directive goes beyond what has been stated in the paragraph below. What we say is to be understood, of course, notwithstanding the possibility that the national legislator decides to extend the scope of application of the transposing act to situations not comprised within the scope of application of the European law.²⁷

Arts 6 to 11 of the CDR Directive regulate the principles that the ADR entities must follow in order to achieve the European certification (expertise, independence, impartiality, transparency, effectiveness, fairness, liberty and legality). The obligation to comply with these standards falls on the ADR entities that achieve certification.²⁸ Everything suggests that the ADR entities will have to comply with these principles in the way in which they are defined by the legislation of the EU Member State of their establishment, as defined in Art. 4 (3) CDR Directive. Therefore, with a unilateral perspective, Art. 3(1) SATD extends the scope of application of the Spanish Act to ADR entities established in Spain. Only these entities must comply with the requisites for the certification of ADR entities (arts 5 to 7 SATD), the requisites regarding the procedures managed by the ADR entities (arts 8 to 21) and the requisites regarding the natural persons in charge of the procedures managed by the ADR entities (arts 22 to 25 SATD). In order to be certified, these entities will have to follow the procedure regulated in arts 26 to 34 SATD. Once they have obtained the certification, they will be subject to the obligations referred to in arts 35 to 39 SATD.

The access to certification of an ADR entity is subject to the condition that it can deal with disputes concerning contractual obligations stemming from sales contracts or service contracts. It follows from the CDR Directive that the certification of an ADR entity that does not deal with this kind of disputes by a state is not possible. For this reason, it will be necessary to ascertain the scope of the second subsection of Art. 3(1) SATD, according to which the Act will be applicable to entities which, being active in the field of alternative resolution of disputes regarding the compliance of commitments undertaken by affiliated companies in codes of conduct regarding commercial or advertising practices, apply voluntarily for certification in order to be included in the national list of certifies entities.²⁹

The second section of Art. 2 CDR Directive and Art. 3(2) SATD contain a list of aspects that remain excluded from their scope of application. For a better understanding of these exclusions, it is interesting to bear in mind its own meaning and, in particular, to discover how they affect the possibility of certification.

According with Art. 2(2) a CDR Directive and due to the fact that the authorisation mentioned by this provision is not contained in the SATD, the certification of ADR entities that are not independent from the trader against whom the consumer has submitted a complaint is not

²⁷ As for instance has been made by most Member States by extending the application of the Directive on Mediation to mediations in cross-border cases.

²⁸ As basis for this interpretation the definition of ADR entity contained in Art. 4 (1) h) CDR Directive can be mentioned. See Esteban de la Rosa and Cortés, *supra* 3, at 524—525 and 539.

²⁹ In the Spanish system, AUTOCONTROL (a jury on adverting matters) would find itself in this situation. Even in the event that the extension to these entities of the certification regulated by the SATD was accepted, we find some difficulties to allow the notification of the certification to the European Commission and their incorporation to the single list of ADR entities from the Member States. Meanwhile, we see no obstacles to the certification of ADR entities with jurisdiction on disputes not included in the scope of application of the CDR Directive, provided that they also have jurisdiction regarding the disputes included in the scope of application of the Directive.

F. Esteban de la Rosa, "The private International law Regime of Alternative and Online Cross-Border Consumer Dispute Resolutions after the new European Legal Frame and the Spanish Act 7/2017", in S. Leible and R. Miquel Sala (edits), *Legal Integration in Europe and America*, JWV, Sippligen, 2018, pp. 321-357.

possible in Spain.³⁰ Certification is also not possible for complaint-handling services operated by the traders (Art. 3(2) c) SATD). Moreover, the SATD is not applicable to the direct negotiation between the consumer and the trader, and therefore procedures of this kind remain excluded from the certification procedure. Both the CDR Directive and the SATD exclude the procedures initiated by a trader against a consumer from their scope of application.³¹ As the ECJ reminds in its decision of 14 June 2017, the provisions of the CDR Directive are only applicable to the procedures initiated for a consumer against a trader.³² However, even if it would seem otherwise, this exclusion does not affect the access to certification of the ADR entities that also deal with complaints of traders against consumers, which do not have to be subject to the standards of the CDR Directive or the SATD. This follows from Art. 2(2) CDR Directive. In fact, some Member States, like Germany, Belgium, Luxemburg and Poland, allow the certified ADR entities to deal with the complaints of a trader against a consumer. In the Spanish system we would find ourselves in a similar case if the consumer arbitration courts would be certified as European ADR entities, because the complaints which they can deal with are not defined by the presence of traders or consumers. Similar considerations can explain the meaning of the exclusion contained in Art. 2(2) CDR Directive (complaints among traders). Also excluded are the disputes among traders (Art. 3(2) d)), the attempts made by a judge to settle a dispute in the course of a judicial proceeding concerning that dispute as well as the complaints referred non-economic services of general interest (Art. 3(2) c)). The exclusions regarding health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices and public providers of further or higher education³³ do not seek to prevent the access to European certification to those ADR entities that deal with complaints in these areas. The followed goal is to reduce the scope of the obligation of the states to ensure full coverage by ADR entities of the disputes related with the contracts for the provision of these services. As a consequence, nothing prevents the extension of the coverage by certified entities to these disputes, something that the Spanish legislator has chosen not to do. In Europe, we already have the precedent of the United Kingdom, where this extension has taken place due to the fact that university students are considered as consumers, and therefore, this kind of complaints are managed by certified ADR entities.

Some provisions of the CDR Directive and the SATD pose problems when defining their scope of application. This affects specially the provisions which contain obligations not directed to the ADR entities. In all these cases, it is necessary to delimitate the material and spatial scope of application taking into account the followed objectives and the effect utile of European law.

One first exception must be found in the scope of the principle of liberty, which is contained in Art. 13 (effectivity of previous agreements between consumer and trader leading to the submission to a procedure which ends with a non-binding decision) and 15 SATD (effectivity of previous agreements between consumer and trader leading to the submission to a procedure which ends with a binding decision and guarantee of informed consent in agreements entered in after the dispute has arisen). The legal guarantee providing that an agreement which has been entered into before the arising of the dispute and deprives the consumer of the right to seek

³⁰ This option was taken into consideration in the Bill for the transposition of the Directive 2013/11/EU into the Spanish legal system.

³¹ See Art. 2(2) g) CDR Directive and 3(2) b) SATD.

³² See Art. 2(2) g) CDR Directive and 3(2) b) SATD.

