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## Article

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## Celsius clawbacks against EU consumers: A real-world test of EU law on online consumer contracts

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**Keywords:** Celsius network, Clawbacks, Consumer protection, Jurisdiction, Unfair contract terms

**Abstract:** Celsius Network was a crypto lending giant managing nearly USD 12 billion and aggressively courting EU crypto enthusiasts. More than two years after it entered bankruptcy, many former clients regret the day they signed up with the failed platform. The Celsius clawback lawsuits in the US against EU consumers present significant legal challenges that test the limits of EU consumer protection laws in cross-border digital finance cases. This article explores the defences available to EU consumers, focusing on the jurisdictional and substantive law rules set forth by the Brussels I (Recast) and Rome I Regulations, alongside the EU's stringent protections against unfair contractual terms. Despite Celsius' efforts to impose US law and jurisdiction on its EU customers, the article argues that these claims are legally unjustified. While such clawbacks cause stress and potential harm, including the risk of default judgments, EU law provides strong defences that should preclude any attempt to recognise and enforce these judgments within the EU. The article also addresses broader issues such as extraterritorial jurisdiction, the application of *Actio Pauliana* against consumers, and due process concerns in cross-border legal actions. It concludes with recommendations for clearer EU public guidance on consumer clawbacks and suggests directions for future policy and regulatory action.

## Introduction

Celsius Network (Celsius) was one of the largest crypto lending platforms that at its prime had almost USD 12 billion in assets under management (Browne, Kharpal, 2022). Celsius began with the promise of a global blockchain finance platform, presenting itself as a blockchain bank and allowing users to earn yield on deposits of their digital assets. In the end, it turned out to be one of the biggest Ponzi schemes, a financial fraud (SEC, 2023), and a continuing financial and legal nightmare for many Celsius customers. As of the time of writing former Celsius management are under trial for securities manipulation and fraud.

On the eve of Celsius's collapse, thousands of customers did not wait for Celsius to publicly admit its troubles and withdrew their assets in the months leading up to the freeze of operations. Some acted based on circulating rumours, but many withdrew for personal, legitimate, and *bona fide* reasons – some completely unrelated to Celsius, such as large purchases, health expenses, or family event expenditures. There had been no indications of any foul play or bad faith on the part of Celsius's customers who withdrew their funds during the run-up to Celsius's collapse. Nevertheless, due to obscure provisions of US bankruptcy law, thousands of such customers, among them consumers in the EU, have now become entangled in the Celsius bankruptcy and face uncertain prospects of defending themselves against clawback lawsuits filed by the Celsius estate (Blocktrainer, 2024).

This situation raises novel and fundamental questions about the interplay between the EU consumer contract law and the global nature of online financial services, which have never before emerged on such a scale. It especially highlights the tensions between US and EU legal frameworks regarding the protection of online consumers. Such tensions are well known and well researched, yet until now, they have largely been treated as interesting academic exercise or subject for comparative law study (Zeng, 2018; Hörnle, 2021; Zhen, 2022), rather than a practical matter. The Celsius clawback claims, however, present a very real situation affecting the lives of hundreds of EU consumers, many of whom know little or nothing about the significant differences between US and EU consumer law but now face major financial concern and complex international legal liability.

The overall risks posed by the Celsius collapse were emphasised as one of the motivations for the EU to regulate digital assets and adopt the Regulation (EU) 2023/1114 on Markets in Crypto-Assets (MiCA) (see MiCA Recital 4), which took effect 30 December 2024. MiCA regulation may hopefully prevent unscrupulous operators like Celsius from conducting business in the EU in the future; however, it does not

address the specific questions at issue in this article. It also offers no consolation to the hundreds of EU consumers affected by Celsius's clawback actions. Disappointingly, the clawback risks and key issues were not addressed in the European Parliament ECON Committee Study on "Remaining regulatory challenges in digital finance and crypto-assets after MiCA" (After MiCA Study, 2023). To clarify these issues, the basic consumer contract rules are most relevant and need to be re-examined in specific context.

