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Access to justice in consumer law^{*}

Marco Loos

1 Introduction

In many areas of private law, mandatory substantive law protects consumers. At first glance, this seems to indicate that the position of consumers is well regulated and that consumers themselves are well protected. In practice, however, consumers face many difficulties in enforcing their substantive rights. The focus in this contribution is on the consumer's access to justice through the ordinary court system. I will argue that awarding consumer rights without properly regulating the consumer's access to the court system renders these rights unenforceable through the ordinary courts. It is argued that the normal rules of civil procedure produce such disincentives for consumers to maintain their rights that many consumers indeed abstain from pursuing their legal rights. This leads to under-enforcement of consumer law.

2 Willingness of consumers to take action and knowledge of rights

Individual private enforcement of consumer law presupposes that the consumer maintains her rights by either taking action if she is not satisfied with the goods or services rendered, or by opposing a claim of her counterpart for payment for such dissatisfactory goods or services rendered. An EU study from 2013 indicates that the willingness of consumers to undertake such actions is in itself considerable: no less than 80%¹ of consumers who indicated that they had experienced a problem with goods or services in the preceding year² in fact had taken action of *some sort*.³ 'Taking action' is interpreted very broadly here: in the vast majority of cases, the consumer simply returns to the store where she has concluded the contract or otherwise contacts the trader directly.⁴ If that does not help, some consumers will resort to self-help, ranging from withdrawing from the contract or simply refraining from purchasing new goods or services from that trader in the future, to a public protest. The latter is potentially harmful for the trader as it leads to negative word-of-mouth: instead of (or in addition to) complaining to the

* This contribution is an abbreviated and updated version of Loos 2011.

1 TNS Political & Social 2013, p. 67.

2 Of all consumers interviewed, only 25% reported that they had experienced a problem with goods or services in the preceding year; see TNS Political & Social 2013, p. 67.

3 It should be noted that it is possible that in fact more consumers had experienced problems but did not recall that at the time of the inquiry. In that case, the willingness to take action is actually considerably lower. On the basis of international surveys in the 1990s, Jacobs 1998, p. 36-37, estimated that no more than half of all dissatisfied consumers are willing to take some sort of action.

4 TNS Political & Social 2013, p. 72. Cf. also Scott 2010, p. 4.

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trader, they warn their family and friends of their negative experience with that particular trader, or complain to a TV program or on webfora, etc.⁵ Those that do not take any action usually indicate that it costs them too much time, energy, and money to do so, and that it is not worth the effort.⁶

Where the complaint is resolved, the consumer of course does not take further action. This does not mean that the consumer had been right or wrong in complaining: in this figure are also included those cases where the trader has convinced the consumer that her complaint was unjustified, even if, in fact, it was justified. Vice versa, the trader may also have been prepared to meet her customer to protect her reputation or to provide a good service, whether or not the consumer actually had a valid claim. Scott therefore rightly argues that market concerns with reputational damage stand behind consumers' ability to secure remedies rather than the law.⁷ It is only when the complaint is *not* resolved at that stage a *dispute* between the parties arises.⁸

Legal action is taken only in a very small minority of cases: in the 2013 consumer study it is indicated that in only 6% of these cases consumers indicated they had taken the case to either a court or an ADR institution, whereas in 17% consumers indicated that they had not taken action although they thought they had a legitimate cause for a complaint.⁹

The taking of legal action, of course, presupposes that the consumer is already aware of her rights or at least is willing to be informed thereof: as long as the consumer does not know of her rights, she cannot enforce them.¹⁰ The most effective means to provide such information would be over the Internet, as consumers nowadays start seeking information there.¹¹ This means that websites such as www.isitfair.eu (set put up by the European Commission) and websites of national governmental bodies or consumer organizations may answer to a large popular demand.

When the consumer, whether or not she has already sought information through websites, legal advice or otherwise, tries to enforce her rights, she would in many cases be confronted with the fact that most traders are not aware of the rights of consumers. For instance, the 2013 study among consumers mentioned above showed that more than half knew that in the case where a refrigerator purchased 18 months before it breaks down and needs repair without there being any fault on their part, they were entitled to have the fridge repaired or replaced for free, even though they had not acquired an extended commercial guarantee.¹² However, a 2011 study among retailers showed that only one out of four retailers

5 Jacobs 1998, p. 37, indicated that no less than 40%-67% of dissatisfied consumers speak of their negative experience with a good or service with friends and acquaintances. Cf. also Scott 2010, p. 4ff.