³³ Art. 2(2) h) and i) CDR Directive, Art. 3(2) g) and h) SATD.

F. Esteban de la Rosa, "The private International law Regime of Alternative and Online Cross-Border Consumer Dispute Resolutions after the new European Legal Frame and the Spanish Act 7/2017", in S. Leible and R. Miquel Sala (edits), *Legal Integration in Europe and America*, JWV, Sippligen, 2018, pp. 321-357.

judicial redress is not binding for the consumer cannot be subject to the condition that the clause in question designates a certified ADR entity. Otherwise, we would not only be creating two different regimes depending on whether the designated ADR entity is a certified entity or not, but we would also deal with a system in which the stricter (European) regime would be only applicable when the clause would designate an ADR entity of higher quality. On the contrary, if the clause designates a non-certified ADR entity, which will probably comply with lower procedural standards, the national system, possibly more tolerant with this kind of clauses, would be applicable. Moreover, the suggested inapplicability of the European regime when the dispute has been initiated by the trader against the consumer is also not acceptable.³⁴ In both cases, the effet utile of European law as stated by the ECJ in its decision of 14 June 2017 must be invoked. The harmonized solutions arising from Art. 10 CDR Directive must be deemed applicable with the extent established by Art. 2(1) CDR Directive, i. e., when the dispute takes place between a trader established in the Union and a consumer resident in the Union. A different question will be the determination of the harmonized solution applicable in a particular case.

The scope of the dispositions of the CDR Directive must also be specified with regard to the definition of the information duties assigned to the traders in Art. 13 CDR Directive and regulated in arts 40 and 41 SATD. As already known, Art. 13 CDR Directive places on the traders the duty to inform the consumers of the ADR entities they are affiliated to or obliged to use. According to the most usual interpretation, which is based in Art. 4(1) h) CDR Directive, this obligation only exists when the ADR entity in question has obtained the European certification, and therefore the traders affiliated to non-certified ADR entities are not obligated to inform the consumers on their affiliation. In the extent in which these obligations are not directed to the certified ADR entities, we believe that, considering the effet utile of this provision, it should be understood that the duty to inform is placed on all traders affiliated to ADR entities, certified or not. This has not been the posture apparently adopted by the Spanish legislator, who in Art. 41 SATD places the information duties only on the traders affiliated to certified ADR entities. By doing so, a powerful incentive for the affiliation of the traders to non-certified ADR entities would have been created. However, if we read more carefully the content of the Spanish provision it is possible to conclude that traders not adhere to certified ADR entities are also obliged, at least in some extent, to inform consumers. Although Art. 41 does not clarify this, these duties are placed on the traders established in Spain, as it can be deduced from Art. 13 CDR Directive. For the determination of this establishment, Art. 2 g) SATD must be taken into account.³⁵

We believe that the regulation of the effects of the submission of a claim before an ADR entity is another occasion in which the effet utile of European law must be invoked. According with Art. 4 SATD:

³⁴ See for instance Norbert Reich, *A Trojan Horse in the Access to Justice – Party Autonomy and Consumer Arbitration in conflict in the ADR-Directive 2013/11/EU?*, 10 n. 2 ERCL 2014, 269—270. We would like to express our profound affection to the quoted author, the epitome of a lawyer, whose special sensibility in the field of the European consumer protection law we have always followed with pleasure. Sadly, he left us recently and we would like to dedicate this contribution to him as a humble tribute to his memory.

³⁵ We held this position in Fernando Esteban de la Rosa, *Challenges for the implementation of the Consumer CDR Directive in Spain*, 285 (Pablo Cortés, *The New Regulatory Framework for Consumer Dispute Resolution*, Oxford University Press, 2016).

F. Esteban de la Rosa, "The private International law Regime of Alternative and Online Cross-Border Consumer Dispute Resolutions after the new European Legal Frame and the Spanish Act 7/2017", in S. Leible and R. Miquel Sala (edits), *Legal Integration in Europe and America*, JWV, Sippligen, 2018, pp. 321-357.

1. The submission of a complaint before a certified entity suspends or interrupts the computation of the periods of limitation or prescription of the claims according to the provisions applicable to the case.

2. When an ADR procedure which ends with a non-binding decision before a certified ADR entity is initiated voluntarily while a judicial procedure is pending, the parties can request by mutual consent the suspension of the judicial procedure in accordance with the procedural legislation.

This provision is the transposition of Art. 12 CDR Directive, which does not allude specifically to the certification of the ADR entity. We believe that everything suggests that the CDR Directive does not intend to prompt the existence of different regimes based on this criterion, and therefore it can be maintained that the Spanish transposition has not been entirely satisfactory. Moreover, if we take into account that prescription is a question that falls into the scope of the law applicable to the contract, the uniform qualification that the Rome I Regulation on the law applicable to contractual obligation dictates for this question leads us to the conclusion that both the CDR Directive and the SATD should be modified in order to ensure the application of this provision without regard to the law applicable to the contract. An overriding mandatory provision must be identified. Regarding its scope, it seems logical to think that it will equal the scope of the CDR Directive, that is, it will require the existence of a complaint by a consumer residing in the European Union against a trader established in the European Union.³⁶

IV. Keeping Access to Courts in the 2.0 Consumer Alternative Dispute Resolution: the Relationship of CADR with the Special International Jurisdiction Criteria for Consumer Contracts

1. Procedures that end with a Non-binding Decision

The CDR Directive does not contain rules on international jurisdiction for ADR entities dealing with cross-border matters or a reference to the Brussels I Regulation mirroring the reference made to Art. 6 Rome I Regulation in Art. 11 CDR Directive. The main reason for this may well be that, as a general rule, the participation in the procedure before an ADR entity takes place on a voluntary basis and is normally initiated by the consumer. However, against this argument it is submitted that, as a matter of fact, the consumer has little say in the matter since the trader may be obliged to participate before a specific CDR entity or, where appropriate, he may have chosen a CDR entity which might be more favourable to him. In cross-border situations, the CDR entity may even be that of a state different from that of the consumer's residence and of the trader's establishment.

In proceedings before CDR entities whose procedures end with a non-binding decision for the consumer, the possibility of initiating court proceedings remains. Therefore, the consumer will not lose the opportunity to use the special fora provided by the Brussels I Regulation for consumer contracts. In the view of CDR Directive, the procedural guarantees included in its Art. 9 (informing the parties, right before the procedure commences, of the possibility of withdrawing from the procedure at any stage if they are dissatisfied with the performance or the operation of the procedure; informing the parties, before agreeing or following a proposed

³⁶ Véase en este sentido Pedro Alberto de Miguel Asensio, *El proyecto de ley de incorporación de la Directiva sobre resolución alternativa de litigios de consumo: algunas cuestiones (carencias) de Derecho aplicable*, <http://pedrodemiguelasensio.blogspot.de/2017/04/el-proyecto-de-ley-de-incorporacion-de.html> (accessed 5 Febr. 2018).