The legal essence of the Celsius clawback cases lies in the conflict of laws – specifically, the question of applicable law and jurisdiction. Celsius cases present a clash between the US legal system, characterised by its broad jurisdictional reach and assertive judicial practices, and the more protective, consumer-friendly legal environment of the EU (Hörnle, 2021, pp. 30-32). The affected Celsius EU consumers are caught between these two powers and face highly complex legal questions. This article focuses on the issues of the current litigation against the EU customers (consumers) of Celsius<sup>1</sup>, specifically on the applicability of EU consumer law and jurisdiction rules to such customers (consumers). The analysis aims to identify and examine the legal defences available to EU consumers against such cross-border legal claims and aggressive legal strategies employed by the Celsius estate under US law.

The broader implications of this analysis extend beyond the immediate concerns of Celsius's EU customers. They touch upon the growing extraterritorial ambitions of national legal systems, to which the EU itself is no stranger (Celeste & Fabbrini, 2021, pp. 10-11). In a world where financial and other online services are increasingly digital and borderless, the outcome of the Celsius clawback litigation will have significant implications for such extraterritorial jurisdiction claims (Drewes & Kirk, 2024). Even with the introduction of the MiCA Regulation, the risk of clawbacks against EU consumers in foreign jurisdictions is not eliminated, and there-

1. Celsius customers were both companies and individuals. Analysis in this article focuses only on the EU individuals who were caught up as Celsius customers. From the point of view of the EU law such individuals are deemed consumers. The EU consumer law (Directives of Unfair Contract Terms 93/13/EEC, Consumer Rights 2011/83/EU, Consumer Credit 2008/48/EU, etc.) use virtually the same definition of the "consumer", defining it as any natural person acting for purposes which are outside his trade, business, craft or profession. There is no monetary or transactional threshold – only a purpose-of-the-contract test. This understanding was affirmed by the CJEU in C-208/18 *Petruchová*, where the CJEU was asked whether an active FOREX trader – classified by her broker as a retail client but manifestly sophisticated – could still rely on the Brussels I bis consumer jurisdiction rules. CJEU held that financial sophistication, high trade volumes, or even earning a living from trading do not automatically strip a natural person of "consumer" status. The decisive criteria is whether the contract serves that person's private needs or their professional activity. Important and relevant to note that CJEU considered the "consumer" status in context of the Brussels I (Recast) Regulation.

fore, additional clarity on these situations is necessary.

The first part of this article examines the Celsius clawback claims and their context. The second part analyses the applicability of the Brussels I (Recast) Regulation (12 December 2012 Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)), Rome I Regulation (17 June 2008 Regulation (EC) No 593/2008 on the law applicable to contractual obligations), and other EU rules pertaining to Celsius's clawback cases against EU consumers. The third part focuses on the recognition and enforcement aspects and legal defences available during it. As it was noted, the analysis assumes that Celsius customers in the EU, who are natural persons, are consumers. It is also assumed that the affected EU nationals are not residents of the US jurisdiction, i.e. they are not EU citizens who are US Green Card holders or have dual EU/US citizenship, as such persons may be amenable to the US court jurisdiction. The article does not investigate multiple special legal defences that may be relevant, e.g. the lawfulness of claiming the present value of assets that were withdrawn and potentially liquidated in 2021, but may have nominally appreciated since then. Nor does it address the situation of EU legal entities that may be subject to Celsius estate clawback lawsuits.

## **1. Legal relationship between Celsius and their customers**

The elephant in the room for any cross-border contract or dispute is the question of applicable law and jurisdiction. Online services are globally accessible to consumers with little regard for their physical location. Moreover, online companies frequently target customers across borders, either directly reaching out to the consumers online or indirectly through various intermediaries (Chen, 2022).

In the EU, a foreign business is generally subject to the jurisdiction of a consumer's country of domicile and the law of the consumer's habitual residence, provided the business has specifically targeted the consumer's home country, and the consumer contract falls within the scope of such targeting activities under the EU Brussels I Recast and Rome I Regulations. These are EU public law mandates that cannot be waived by contract and are designed to protect EU consumers from arbitrary contractual terms imposed by online service providers. The purpose of these mandates is to protect consumers from being dragged into foreign courts under foreign laws (Hörnle, 2021, pp. 331–368).