6 Scott 2010, p. 4.

7 Ibid.

8 Jacobs 1998, p. 25-26.

9 TNS Political & Social 2013, p. 72.

10 Hondius 2006, p. 198.

11 Cf. Nikkels et al. 2008, p. 34.

12 Cf. TNS Political & Social 2013, p. 59.

interviewed knew the exact period during which consumers have the right to return a defective product, with respondents claiming to feel well informed about consumer legislation answering the question only slightly better than those who felt un-informed (27% vs. 22%).¹³ Similarly, a recent mystery-shopping research conducted by the Dutch consumer organization *Consumentenbond* showed that sellers often refer to the producer when goods break down as they think that not they, but the producer is liable for non-conformity.¹⁴ In such situation, the trader is likely to think that the consumer's claim is unjustified and therefore to deny the consumer a remedy to which she may actually be entitled.¹⁵

In short, already the lack of knowledge on the part of consumers *and* traders of existing consumer rights stands in the way of an effective enforcement of consumer law by consumers themselves.

3 Problems when taking legal action in court

There are good reasons for consumers not to take legal action even if they are dissatisfied with the solution offered by the trader. The financial value of a consumer claim is often relatively low. In such cases, a consumer in fact acts rationally by *not* enforcing her rights.¹⁶ Moreover, having to go to court to enforce one's right produces emotional strain for the consumer: it leads to stress and a lot of frustration. The emotional strain involved may very well prevent consumers from taking legal action.

Nevertheless, *some* consumers will actually try to take legal action. The question then arises whether consumers are actually in a position to take legal action to enforce their rights. Is the consumer's access to the court system safeguarded?

In this section, I will pinpoint the problems that a consumer faces when she wants to enforce her rights in front of an ordinary court.¹⁷ First, it is possible that the consumer is unaware of the possibility that the dispute may be settled by a court (3.1). The formal language and the intimidating nature of the proceedings may deter consumers from making use of the procedure. That is, of course, also the case if the consumer is not sufficiently proficient in the language used in the court (3.2). There may also be formal obstacles before a procedure can start, such as the requirement to first attempt an amicable settlement of the claim (3.3). Moreover, the duration of the procedure can easily deter consumers from launching a formal claim in court (3.4). The biggest problem for consumers in submitting a claim to a court, however, is the cost of the procedure itself, and, in particu-

13 Cf. The Gallup Organization 2011, p. 36.

14 Cf. Zuurmond 2015.

15 In fact, The Gallup Organization 2011, p. 55, showed that 97% of all retailers interviewed in the study declared that they complied with all legislation dealing with the economic interests of consumers.

16 According to the 2013 EU consumer study, 37% of all consumers who thought they had a legitimate reason to complain but decided not to take action, refrained from doing so because the sums involved were too small; see TNS Political & Social 2013, p. 77.

17 Consumers may experience additional problems in international cases, but I will not go into these problems in this contribution. On that, see Loos 2011, Section II.F.

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lar, the risk of having to pay the costs of the other party if the consumer loses the case (3.5).

3.1 Ignorance of the possibility of settlement of the consumer dispute by a court

When a well-informed consumer wishes to enforce her claim, she will have to find a party competent to decide it. In doing so, she must overcome a number of obstacles. First, she will need to know to whom she may turn. However, in practice, in most consumer cases it is not the consumer but the trader who sues the other party: consumers typically do not act as the plaintiff, but as the defendant. Consumer rights are then invoked by the consumer – or sometimes applied by the court of its own motion on the basis of EU consumer law – as a defence to (typically) a trader's claim for payment. This suggests that consumers' ignorance as to the possibility to enforce a claim in court is not the main obstacle for the enforcement of consumer rights.

3.2 Language and formalities relating to the court procedure

A second problem is the formal character and the impressive entourage of court procedures, including the wearing of robes by judges and lawyers and the often formal and complex language of judicial authorities. This may require the consumer to invoke assistance or even legal aid in order to understand what is happening and what she needs to do to successfully invoke her rights and protect her interests during the proceedings.¹⁸ However, it should be noted that small claims (i.e. most consumer cases) mostly are dealt with by a small claims court or a justice of the peace, where there is usually no requirement of legal representation and where the formalities of a procedure also tend to be less. As a result, the need for legal aid, and in particular formal legal representation by lawyers, is less as well.¹⁹ An additional advantage of such small claims courts and justices of the peace is that they often sit in more provincial towns and cities, closer to the place of residence of the consumer, which implies that the consumer – in particular when she is the defendant – normally need not travel much to appear thereby reducing the costs involved.