F. Esteban de la Rosa, "The private International law Regime of Alternative and Online Cross-Border Consumer Dispute Resolutions after the new European Legal Frame and the Spanish Act 7/2017", in S. Leible and R. Miquel Sala (edits), *Legal Integration in Europe and America*, JWV, Sippligen, 2018, pp. 321-357.

solution, that they have the choice as to whether or not to agree to or follow the proposed solution; and that the proposed solution may be different from an outcome determined by a court applying legal rules; allowing the parties, before expressing their consent to a proposed solution or amicable agreement, a reasonable period of time to reflect) have enough protective effect to compensate for the fact that the consumer may end up losing the possibility of seeking judicial redress. This idea is reinforced after the aforementioned ECJ judgment from 14 June 2017³⁷, according to which the CDR Directive must be interpreted as precluding national legislation which provides that the parties may withdraw from a mediation procedure only if they demonstrate the existence of a valid reason in support of that decision.

In our opinion, however, the solutions of the CDR Directive are not entirely satisfactory. On the one hand, in purely domestic cases, the guarantees provided by Art. 9 CDR Directive are not sufficient to assure the consumer that the solution reached through the agreement is close to the solution that would be issued by a judge, since no independent legal advice is offered to him at any time. For this reason, we believe that Member States should establish mechanisms to foster independent legal advice in their respective implementing legislations. A step in his direction could be the introduction of a period of withdrawal from the agreement reached by the parties, which would benefit the consumer once he has given his consent to the mediation agreement. Even though an amendment was proposed in the Spanish *Congreso de los Diputados* to this purpose,³⁸ it was not taken into consideration and as a result Art. 14 SATD closely follows art 9(2) CDR Directive.

On the other hand, even greater deficiencies may be identified in the treatment given to cross-border claims. The CDR Directive does not guarantee the processing of the claim in the language of the consumer, and therefore there is no guarantee that the consumer will understand what is being said to him/her and will not end up losing the possibility to seek judicial redress. For this reason, for cross-border litigation, it is necessary to ensure that the information referred to in Art. 9 CDR Directive, which is relevant in order to keep the right to pursue the claim in court, even before a court of his domicile, should be provided to the consumer in his own language, or, at least, in the language in which the claim was filed. In the course of online proceedings, a specific instrument should be introduced allowing the consumer to declare, without unambiguity, that he/she is aware of all relevant information.

2. Procedures that end with a Binding Decision: the Indirect Effects of the CDR Directive on Cross-Border Consumer Arbitration

When the decision that puts an end to the procedure is binding on the consumer, the CDR Directive contemplates two additional consumer protection elements in arts 10 (principle of freedom) and 11 (principle of legality). The principle of freedom is twofold. On the one hand, Member States are required to guarantee the non-binding nature of a clause contained in an agreement entered into before the dispute arises when it has the effect of depriving the consumer of his right to appeal to the competent courts. On the other hand, Member States are obliged to ensure the existence of an informed consent of the parties (consumer and trader) with regard to the binding nature of the decision when the procedure ends with the imposition of a solution. Regarding the principle of legality, states are required to guarantee the application

³⁷ Case C-75/16: 'Livio Menini, Maria Antonia Rampanelli y Banco Popolare Società Cooperativa.

³⁸ See amendment number 49 of the Socialist Parliamentary Group to the Draft SATD. BOCG, Congreso Series A, 23 May 2017.

F. Esteban de la Rosa, "The private International law Regime of Alternative and Online Cross-Border Consumer Dispute Resolutions after the new European Legal Frame and the Spanish Act 7/2017", in S. Leible and R. Miquel Sala (eds), *Legal Integration in Europe and America*, JWV, Sipplingen, 2018, pp. 321-357.

of the mandatory consumer protection rules by the ADR entity. The Spanish transposition of the principle of freedom in proceedings that end with a binding decision has been included in Art. 15 SATD, and the principle of legality in Art. 16 SATD.

The solutions contained in the CDR Directive have brought about very significant changes in the regime of consumer arbitration in the European Member States, both in the domestic sphere and in cross-border cases. So much so that the doctrine has denounced the CDR Directive, indirectly, stating that it contributes to strengthening the systems of consumer arbitration in the Member States, in the framework of a new and clandestine European Union policy.³⁹ That has happened even despite the fact that there are good reasons to question the suitability of arbitration as a method for resolving consumer disputes.⁴⁰

In the domestic sphere, Art. 10 CDR Directive has harmonized the required conditions to affirm the submission to consumer arbitration, while maintaining the harmonized but different regimes derived from Directive 93/13/EEC.⁴¹ While with this modification European law is apparently setting additional obstacles to the option for arbitration and the consequent renunciation to judicial redress, the general design of the system built by the CDR Directive and the ODR Regulation contributes to potentiate consumer arbitration in cross-border claims. Indeed, until now it has been unanimously accepted that the submission of the consumer to foreign arbitration contradicts the principles of public order because this would mean that the international jurisdiction criteria for consumer contracts recognized by the Brussels I Regulation are left unapplied.⁴² However, this conclusion must be deemed obsolete as a consequence of the admission of consumer arbitration by art. 2(4) CDR Directive. As a result, consumers with residence in a Member State may submit themselves an arbitration conducted by a CDR entity in another Member State, even if by doing so they lose the access to the courts of the country of their residence. Such cross-border cases, far from being anecdotal, are expected to increase in the near future as a result of the functioning of the European platform for online dispute resolution.

What we think is that, rather than attempting the enforcement of a clandestine or indirect policy of the European Union, the European legislator did not realize the effects of the general system on the treatment of cross-border consumer arbitration. However, once the European legislator has admitted arbitration as a solution that can be used by certified CDR entities within the current regulatory framework, there is no place for the invocation of the principles of public order arguing that the fora on consumer contracts are left unapplied.

³⁹ See Reich, *supra* 34, at 258.