However, in this specific situation, there are several regulatory caveats pertaining

to the subject matter of the Celsius contracts (contracts on transfer of digital assets) and the nature of the lawsuits (clawbacks resulting from Celsius bankruptcy proceedings). It is crucial to assess whether the general principles of the aforementioned EU public law still apply because, as mentioned in the introduction, the rules governing consumer contract jurisdiction in the US and the EU could not be more different.

### **1.1. Celsius relationship with the EU consumers**

Celsius was a global online finance platform attempting to reach consumers worldwide, and especially in the US and EMEA (Europe, the Middle East and Africa) regions (Celsius Whitepaper, n.d.-a). Operating as a US company, Celsius actively targeted EU consumers by all available means. This was done directly by making its services available to EU consumers and putting significant effort into onboarding them, and indirectly through advertising and local partners, such as the German fintech company Nuri GmbH, which itself targeted consumers across the EU and went bankrupt due to its partnership with Celsius (Reuters, 2022).

The main service offered by Celsius was Celsius Earn. Onboarded customers could transfer their cryptocurrency assets to Celsius in exchange for weekly interest. Celsius stated it would lend those cryptocurrency assets to other market players to generate yield, thus acting as a kind of crypto bank. Celsius account holders could elect to receive weekly rewards payments (or interest) in the transferred cryptocurrency (i.e., in-kind) or in CEL token, which had higher return interest rates. The relationship between Celsius Earn users and Celsius was governed by Celsius's Terms of Use.

Customers who agreed to the Terms of Use entered into a contractual arrangement with Celsius Network Ltd, a United Kingdom entity. However, in July 2021, the Terms of Use were updated such that the counterparty for all customers became Celsius Network LLC, a Delaware entity. Moreover, the governing law of the Terms of Use was changed to New York law, and the jurisdiction clause on resolving the disputes was also changed. According to Section 33 of the last version of the Terms of Use (v8) "disputes arising out of, or related to, your Celsius Account or relationship with Celsius must be brought exclusively in the competent courts located in New York, NY and the US District Court located in the Borough of Manhattan." All customers were required to accept these updates to the Terms of Use through a push notification to continue to access Celsius's platform. All "user-facing" activities, including all withdrawal requests related to the Earn product, were housed in the workspace hosted by the Celsius US entity for customer accounts<sup>2</sup>.

From a formal perspective, for almost a year before filing for bankruptcy all Celsius customers who used the Celsius Earn service were contracting with a US entity in connection with the assets that they transferred to and withdrew from Celsius's platform.

It is important to note that the Terms of Use were not localised to meet EU consumer law requirements. For example, they were available only in English, were not provided in the national languages of various EU countries, and did not account for the domestic laws of the customers' domiciles. Nevertheless, Celsius actively targeted EU consumers in their marketing, and facilitated their contracting. A crucial aspect of this targeting was Celsius's onboarding process, which required all customers to confirm their identity, address, and sources of funds—commonly referred to as the "Know Your Customer" (KYC) process, which is essential for compliance with anti-money laundering, counter-terrorist financing, and other financial services regulations. Celsius also used various Europe based KYC service providers (Celsius KYC, (n.d.-a)) to localise and tailor the KYC process, ensuring it could recognise EU identity documents and other EU consumer information.

## 1.2. Celsius estate clawback lawsuits

Generally, according to the US Supreme Court personal-jurisdiction standard for the US courts to have jurisdiction over non-resident individuals, such individuals shall have contacts with the forum state in a way that the "maintenance of the suit does not offend `traditional notions of fair play and substantial justice'" (*International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Also, the individual should have such a degree of "minimum contact" with the forum that he might expect the necessity of litigating there. "Minimum contacts" are usually established if the defendant "purposefully availed" himself of the laws of the forum seeking jurisdiction by doing business within it, which may be satisfied by the defendant agreeing to a contractual clause (Niesel, 2019).