Submitting a claim to a court is also subject to regulations. Also in this respect, the formal nature of procedures before a court stands out. The procedure normally starts by way of a summons that is to be served to the defendant either by a clerk at the court after the claim is filed at the court, or by a bailiff directly to the defendant, in accordance with national procedural law. At least in the second case the plaintiff cannot start the proceedings herself but is required to turn to another person to start the proceedings on her behalf.

The formalities to be observed when submitting the claim and the legal jargon used, of course, constitute an additional threshold for consumers that do not master the language of the court sufficiently. The proceedings take place in the official language (or one of the official languages) of the country of the competent court; often, all documents must be made available in that language as well. Sum-

¹⁸ Jacobs 1998, p. 161, 169, 182.

¹⁹ Cf. Cortés 2008; Kramer 2008.

mons written in another language than that of the court will often be considered null and void. When the consumer opposes the claim in a language different to that of the court, the court may even deem the claim of the plaintiff as not having been opposed at all. That implies that when the consumer is not able to communicate in the language of the court, she will require the assistance of an interpreter. In so far as the assistance of an officially registered interpreter or translator is to be invoked, additional costs must be incurred. Clearly, this constitutes a considerable additional obstacle for a consumer to submit a claim, in any case in an international dispute.

However, it should be noted that in many legal systems attempts are being made to simplify proceedings, e.g. by introducing model forms the parties may fill in without much knowledge of legal proceedings. Examples of such proceedings at the European level are the European Payment Order procedure²⁰ and the European Small Claims procedure.²¹ In addition, Member States have introduced or are preparing to introduce electronic proceedings, in particular with regard to the initial stages of the court proceedings. Such proceedings typically start with the plaintiff filling in an electronic form (accompanied by written proof) and submitting this to the court, and the defendant responding by filling in another electronic form (again accompanied by written proof), after which the court may request the parties to appear in person. The electronic forms are written in relatively simple language, enabling most consumers to fill them in without assistance.

3.3 *Prior communications, duty to notify, and notification periods*

It depends on the national law of procedure and the type of claim whether prior communication between the parties is required for a party to be allowed to submit its claim. In practice, prior to the filing of a claim the parties will almost always have communicated with each other. A trader's demand for payment will almost always have been expressed in writing so evidence of that demand may normally be produced easily. When, on the other hand, the consumer has demanded repair or replacement of a defective good, she will most often not (immediately) have reported that in writing, but have communicated that in person at the store where she had purchased the good. The fact that such communication has taken place is usually not recorded in the correspondence between the parties. As a result, it is often difficult to prove for the consumer that such contact has taken place. When the contract was concluded online, the consumer will normally have made her complaint made known by email or through a complaints form on the website of the seller. When the seller reacts on the basis thereof, it will not be too difficult to prove that the consumer has complained to the seller, but that is certainly different where use is made of a webform and the seller has neither responded to the complaint nor sent an automatic notice acknowledging its submission.

20 Regulation (EC) No 1896/2006 of 12 December 2006 creating a European order for payment procedure (Payment Order Procedure Regulation) [2006] OJ L399/1.

21 Regulation (EC) No 861/2007 of 11 July 2007 establishing a European Small Claims Procedure (European Small Claims Regulation) [2007] OJ L199/1.

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That means that where the consumer needs to prove that she has first complained to the seller before her claim may be heard in court, the consumer could be forced to complain (again, but now) in writing. That in itself may constitute an additional obstacle to the consumer's access to the court system.

In practice, the matter of proof is much more important where the national legislator has introduced a duty for the consumer to notify the trader of an alleged breach by the trader of her obligations. If such a duty is introduced, the consumer is required to inform the trader of a defect in the goods or services rendered within a short period after she has or – as the case may be under national law, apart from consumer sales contracts²² – should have discovered the defect. Interestingly, the 2011 proposal for a Common European Sales Law (CESL)²³ explicitly excludes the duty to notify for consumer sales contracts, i.e. for a non-conformity in the case where the seller is a trader and the buyer a consumer.²⁴ The corresponding provision in the (academic) Draft Common Frame of Reference (DCFR) – which is intended to apply to all consumer contracts – is explained in the Comments thereto by pointing out that “lay people may be unaware of such a legal requirement and that it could be harsh to deprive them of remedies for failure to observe it”.²⁵ The removal of the duty to notify in CESL is therefore clearly motivated by the desire not to burden the consumer with this additional obstacle for enforcing her rights.²⁶