⁴⁰ These criticisms can be summarized in four points: In the first place, the benefits in terms of enforceability of the decision lose much of their significance as a consequence of the high percentage of voluntary compliance of the decisions; secondly, arbitration involves the submission of litigation to rigid procedural rules that do not make the resolution of cases easier; thirdly, the arbitration method, by definition, prevents dialogue between the parties to try to find a solution, which can lead to decisions with winners and losers; finally, arbitration implies a waiver of judicial remedies, while courts have the responsibility to provide the ultimate guarantee of compliance with the mandatory rules of consumer protection.

⁴¹ See a description of these solutions in Esteban de la Rosa & Cortés, *supra* 3, at 539—540.

⁴² See Miguel Virgós Soriano, *El convenio arbitral en el arbitraje internacional*, 14 *Actualidad Jurídica Uría Menéndez*, 16—21 (2006).

F. Esteban de la Rosa, "The private International law Regime of Alternative and Online Cross-Border Consumer Dispute Resolutions after the new European Legal Frame and the Spanish Act 7/2017", in S. Leible and R. Miquel Sala (edits), *Legal Integration in Europe and America*, JWV, Sippligen, 2018, pp. 321-357.

Therefore, it is legitimate to question whether, through the special guarantees established in arts 10 and 11 of the CDR Directive, the rights of consumers recognized by European law are protected in a manner compatible with access to effective judicial protection recognized for the parties by art. 47(1) EU Charter of Fundamental Rights (ECFR) and Art. 19 EUT.⁴³ Professor Norbert Reich has suggested this interesting line of thought, going so far as to affirm that the admission and incorporation of consumer arbitration into the European system of CDR entities causes at least an unfortunate loss of the protection foreseen by the special fora for consumer contracts.

We do not believe that the European legislator should reverse the *de facto* created situation. On the one hand, the online availability of CDR, as well as the automatic translation and advisory functions available in a special way for cross-border cases, mean that the cross-border nature should cease to be perceived as a factor that causes a significant detriment to guarantees recognized for consumers. That said, the European legislator should take note of some additional guarantees in order to improve the consumer's position in consumer arbitration proceedings, especially with regard to cross-border claims. To this end, the proposals that seek to submit the validity of the arbitration agreement to courts, giving less weight in this area to the rule according to which the arbitration body decides on its own competence, and to allow the challenge of the award by infringement of mandatory rules of consumer protection, are adequate. Other guarantees could include making the use of his/her language easier for the consumers, or at least the use of the language of the claim that has been filed, with the minimum information that is relevant to maintain the right to go to court, so that there is no unexpected loss of this right.

The purposes of the European platform are not related to the criteria for the determination of international jurisdiction for consumer contracts. This explains why the admission of cross-border claims through the European platform is not subject to the same principles as the competence rules of contracts concluded by consumers. The use of the platform is reserved for claims arising from online purchases of goods and services. On the other hand, to determine the operability of the consumers' domicile forum, it is necessary to take into account 'whether, prior to the conclusion of the contract with the consumer, the aforementioned web pages and the overall activity of the seller, it was apparent that the latter intended to trade with consumers domiciled in one or other Member States, including that of the address of the consumer, in the sense that he was willing to enter into a contract with them'.⁴⁴ Without prejudice to the diverse purpose of the European platform and the Brussels I Regulation, there are reasons to put forward the convenience of enabling the use of the EU ODR Platform, also in the case of cross-border claims, for consumers who have the right to use the procedural privilege. This would avoid the need to consider a fortuitous and difficult to prove element, such as commissioning an order through the Internet. On the other hand, according to the criterion now accepted, "passive" consumers, who have not made the order through the Internet, cannot use the EU

⁴³ See Reich, *supra* 34, at 258—280.

⁴⁴ ECJ Judgment December 7, 2010, Case C-585/08 y C-144/09, ECLI:EU:C:2010:740. See also ECJ judgments September 6, 2012, Case C-190/11, ECLI:EU:C:2012:542, and October 17, 2013, Case C-218/12, ECLI:EU:C:2013:666. See a commentary of this judgment in Fernando Esteban de la Rosa, *El papel del nexo de causalidad en el sistema europeo de competencia internacional de los contratos de consumo: ¿Una condición para el olvido?*, 11 La Ley Unión Europea, 5—17 (2014).

F. Esteban de la Rosa, "The private International law Regime of Alternative and Online Cross-Border Consumer Dispute Resolutions after the new European Legal Frame and the Spanish Act 7/2017", in S. Leible and R. Miquel Sala (edits), *Legal Integration in Europe and America*, JWV, Sippligen, 2018, pp. 321-357.

ODR Platform to submit their claims, an option that would help them avoid filing a legal claim before the courts of their domicile.

V. Questions of Applicable Law

1. *The ways of Providing Consent for the Initiation of Proceedings Before an ADR Entity*

The new European system allows claims to be filed in three ways, namely directly before a foreign ADR entity without using the online resource,⁴⁵ through the use of an online access that must be enabled by each certified ADR entity⁴⁶ and, finally — the way that will probably be favoured because it allows the use of the consumer's language — through the use of the European platform for online resolution of consumer disputes. In all cases, the intervention of the ADR entity presupposes the existence of a legal obligation to participate, a valid agreement between the parties or a combination of both.⁴⁷

2. *The Submission to ADR Entities Whose Procedure ends with a Non-binding Decision*

The CDR Directive does not provide a regime for the international validity of the agreements to submit to ADR entities. Therefore, this question must be answered according to the general rules of private international law. The applicable regime depends fundamentally on the solution method used by the ADR entity. When the procedure ends with a non-binding decision for either party as a result of a mediation or conciliation procedure, a contractual qualification is imposed, and as a consequence the Rome I Regulation will apply to disputes concerning the validity and interpretation of the mediation agreement.⁴⁸ The same law is applicable to decide on the incorporation into the contract of a clause contained in the general terms and conditions, also when included in a website, that the consumer has accepted at the time of concluding the contract that has given rise to the claim. In this case, Art. 10(2) Rome I Regulation may lead to the application of the law of the country of habitual residence when, according to the law of that country, it is not possible to associate the effect of giving consent to the behaviour of that party. Nowadays, the issuance of declarations of will through electronic means is not a serious problem since most of the state systems have accepted this possibility. Within the European Union, Art. 9 of the Directive on electronic commerce imposes on States the obligation not to hinder the use of electronic means.⁴⁹

Sometimes, all companies or only the ones belonging to specific sector of activity are obliged to participate in a procedure before an ADR entity and even to accept its decision. The submission to compulsory arbitration in the field of essential services in Portugal is a paradigmatic example

⁴⁵ See Art. 5(2) c) CDR Directive.

⁴⁶ See Art. 5(2) a) CDR Directive.