Celsius bankruptcy proceedings are handled by the US Bankruptcy Court for the Southern District of New York. According to the US bankruptcy law, the court presiding over the bankruptcy also has a general jurisdiction over clawback lawsuits in bankruptcy proceedings (28 U.S.C. § 157(b)(2)(F)). Note that clawback lawsuits are a form of *Actio Pauliana*, which in itself is not a bankruptcy proceeding. Also, Celsius bankruptcy from the outset was a so-called Chapter 11 proceeding, which would be an equivalent of restructuring proceedings in the EU, and not a winding-

2. Cf lawsuits against consumers Sections 22; all lawsuits are identical and are public in the Celsius Court Docket (Celsius Court Docket, n.d.-a.).

up and liquidation proceeding – the sale of a debtor's assets and the distribution of the proceeds to creditors, which in the US is referred to as the Chapter 7 proceeding (LoPucki & Doherty, 2017). Inadvertently, this may have a crucial role in determining the applicability of the EU jurisdiction for clawback lawsuits against EU consumers.

All clawback lawsuits filed by Celsius estate are public in the Celsius Court Docket (Celsius Court Docket, n.d.-a.) and provide a full insight into applicable law and jurisdiction arguments made by the Celsius estate. Celsius estate claims that the US Bankruptcy Court has jurisdiction over defendants, which are not US residents. This is claimed to be based on the minimum contacts with the United States in connection with the claims asserted; Bankruptcy Rules 7004(d) and (f) and New York Civil Practice Law & Rules § 302 because, Celsius customers purposefully availed themselves of the laws of the US and the State of New York by, among other things, doing or transacting business in the US and in the State of New York which gives rise and/or relates to the claims at issue. Furthermore, jurisdiction is held by virtue of the individuals having entered into agreements with Celsius that for various contracts and matters designated the State of New York law as the governing law and as the forum state for dispute resolution. Celsius customers who have also filed a proof of claim in Celsius bankruptcy proceedings may have additionally subjected themselves to the New York law as the governing law and New York as the forum state for dispute resolution.

On the surface, the clawback jurisdiction and venue claims meet the said general “minimum contacts” requirement. However, the lawsuits completely ignore the consumer nature of the relationship between Celsius and its individual non-US customers, as well as the circumstances in which that relationship was established. Even US legal scholars acknowledge that in consumer contracts, the parties lack equal bargaining power. Accordingly, the stronger party will dictate the terms of the contract, including any choice of forum or choice of law clause; also, at a minimum summoning non-US resident consumers to the US litigation raises very serious concerns about the fulfilment of the due process requirements (Effron, 2018), which will be also addressed further below in discussing recognition and enforcement matters.

Clawback lawsuits fail to address any defenses that may be available to non-US Celsius customers against the asserted jurisdiction and venue. Thus, the arguments advanced in those lawsuits in support of that jurisdiction and venue should be assessed very critically. It is not certain, however, that the bankruptcy specialist judge presiding over the Celsius bankruptcy litigation will ascertain the complexity

of the matter and the conflict of laws at issue. The court may choose to follow a path of least resistance – a nominal procedure of issuing default judgements against customers who do not respond to the clawback lawsuits.

Clawback lawsuits were filed against Celsius customers, who withdrew their digital assets worth at least USD 100,000 at the date of withdrawal from Celsius platform in 90 days leading to the initiation of the Celsius bankruptcy proceedings (Businesswise, 2024). Note that USD 100,000 is an arbitrary threshold, which was established in the Celsius restructuring plan and likely represents a purely pragmatic threshold, where a lower amount would not justify the potential administrative and litigation costs.

A lot of withdrawals were in the original assets (e.g. BTC or ETC), that are highly volatile and it is not entirely certain how the clawback threshold value was calculated. Yet the clawback amounts were calculated based on the asserted market value of the withdrawn assets as of 14 June 2024 (Celsius Open Letter, n.d.-a.). This may be a rather important circumstance in specific situations, potentially leading to a dismissal of the clawback lawsuits. It is not analysed further in this article, due to focus on matters of applicable law and jurisdiction.

Based on the US rules (11 US Code § 547) for the statute of limitations on clawbacks Celsius estate had three years to file such claims, and filed approximately 5,000 such claims by 13 July 2024 in the US Bankruptcy Court of the Southern District of New York. Hundreds of claims were filed against the consumers based in the EU as reported in online groups of Celsius consumers (Reddit, n.d.-a.).