3.4 *Duration of the procedure*

A consumer needs a lot of stamina if she wants to pursue her claim through the court system. Whenever a party is instructed to provide witness testimony, when an expert opinion is commissioned, or when the court wishes to visit a particular site the average duration of the procedure will easily exceed 6 months. Moreover, the full duration of the procedure will be at least doubled or even tripled when either party appeals the judgement.²⁷ The possibility to appeal against the judgement of the court of first instance – or even from the appellate court's decision – therefore leads to a clear delay in the final settlement of a consumer dispute. Although such possibility may be advantageous in individual cases as mistakes – by the parties themselves or by the court – may be rectified in appeal – the result-

22 For consumer sales contracts, the notification period may only start when the consumer has discovered the non-conformity, *see* Article 5(2) of the Consumer Sales Directive (Directive 1999/44/EC, [1999] OJ L 171/12).

23 Proposal for a Regulation on a Common European Sales Law, COM(2011) 635 final.

24 *See* Article 106(2) CESL.

25 Von Bar & Clive 2009, p. 807.

26 The proposal for a Regulation on a Common European Sales Law has been withdrawn by the new European Commission and will be replaced by a modified proposal ‘in order to fully unleash the potential of ecommerce in the Digital Single Market’, *see* Annex 2 to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions; Commission Work Programme 2015; A New Start, COM(2014) 910 final, p. 12, no. 60. The new proposal is expected to be published by the end of 2015.

27 *See*, for instance, Section 12 of *De Rechtspraak 2014*, which contains the annual report of the Dutch judiciary.

ing prolongation of the proceedings may easily deter consumers from enforcing their rights through the court system. The same holds true for the time-consuming (and costly) application of the normal rules of civil procedure, in particular the rules on evidence. Not surprisingly, a 2013 Eurobarometer shows large dissatisfaction on the point of the duration of the proceedings, with only 21% of citizens interviewed being satisfied with the length of proceedings in civil and commercial cases and no less than 65% responding in a negative manner to this question.²⁸

If the consumer's claim is recognized by the court and the judgement is no longer subject to appeal, the consumer may demand the immediate compliance with that judgement. Where the trader 'voluntarily' complies with the judgement, the enforcement of the judgement need not cause further delay or additional costs for the consumer. This is different when the trader does not comply with the judgement and the judgement must be enforced. To that extent, the consumer would have to invoke the assistance of a bailiff to serve a writ of execution. The forced execution of the judgement will of course also take time and cause additional costs, and will thus constitute an additional obstacle for the consumer to enforce her rights.

3.5 *Costs of the procedure*

The 2013 Eurobarometer also shows large discontent of European citizens with regard to the costs of civil and commercial proceedings: far more EU citizens rate these costs negatively (48%) than positively (26%).²⁹ Nevertheless, until recently the costs of civil procedure were largely overlooked when evaluating how well the court procedure works.³⁰ The lack of interest is unjustified, in particular with regard to the evaluation of the access to the court system in consumer cases: the costs of legal proceedings undoubtedly constitute the most important burden for consumers to submit a claim to the courts. In most cases, the consumer's claim is of relatively low financial value, and the costs involved in court proceedings in practice often prevent the consumer from bringing such a claim. The higher these costs are, the more likely it is that the enforcement of consumer rights is beyond the reach of consumers as they tend to have shallower pockets than traders.³¹ Where a party cannot afford to submit a claim or to oppose the other party's claim, access to justice is simply denied and wrongs are not remedied or compensated.³²

The costs the consumer may need to incur are manifold. First, the consumer may need to travel to the place where oral proceedings take place, and possibly also pay for accommodation. Certainly in international cases these costs may be higher than the amount of money claimed by the consumer. But even apart from such costs, there are many other expenses the consumer may encounter: charges

28 TNS Political & Social 2013, p. 33.

29 Ibid.

30 Cf. Hodges et al. 2009, p. 7.

31 Cf. in more generic terms Musger 2005, p. 81.

32 Hodges et al. 2009, p. 10, 32.

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to start the procedure (the costs for court fees and the costs for the services of a bailiff, see 3.5.1), the costs of legal advice and representation (3.5.2), and the expenses involved with the hearing of witnesses and expert opinions (3.5.3). In principle, the parties will need to pay for these costs when they occur.³³ However, generally the costs will at least to some extent be shifted to the losing party ('loser pays' principle or indemnity principle).³⁴ In 3.5.4, specific attention will be paid to the problem that this principle causes in consumer cases.