⁴⁷ We leave aside the possibility of presenting the claim before the European Consumer Centres in the way that has been done so far. Although it is true that with the entry into force of the RRLL the European Consumer Centres have assumed specific functions related to the management of the claims, the functions that they had until now have not been modified. See the information available on the web http://www.cec.consumo-inc.es/secciones.php?id_sec=5&id_subsec=16 (accessed 7 Dec. 2017).

⁴⁸ In this sense, see Carlos Esplugues Mota, *El régimen jurídico de la mediación civil y mercantil en conflictos transfronterizos en España tras la ley 5/2012 de 6 de julio*, Año XLVI, núm. 136, Boletín Mexicano de Derecho Comparado, nueva serie, 181—182 (Jan.-Apr. 2013).

⁴⁹ Ángeles Lara Aguado, *La formación del contrato de consumo electrónico*, 285—286 (Fernando Esteban de la Rosa (ed.), *La Protección del Consumidor en Dos Espacios de Integración – Una Perspectiva de Derecho Internacional, Europeo y Comparado*, Tirant lo Blanch, 2015).

F. Esteban de la Rosa, "The private International law Regime of Alternative and Online Cross-Border Consumer Dispute Resolutions after the new European Legal Frame and the Spanish Act 7/2017", in S. Leible and R. Miquel Sala (edits), *Legal Integration in Europe and America*, JWV, Sipplingen, 2018, pp. 321-357.

of this option. Regarding such cases, it may be necessary to verify the scope of this legal obligation. Since the cases in which it is possible to identify a legal obligation freely agreed by one person with another are also considered "contractual matter",⁵⁰ the Rome I Regulation also applies in order to determine the validity of the consumer agreement. However, neither the CDR Directive nor the general system determine which law decides on the existence of an eventual legal obligation to adhere to the procedure before an ADR entity. The CDR Directive seems to point to the law of the country of establishment of the company,⁵¹ but an explicit regulation is still missing, and not even the Member States have been concerned with defining, unilaterally, the scope of these obligations. The existence of a significant volume of activity of a company in a country other than its country of establishment could be an argument for extending such obligations over that company. In this case, it will be necessary to determine if such an extension can be considered as an unjustified restriction to the freedom to provide services recognized by European law.

On the other hand, although it may seem strange from the point of view of European legal culture, there are systems, such as the Italian one, in which it is necessary to participate in a mandatory mediation procedure to be able to take legal action. This possibility has been endorsed by the ECJ in the decision of 18th of March 2010 issued in the *Alassini* case,⁵² and in the same line the already mentioned decision of the ECJ of 14 June 2017 has been added. Despite the tolerance of European law, the Spanish system has opted to raise consumer protection by establishing in Art. 13 SATD that agreements to undergo a procedure with a non-binding result entered into by a consumer and a trader prior to the litigation are not binding on the consumer.

The CDR Directive does not decide which should be the applicable law to determine, for example, the scope of the obligation to mediate that may weigh on a consumer and, where appropriate, the scope of the non-binding nature of the mediation agreement entered into before the dispute has arisen. In view of the procedural nature of the issue, it is difficult to exclude such a qualification and the application of forum law. However, to give a better response to the expectations of the consumer residing outside the country of the forum, it may seem reasonable to submit this kinds of issues to the law of the country of the habitual residence of the consumer. This way, a protection criterion similar to the one established in Art. 2(2) EU ODR Regulation could be followed to decide if it is possible for the trader to claim against the consumer through the European Platform.

3. The Submission to ADR Entities Whose Procedure ends with a Binding Decision

As we have just seen, the Rome I Regulation also determines the validity of the agreement under which the parties submit to the binding decision of a third party that has only contractual (and not arbitral) force, as it happens in some ADR entities existing in the Netherlands. The validity problems of the arbitration agreement in cross-border claims are instead subject to the Convention on Recognition and Enforcement of Foreign Arbitral Awards, made in New York on 10th of June 1958 (hereinafter NYC).⁵³ Art. II NYC requires the existence of a written agreement and sets the conditions to fulfil this requirement through a mixed regime consisting, on the one

⁵⁰ See judgments of 20 January 2005, Case C-27/02, ECLI:EU:C:2005:33, and 14 March 2013, Case C-419/11, ECLI:EU:C:2013:165.

⁵¹ See Art. 13 CDR Directive.

⁵² Cases C 317/08, C 318/08, C 319/08 and C 320/08, ECLI:EU:C:2010:146.

⁵³ BOE 164, 11 Jul. 1977.

F. Esteban de la Rosa, "The private International law Regime of Alternative and Online Cross-Border Consumer Dispute Resolutions after the new European Legal Frame and the Spanish Act 7/2017", in S. Leible and R. Miquel Sala (edits), *Legal Integration in Europe and America*, JWV, Sippligen, 2018, pp. 321-357.

hand, of a uniform regulation and, on the other hand, of a reference to the applicable national law according to the conflict rule contained in Art. V(1) a) of the NYC.⁵⁴ Regarding the claims that are presented via the European platform, or also eventually through the electronic resource enabled by a state ADR entity of consumer arbitration, compliance with the requirements should not be too difficult despite the requirement of the agreement in writing. As a consequence of the proliferation of electronic commerce and the frequent use of arbitration clauses in e-mails or interactive websites such as the European platform, the assimilation of both types of communications has been proposed also in this area.⁵⁵ Given the protective regime incorporated in Art. 10 CDR Directive, according to which the agreement must be subsequent to the appearance of the litigation, it will be difficult that the opportunity to give validity to an arbitration agreement contained in the general conditions of the contract arises. If this were the case, the NYC system itself will apply to the incorporation of the clause to the contract.⁵⁶

4. Law Applicable to the Enervation of the Binding Nature of the Consumer Arbitration Agreement for the Consumer

The incidence of the CDR Directive on the regime of the agreement to submit a dispute to an ADR entity is only partial and does not concern validity questions, except in relation to the special requirement of informed consent referred to in the second section of Art. 10 CDR Directive and Art. 15(3) SATD. When the agreement to submit a dispute to an ADR entity has been entered into before the dispute arose but does not hinder the possibility of initiating court proceedings because the procedure followed is, for example, mediation, the validity and effectiveness of the agreement is assessed, exclusively, on the grounds of the law declared applicable following the criteria we have exposed in Section 2.

Art. 15(3) SATD declares that the agreements to submit to a procedure with binding result between a consumer and a trader which have been entered into before the dispute are not binding for the consumer. This situation can occur in cases of consumer arbitration, but also when the decision is binding even if it has, exclusively, contractual force. Given that the CDR Directive does not enjoy direct application, in cross-border claims it is necessary to determine

⁵⁴ Regarding the interpretation to be made of the New York Convention in order to convert the rule on recognition of Article V into a rule of conflict referring to the validity of the arbitration agreement see Virgós Soriano, *supra* 42, at 16—21.

⁵⁵ In this sense, see José Carlos Fernández Rozas, Rafael Arenas García & Pedro Alberto de Miguel Asensio, *Derecho de los negocios internacionales*, 655 (Iustel, 2d ed 2009). The proliferation of electronic arbitration agreements contained in online contracts and the possible lack of certainty regarding their validity and effectiveness in all jurisdictions has made it necessary for the body that drafted the agreement of New York, United Nations to direct their attention towards this topic. Firstly, a Recommendation regarding the interpretation of para. 2) of Article II and para. 1) of Article VII of the New York Convention of 10 June, 1958 was adopted by the United Nations Commission on International Trade Law at its thirty-ninth session on 7 July 2006. This Recommendation, in view of the possibility of the electronic arbitration agreement, states that the circumstances described in para. 2 of Article II of the New York Convention should be considered as non-exhaustive. The second measure adopted refers to the Convention on the Use of Electronic Communications in International Contracts, which includes a provision in its Art. 20 that extends its regulation to the agreement of New York of 1958. In any case, the possibility of recovery for the purpose of proof is what gives the electronic arbitration agreement its equivalence with the arbitration agreement reproduced in a traditional formal. The electronic signature is another means of proof that follows this purpose, since it allows to verify the identity of the origin and the integrity of the messages exchanged on the Internet.

⁵⁶ See Virgós Soriano, *supra* 42, at 16—21.

F. Esteban de la Rosa, "The private International law Regime of Alternative and Online Cross-Border Consumer Dispute Resolutions after the new European Legal Frame and the Spanish Act 7/2017", in S. Leible and R. Miquel Sala (edits), *Legal Integration in Europe and America*, JWV, Sippligen, 2018, pp. 321-357.

the legal regime applicable to the possibility of enervating the binding nature of an agreement entered into before the dispute arises, a matter not covered by the CDR Directive.

When the decision terminating the procedure is binding but has only contractual force, the contractual qualification of the matter must lead to the application of the solutions of the Rome I Regulation. If, on the contrary, the decision has the force of an arbitral award, the applicability of the Rome I Regulation must be discarded, since Art. 1(1) e) of this Regulation excludes 'arbitration agreements' from its scope of application. As a consequence, it is necessary to look at the NYC, which deals not only with issues of validity of the arbitration agreement but also with its ineffectiveness or inapplicability (Art. II(3)). According to a plausible interpretation Art. V(1) NYC, the matter is subject to the law chosen by the parties and, failing that, to the law of the state in which the arbitration will take place.⁵⁷ In the case of consumer ADR entities, this solution points to the law of the country of the entity's headquarters, which are determined according to Art. 4(3) CDR Directive.⁵⁸

The resulting solutions are inadequate in both cases because the choice of the applicable law does not guarantee the application of the law of a Member State. As a consequence, the European rule according to which this kind of agreement does not have to be binding on the consumer when they were concluded before the litigation arose can become inoperative. Thus, an area in which it is necessary to invoke the character of mandatory material rule of Art. 15(1) SATD emerges.

In the process of transposition of the CDR Directive, it is already possible to identify some Member States which, like Germany, have decided not to certify arbitration entities and consequently have not incorporated art. 10 CDR Directive into their legal system. Although it is true that the existence of such rule can be ignored in domestic cases, its functionality in cross-border cases is of the greatest relevance. To give a graphic example, if a consumer residing in Germany makes an online purchase from a seller established in Spain, according to the system currently in force in Germany, the German judge can estimate the arbitration exception and will no longer rule on the case if a separate arbitration agreement was entered into before the litigation arose. This gives rise to a different solution to the one contemplated in the new European law, under which consumer arbitration agreements entered into before the litigation are not binding on the consumer. Only through a provision in the German legal system and in the other legal systems of the Member States will it be possible to correct this dysfunction in order to respond to the needs of cross-border cases and the effect utile of harmonized law.

5. Conflict of laws and Material Regime of the Informed Consent

The second section of Art. 10 CDR Directive contains a new requirement that is applicable when the decision of the ADR entity is binding on the parties. As we have seen, this effect can exist both in cases of consumer arbitration and in cases in which the binding decision has merely contractual effect. Art. 10(2) CDR Directive incorporates a new validity requirement for the arbitration agreement. The special regime on informed consent contained in Art. 10(2) does not include criteria to define its spatial scope of application, and therefore the former considerations

⁵⁷ See Virgós Soriano, *supra* 42, at 21.

⁵⁸ According to this provision 'An ADR entity is established: if it is operated by a natural person, at the place where it carries out ADR activities, if the entity is operated by a legal person or association of natural or legal persons, at the place where that legal person or association of natural or legal persons carries out ADR activities or has its statutory seat'.

F. Esteban de la Rosa, "The private International law Regime of Alternative and Online Cross-Border Consumer Dispute Resolutions after the new European Legal Frame and the Spanish Act 7/2017", in S. Leible and R. Miquel Sala (edits), *Legal Integration in Europe and America*, JWV, Sippligen, 2018, pp. 321-357.

on the determination of the applicable law become valid. Therefore, Art. 15(3) SATD should be considered as an international mandatory rule.

Additionally, we need to underline the impact that the requirement of informed consent has on the configuration of the declaration of consent through the European platform. Although the ODR-Regulation refers to the need of the parties to agree on the ADR entity that will deal with the claim (Art. 9 secs. 3 and 4), it does not provide information on whether a special way of giving consent which guarantees informed consent as referred to in Art. 10(2) ADR-Directive and Art. 15(3) SATD is contemplated by the platform. To guarantee such consent while waiting for a future interpretation of the ECJ, it seems advisable to enable the possibility of declaring, by clicking on two separate buttons, that the decision is accepted as binding and that the consumer knows that the decision will be binding on him.