3.5.1 *Costs necessary to start the procedure*

In almost all legal systems – the principal exceptions being France and Sweden³⁵ – the plaintiff is faced with the need to pay court fees directly at the beginning of the procedure; whereas most legal systems only levy one court fee, in some legal systems other fees apply with regard to subsequent procedural steps.³⁶ Where the procedure starts by the bailiff serving a summons to the defendant, the consumer taking legal action will sometimes have to pay for these costs separately, otherwise they tend to be included in the court fee.³⁷ Where she acts as a defendant, the consumer may normally avoid the costs of serving a summons (sometimes even when she launches a counterclaim), and depending upon national procedural law she may often also avoid the court fees. At first glance it thus seems attractive to simply wait until the trader lodges a claim. However, this is of course only possible if the consumer has not already paid. Moreover, as these costs are (to a large extent) shifted to the losing party anyway, in practice it does not make much difference whether the consumer acts as the plaintiff or as the defendant. What does matter, is the manner in which the court fees are calculated and, thus, the amount that is charged to the parties. In some legal systems, the court fees will be fairly modest as the access to the court system is seen as a fundamental right, which basically implies that the costs should not impede consumers from invoking the assistance of a court in settling a dispute. In other legal systems, the full cost of the use of the court system – including the judge's and staff's salary – is recovered from the fees that the parties to a dispute have to pay.³⁸ Obviously, in such a court system the access to justice in consumer cases may be in jeopardy.

3.5.2 *Costs of legal aid*

Where the parties are required to engage legal representation, the associated costs may easily stand in the way of filing a claim against the other party. There are huge differences in the way that the fees of attorneys are normally composed – varying from a contingency fee ('no win, no fee') to fixed fees and hourly rates. A European study by Hodges, Vogenauer, and Tulibacka in 2009 showed that hourly rates in Europe vary from € 15 to 250 in Lithuania to € 134 to 504 in Den-

33 Musger 2005, p. 81.

34 Ibid, p. 82.

35 Hodges et al. 2009, p. 11ff.

36 Ibid, p. 12, and critical with regard to this approach, p. 33f.

37 Musger 2005, p. 81.

38 Cf. Turner 2005, p. 87.

mark and € 75 to 700 in the Netherlands.³⁹ It should be recognized that in most cases even the simplest consumer claim will cost a lawyer several hours in preparing and pleading, which probably means that these figures are to be multiplied at least by four in order to paint a good picture of the costs of legal representation. Even so, the full amount of the costs of legal representation is based on calculated guesses, as lawyers from several legal systems indicate that it is difficult under their system to predict what the lawyers' costs would be.⁴⁰ This clearly indicates that these costs are not sufficiently predictable in those jurisdictions,⁴¹ which in turn may deter parties from going to court altogether as they will have trouble in ascertaining whether the costs of bringing a claim are proportionate to the value of the claim.

Where legal representation is not required – which is usually the case if the proceedings take place in front of a small claims court or a justice of the peace – these costs may be avoided. However, in practice traders, and – depending on the value of the claim – even consumers often obtain legal representation, albeit normally not from lawyers but from other providers of legal aid, such as trade unions and consumer organizations, or from family or friends. It seems likely that such providers of legal aid in any case charge *lower* rates than the hourly fee of solicitors, but nevertheless it appears that even in small claims often costs are incurred rather frequently. The costs associated with such legal assistance will often not be proportionate to the value of the claim, which may deter consumers, in particular, from submitting relatively modest claims to the court.⁴²

3.5.3 *Costs of expert opinions and witness hearings*

Whenever an expert opinion is needed – for example, research is needed to determine whether the goods delivered were already defective upon delivery – the judge is required to determine whether parties are required to deposit an advance in order for the expert to be paid. The normal situation will be that the party who requests the expert opinion is to pay the remuneration or an advance thereof.⁴³ Nevertheless, the court may be allowed to shift the payment of any advance to the other party or to divide it between the parties, in particular where the expert is to provide evidence for which each party bears a part of the burden of proof. For instance, it is the consumer who must prove that the goods delivered do not conform to the contract, but it is the seller, under Article 5 para. (3) of the Consumer Sales Directive, who bears the burden of proving that a lack of conformity which becomes apparent within 6 months of delivery of the goods, did not already exist at the time of delivery. In such a situation, both parties may profit from the expert opinion and the court may decide to order both parties to pay half of the advance.