Therefore, the following proposals *de lege ferenda* are necessary: Given the importance of these declarations, which imply the waiver of the consumer's right to go to court and also of the possibility of benefitting of the forums of his/her country of domicile, it should be required, in cross-border cases, that such declarations are made in the language of the consumer or, at least, in the language in which the claim was filed. Simply allowing the use of the language in which the transaction giving rise to the complaint was effected is not sufficient. As a consequence, in cross-border cases the declaration of consent should only be allowed through the European platform. Therefore, the possibility of giving effect to a declaration of acceptance of consumer arbitration through platforms enabled by foreign ADR entities that do not allow the use of the consumer's language for this purpose should be excluded. As an additional guarantee of the right of access to court, the violation of these language requirements should open up the possibility of challenging the validity of the consumer arbitration agreement.

Finally, the existence of the private regime on the validity and binding nature of the consumer arbitration agreement will make necessary to adapt the regulation of the declinatory plea. In the Spanish legal system, this regime has been amended by virtue of the Fourth Final Provision of the STAD. According to the new text of Art. 63 Civil Procedure Law Act:

By means of the declinatory plea, the defendant and those who may be a legitimate party in the promoted trial may denounce the lack of jurisdiction of the court before which the claim has been filed, since the knowledge of the same applies to foreign courts, to organs of another jurisdictional order, arbitrators or mediators, except in cases where there is a prior agreement between a consumer and a trader to submit to an alternative dispute resolution procedure for consumer disputes and the consumer is the plaintiff.

6. Relations Between the Regime of Article 10 CDR Directive and the Regime on Unfair Terms

The European legislator has not been concerned with the definition of the relations between the regime of Art. 10 CDR Directive and other regimes that can apply simultaneously, especially regarding the regulation of unfair arbitral clauses in consumer disputes pursuant to Directive 1993/13/EEC. In our opinion, the regulation of referral agreements to ADR entities provided by the CDR Directive does not intend to affect the application of European consumer protection standards against unfair terms. Both regimes are autonomous and, depending on the concrete compatibility between them, can become complementary. Therefore, finding out their

F. Esteban de la Rosa, "The private International law Regime of Alternative and Online Cross-Border Consumer Dispute Resolutions after the new European Legal Frame and the Spanish Act 7/2017", in S. Leible and R. Miquel Sala (edits), *Legal Integration in Europe and America*, JWV, Sippligen, 2018, pp. 321-357.

respective scope of application and the way in which the applicable law is determined in every case is a question of utmost importance.

The relations between the two regimes must be regarded from a practical point of view. If, for example, the consumer arbitration agreement has no effect when it was entered into before the dispute arose and has not been recorded in a separate agreement, as provided for in the German rules on unfair terms, it will likewise not produce this effect. This is due to the fact that it was not agreed upon after the litigation began. The detection of this overlap invites us to affirm that the regime of Art. 10 CDR Directive has replaced the regime of unfair terms.

In the current Spanish legal system, three norms are applicable: Art. 57(4) of the Consolidated Text of the General Law for the Defence of Consumers and Users (TRLGDCU) in the version given by Law 3/2014, of 27 March, Art. 90(3) of the same legal text and finally art. 15 SATD. According to the first mentioned provision:

*Arbitration agreements signed with an entrepreneur prior to the dispute arising shall not be binding on consumers. By signing the agreement, the entrepreneur is deemed to have accepted arbitration to resolve the disputes arising from the legal relationship in question, provided that the agreement to submit to arbitration meets the requirements of the applicable regulations.*⁵⁹

According to Art. 90 TRLGDCU,

terms that establish the following shall also be deemed unfair:

1. Submission to arbitration other than consumer arbitration, except where this involves institutional arbitration bodies created by law for a specific circumstance or sector.

Finally, Art. 15 SATD reads as follows:

Article 15. Efficacy of previous agreements between consumer and trader subject to a procedure with binding result and guarantee of informed consent in the agreements after the litigation arose.

1. The agreements signed before the appearance of a dispute between a consumer and a trader in order to submit to a procedure with binding force will not be binding on the consumer.

2. For the trader, the agreement concluded before the litigation arises will be binding if it meets the conditions of validity required by the regulations applicable to said agreement. This agreement will not be necessary when the trader is obliged, by law or by prior adhesion, to participate in said procedure.

3. The submission of the consumer and the trader to the procedure before an alternative consumer dispute resolution entity whose decision is binding will require, together with the existence of an agreement subsequent to the

⁵⁹ A translation of the TRLGDCU provided by the Spanish Ministry of Justice is available under <http://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacion-publicaciones/publicaciones/traduccion-derecho-espanol> (accessed 12 Febr 2018).

F. Esteban de la Rosa, "The private International law Regime of Alternative and Online Cross-Border Consumer Dispute Resolutions after the new European Legal Frame and the Spanish Act 7/2017", in S. Leible and R. Miquel Sala (edits), *Legal Integration in Europe and America*, JWV, Sippligen, 2018, pp. 321-357.

appearance of the litigation, that at the time of the provision of consent the parties are informed that the decision will be binding, and if it prevents them from going to court, must be recorded in writing, or by other equivalent means, express acceptance. This guarantee of informed consent shall not apply to the trader when he is obliged, by law or by his previous adhesion, to participate in said procedure.

The reader can check the differences between the three provisions. If, as we have indicated previously, Art. 15 SATD cannot limit its scope to the cases in which the clause envisages the submission to a certified ADR entity, this means that, in practice, the new regime of article 15 SATD, being a *lex posterior*, necessarily implies the abrogation of the regime of Art. 57(4) TRLGDCU. Besides, this article did not make a satisfactory transposition of Art. 10 of the Directive because it did not include the need of informed consent. Since Art. 90(1) TRLGDCU has not been modified, terms implying submission to arbitrations other than consumer arbitration will still be able to be deemed unfair.⁶⁰

However, the different international scope of the two regulations must be taken into account. With regard to the scope of the rules on abusive clauses, the national rules transposing Art. 6(2) of the Directive 93/13/EEC must be followed. In the Spanish case, these are contained in Art. 67(2) TRLGDCU. With regard to the scope of the second set of rules, according to the interpretation criterion we have proposed, the location of the consumer's residence in a Member State and the establishment of the trader in a Member State must be taken into account. Although it has not been issued for that purpose, we believe that it is appropriate to maintain the application of the European *acquis* on consumer protection against unfair terms⁶¹ in the context of Art. 10 CDR Directive and Art. 15 SATD.

7. Law Applicable to the Procedure Before ADR Entities

Although the general regime usually allows the parties to choose the law applicable to the procedure, in practice, the adherence of the consumer to the procedure before an ADR entity established in a Member State will determine that the law of this country is the applicable law. Therefore, the law applicable to the procedure will end up being the law of the country in which the certification as ADR entity has taken place. Each state will have to decide on the procedure that will be followed by its ADR entities and, if applicable, establish which (allowed) deviations from the rules of the CDR Directive are going to be adopted. The applicable law, for example, will determine the use that the states make of Art. 5(4) CDR Directive, establishing the possibility of rejecting the claim if it has not been submitted to the trader beforehand or if it is extemporaneous or frivolous. With some deviations and useful precisions, Art. 18 SATD has welcomed most of the reasons for rejection that appear in Art. 5(4) CDR Directive.

⁶⁰ See Helena Díez García, *Los principios de libertad y de legalidad de la Directiva 2013/11/UE de 21 de mayo (Directiva sobre resolución alternativa de litigios en materia de consumo) y su impacto en el sistema arbitral de consumo*, 174 (Silvia Díaz Alabart & Cristina Fuenteseca Degeneffe (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).

⁶¹ Judgments of the ECJ of 6 Oct. 2009, Case C-40/08, ECLI:EU:C:2009:615; and 26 Oct. 2006, Case C-168/05, ECLI:EU:C:2006:675.

F. Esteban de la Rosa, "The private International law Regime of Alternative and Online Cross-Border Consumer Dispute Resolutions after the new European Legal Frame and the Spanish Act 7/2017", in S. Leible and R. Miquel Sala (edits), *Legal Integration in Europe and America*, JWV, Sippligen, 2018, pp. 321-357.

8. Law Applicable to the Consumer Dispute in Proceedings that end with a Binding Decision

Respect for the principle of legality in the resolution of claims constitutes a guarantee to be observed by certified ADR entities whose procedure ends with a binding decision. However, the European legislator has not been very skilled when drafting the principle and has not taken into account, for example, that the Rome I Regulation has included a new fourth section in Article 3 in order to ensure the application of European consumer protection law when the contract has ties only with EU member States, or that there are Directives, such as 1993/13/EEC or 1999/44/EC, which constitute the basis for special solutions regarding applicable law in the legislations of the different EU Member States.⁶² The wording given by the Spanish legislator to the formulation of the principle of legality, found in Art. 16 SATD, is more respectful with the abovementioned elements which interfere with the determination of the applicable law. According to its tenor:

If the disputes is of cross-border nature and there is a conflict of laws, the resolution imposed by the alternative resolution entity cannot deprive the consumer of the protection provided by the mandatory rules that cannot be excluded by agreement under the legislation applicable to the consumer contract determined, as appropriate, in accordance with the provisions of the Rome Convention of the 19th of June 1980, on the law applicable to contractual obligations, the Regulation 593/2008 of the 17th of July 2008, on the law applicable to the contractual obligations (Rome I), or the rules of the Spanish system of private international law that transpose European Directives and have established special solutions for the regulation of cross-border consumer contracts linked to the European Internal Market.

In order for consumer arbitration to have an accommodation in the European system of alternative resolution of consumer disputes which is more in line with the guarantees that derive from the right to effective judicial protection, we believe that the proclaimed principle of legality must be protected by a device that allows the challenge of the award due to the breach of mandatory rules of consumer protection, especially in the cases – very frequent in Spain – in which the arbitrators decide on the grounds of equity. Otherwise, we believe that the effectiveness of the rights granted to consumers by the European system will be undermined for the sake of swift resolution. Everything indicates that the law of the country of the headquarters of the ADR entity will be the one having to determine the grounds for contesting the award. Besides, despite the fact that this guarantee is not established by the Directive, the law of the country of the ADR entity's headquarters will have to decide if a mediation agreement can be challenged on the grounds that it is wrongful or because it implies a waiver of the consumer's rights contrary to public policy.

VI. Conclusions

The new European law on alternative and online resolution of consumer disputes represents a regulation which is unprecedented in Europe and pioneer at the global level establishing an institutional framework which favours the online resolution of consumer disputes. However,

⁶² On the complex construction of the European law system applicable to electronic consumer contracts see Fernando Esteban de la Rosa, *Régimen jurídico de la contratación electrónica internacional de consumo en el sistema español de Derecho internacional privado*, 15—45, 2 Aranzadi Civil (2009).

F. Esteban de la Rosa, "The private International law Regime of Alternative and Online Cross-Border Consumer Dispute Resolutions after the new European Legal Frame and the Spanish Act 7/2017", in S. Leible and R. Miquel Sala (edits), *Legal Integration in Europe and America*, JWV, Sippligen, 2018, pp. 321-357.

since for the time being not all member states have certified entities and that the number of complaints received until now by the European platform is not large, it remains to be seen which how successful the new legislation will be. From now on, it will be necessary that all the involved subjects cooperate to publicize and detect errors and problems, some of them already highlighted in this study.

The structure which has been created is designed to produce a multiplier effect on of cross-border claims, which opens up new challenges for the regulation of the private international law system from two different perspectives. On the one hand, it is necessary to make a fine-tuning and check the contents of the current system through the combination of special and general solutions. On the other hand, it is necessary to review whether the current solutions respond to the special demands arising from the right to effective judicial protection in accordance with arts 47 EUCFR and 19 EUT.

In the review that has been carried out, we have detected shortcomings in existing private international law solutions in order to ensure the application of Art. 10 CDR Directive in all its spatial application scope, for which it is necessary to give the rank of overriding mandatory provision to Art. 15 SATD. We have indicated the urge to overrule, in order to ensure the functioning of the European platform, the interpretation according to which the submission to a foreign consumer arbitration is not compatible with public policy. The new regime has also caused the surfacing of some regulatory gaps that must be filled in, such as the one regarding the determination of the applicable law to the obligation to participate in proceedings before entities or to determine the non-binding nature of the consumer mediation agreement.

Regarding the conformity of the new regime with the right to access to justice, we believe that it is necessary to provide a better accommodation in the European system to the institution of consumer arbitration, through the establishment, in each Member State, of a device for the challenge of the award in case of infringement of mandatory rules of consumer protection. Only in this way is it possible to give endorse and ensure the proclaimed principle of legality. Besides, we have warned of the need to have a regulation on the language of the procedure that manages to safeguard the effectiveness of the principles of equity and freedom in cross-border cases. To guarantee the effectiveness of recognized rights with respect to cross-border claims, it is necessary that certain minimum information is transmitted in the consumer's language or, at least, in the language in which the claim was filed. The use of the language in which the transaction was made would be under no circumstances sufficient for this purpose. All in all, the detected improvable elements cannot conceal the great importance of the new European regulation, which is destined to be an indispensable instrument for generating confidence in the electronic commerce of the future.