39 Hodges et al. 2009, p. 55 (Appendix III).

40 Ibid, p. 17.

41 Ibid, p. 35.

42 Jacobs 1998, p. 161-162.

43 Hodges et al. 2009, p. 13.

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Someone who is called upon to appear as a witness is required to appear and submit a statement. However, the witness has the right to compensation of the costs for travelling and, if need be, for accommodation, as well as for loss of income. These costs are normally to be compensated for by the party that has called the witness.

3.5.4 *The 'loser pays' principle*

If the consumer loses the case she will, of course, not be able to reclaim the court fee, the costs for serving the summons, and the costs of the expert opinion and the witness hearings. Moreover, whether she was the plaintiff or the defendant, she will normally be required to compensate the costs the other party has incurred: almost all legal systems⁴⁴ recognize, at least as a starting point, the 'loser pays' principle.⁴⁵ This principle is also laid down in Article 16 of the Small Claims Procedure Regulation,⁴⁶ which makes an exception, however, "to the extent that costs were unnecessarily incurred or are disproportionate to the claim", an exception that seems to have been accepted in most legal systems as well.⁴⁷ The starting point, however, is that all costs of the proceedings incurred by the winning party should be compensated by the losing party. This includes the trader's costs of legal representation, even in cases where the consumer was not represented herself.

The risk of not only having to bear her own costs, but also having to compensate the costs incurred by the trader, casts a dark cloud over the procedure.⁴⁸ This is, of course, true for both parties, but may prevent in particular consumers – who do not have the opportunity to spread the risk across multiple procedures or to write-off the costs as part of the price for other contracts – from taking legal action by filing a claim themselves or by opposing a claim from the trader, or from attempting to provide evidence of certain positions. Hondius rightly notes that the risk of having to compensate the other party's costs thus stands in the way of consumers asserting their claims.⁴⁹ In this respect, it should be recognized that the outcome of a procedure cannot always be predicted. For example, a consumer who argues that a refrigerator that has broken down 7 months after delivery did not conform to the contract, bears the burden of proving that the non-conformity was caused by a defect which was already latently present at the time of delivery. The risk that even after an expert has examined the refrigerator it remains unclear whether a hidden defect existed at the time of delivery is therefore borne by the consumer. That means that the seller will not be required to repair or replace the refrigerator and the consumer will have to pay for the repair or replacement herself. Moreover, the costs the consumer has incurred in going to court cannot be reclaimed from the seller, and on top of this all she will have to

44 With the notable exception of France, *see* Hodges et al. 2009, p. 20.

45 Musger 2005, p. 82; Turner 2005, p. 88.

46 Regulation (EC) no 861/2007 of 11 July 2007 establishing a European Small Claims Procedure [2007] L199/1.

47 Musger 2005, p. 82.

48 Jacobs 1998, p. 27.

49 Hondius 2006.

compensate the seller for the costs the seller encountered during the procedure. Under such conditions, the consumer would be wise not to run these risks and simply order a new refrigerator or have the old one repaired at her own expense, even if she might have a valid claim against the seller. The risk of having to compensate the costs of the procedure will therefore lead to under-enforcement of consumer law.⁵⁰ Moreover, it provides rogue sellers with an additional argument not to meet their customers' demands, as these customers will hardly ever be able to enforce their rights anyway. If, from a policy point of view, the private enforcement of consumer law is valued by the European and national legislators, it seems worthwhile to introduce a system of 'one-way' cost shifting, where consumers may shift their costs, but their professional counterpart may not, or to exclude the application of the 'loser pays' principle altogether in small claims procedures.⁵¹

4 Concluding remarks: the way forward?

In Sections 2 and 3, several obstacles to the proper enforcement of consumer rights by individual consumers were identified. A first problem is that consumers (as well as traders) are not aware of consumer rights. The development of easy-to-use and easily accessible websites with information on consumer rights may help in empowering consumers. This is a necessary condition for the individual maintenance of consumer rights, as consumers will only take legal action if they know of their existence and if there is a high probability that taking legal action will be successful. However, this barrier to the enforcement of consumer rights may be taken away only to a limited extent: in practice, consumers will only invest time and energy in becoming informed when they believe they should be entitled to protection and when the interests at stake are serious enough to them. Where consumers believe they are not entitled to a remedy or where, already from the outset, the monetary value of a potential claim does not outweigh the assumed cost and effort in obtaining that remedy, consumers will simply take their losses. Where consumers want to enforce their rights by taking legal action, they are faced with formal proceedings and language that is difficult to understand for laypersons. However, both the formalities and the jargon used tend to be less in courts that usually deal with consumer cases, e.g. small claims courts or justices of the peace. Nevertheless, problems are caused due to procedural requirements, for instance as regards the content of a summons. An informal procedure that is started by way of an electronic form and in which standard forms are used by both the parties and the courts will diminish this particular obstacle. In this sense, both the European Payment Order Procedure and the European Small Claims Procedure show the way for developments in national procedural law. The next obstacles are related to the practicalities of communication between the parties: the consumer may need written evidence of her complaint, or may have

50 This fear evidently even applies in commercial cases, as the example of the effect of Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L157/32, L195/16) in the Netherlands shows; Hodges et al. 2009, p. 21.

51 Hodges et al. 2009, p. 23, 45.

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to notify her complaint within a fixed or a reasonable period after its (presumed) discovery. The first of these obstacles relates to the requirement that a party, before being allowed to go to court, in some legal systems must be able to prove that prior communication has taken place between the parties. In consumer cases, that prior communication typically has taken the form of an oral complaint at the retail shop, of which no recorded evidence exists. In such countries, before going to court, the consumer then in fact must state her complaint again in writing. In practice, however, this hardly constitutes an extra burden as such a (second) written complaint is rather common anyway. More problematic is that the consumer may run into evidentiary problems if a Member State requires a timely notification of the complaint – the second of these types of obstacles. Here, the absence of proof is even more pertinent, as a later notification that can be proven does not absolve the absence of proof of the earlier oral complaint. Hence, the consumer runs the risk of not being able to prove the timeliness of her complaint, and thus faces losing her claim altogether. The former of these obstacles need not necessarily be tackled; the second should be dealt with. If the duty is not abolished altogether for consumer contracts – as is suggested in the academic DCFR and (for consumer sales contracts) in the now withdrawn Commission proposal for a Common European Sales Law – at least the consequences of a breach thereof should be mitigated, for instance by only taking away the consumer's rights to termination or specific performance of the contract, but leaving the right to claim a price reduction or damages intact.

Another obstacle is the fact that the consumer must be perseverant. A court procedure takes a long time, in particular if the court orders the hearing of witnesses or requires an expert opinion. Where such means of gathering evidence are used, in many countries the procedure is likely to take over a year. Moreover, where the parties are given the possibility to appeal against the judgement, the length of the procedure is more than doubled. These problems would certainly diminish if the European Small Claims Procedure – which includes a restrictive approach to costly and time-consuming evidence gathering procedures – were to be applied to domestic cases too and the possibility of appeal excluded altogether.

However, the most important burden involved with submitting a claim to the court in a consumer case is undoubtedly the fact that the consumer's claim often is of a relatively low financial value, which often does not justify bringing the claim in the first place. Costs for travelling (and accommodation), in particular in international cases, may be higher than the value of the claim. The same holds true if the consumer is in need of legal assistance or when costs are incurred during the hearing of witnesses and expert opinions. These costs may largely be avoided by the parties. This is not true for court fees and the costs for a summons. Most problematic for consumers, however, is the fact that the losing party is required to pay the other party's legal fees. These costs cannot be controlled by the consumer in any other way than by refraining from the procedure altogether. In practice, the risk of potentially having to reimburse these expenses may deter consumers from enforcing their rights, in particular in claims of a relatively low financial value. The (rational) fear of having to cover these costs will therefore restrict the number of consumers enforcing their rights and thus lead to under-

enforcement of consumer law. The problem of the low financial value of the initial claim in relation to the potential costs of the procedure can, of course, not be taken away completely. Application of the European Small Claims Procedure, with its simple option for starting a procedure, the restrictive application of the hearing of witnesses and the absence of a legal advice obligation will certainly help diminish the problem.⁵² The problem that the application of the 'loser pays'-principle causes is, however, not resolved by the European Small Claims Procedure. It is high time for legislative reform!

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