## **2. Pertinent EU law**

### **2.1. EU jurisdiction rules pertinent to Celsius clawback claims**

The Brussels I (Recast) is the mandatory disciple of the earlier 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. Brussels I (Recast) sets forth the general principles that the rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor (Recital 11). In relation to consumer contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for (Recital 13).

Jurisdiction rules for consumer contracts are set forth in Articles 17–19 of the Brussels I (Recast) and set forth an aforementioned mandatory consumer privilege of jurisdiction of consumer’s own country of residence in the EU (Giesela, 2016). There is one essential caveat, however. Pursuant to Article 1.2(b) of the Regulation, it shall not apply to bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings. Thus, it is not entirely clear whether the rules of the Brussels I (Recast) actually applies to Celsius clawback claims against EU consumers. Additional analysis is required to answer this question.

In interpreting the EU law, the Court of Justice of the European Union (CJEU) is the ultimate authority. *Actio Pauliana* cases have emerged as an area of significant uncertainty under the Brussels I (Recast) (Ciaptacz, 2021) and there have been multiple referrals to the CJEU to clarify jurisdiction rules in such matters.

In Case C-213/10 F-Tex citing the old case of C-133/78 *Gourdain*, the CJEU noted that “it is necessary, if decisions relating to bankruptcy and winding-up are to be excluded from the scope of the Brussels Convention, that they must derive directly from the bankruptcy or winding-up and be closely connected with the proceedings for realising the assets or judicial supervision” (Section 22). This was followed in subsequent cases on the interpretation of the Brussels I (Recast) Regulation (e.g. C-111/08 *SCT Industri*) making it decisive that the exception under the Brussels I (Recast) will apply only to those claims deriving directly from the insolvency proceeding – there must be a close link (Ciaptacz, 2021). Thus, according to the CJEU, Article 1.2(b) excludes only actions derived directly from insolvency proceedings and closely connected with them. Restructuring proceedings and *Actio Pauliana per se* are not actions derived directly from insolvency proceedings and closely connected with them, therefore are not exempt from the jurisdiction rules of the Brussels I (Recast). Accordingly, where there is an *Actio Pauliana* in relation to a transaction connected to a restructuring, but not directly a part of a procedure falling within the strict bankruptcy proceedings (that is proceedings relating to the winding-up of insolvent companies) such actions shall be covered by the Brussels I (Recast)<sup>3</sup>.

It is important to note that all CJEU *Actio Pauliana* jurisdiction cases were cases among legal entities and not cases where the counterparty was a consumer. CJEU is yet to address the situation where jurisdiction rules affecting consumers are

3. Similar conclusions can be inferred from the guidance that CJEU provided in other cases such as C-337/17 *Feniks*, C-296/17 *Trachte GmbH*, and Case C-535/17 *BNP Paribas*.

contested by *Actio Pauliana* situation, however given the narrow interpretation of the bankruptcy proceeding exemption, as well as very high level of protection that consumers enjoy under the EU law (Rott, 2018), it is very unlikely that CJEU would preclude the applicability of the Brussels I (Recast) to such situations. This is further substantiated by most recent CJEU guidance in C-183/23 *Credit Agricole*, where the CJEU reiterated the principle of effective judicial protection enshrined in EU law, particularly where consumers are concerned. CJEU asserted the broad interpretation of the Brussels I (Recast) Regulation to protect consumer interests in cross-border disputes, even if the consumer is not the EU national, but used to be domiciled in the EU at the moment of conclusion of the contract.

From this analysis, it is evident that the situation faced by Celsius' EU customers has neither been directly anticipated nor addressed by the EU legislator or the CJEU. Nevertheless, sufficient grounds exist for it to be governed by Articles 17-19 of the Brussels I (Recast) which assign jurisdiction to the courts of the EU consumers' domiciles.

In this context, the claim of the Celsius estate lawsuits that New York jurisdiction is a proper jurisdiction against the EU consumers who merely clicked through the company's terms and conditions is not only legally dubious but also potentially misleading, since no attempt is made to address the applicable EU law.

## **2.2. EU rules on the applicable substantive law for Celsius clawback claims**

The same can be said regarding the applicability of New York substantive law to contracts and transactions between Celsius and EU consumers. Similar to the Brussels I (Recast) Regulation, the Rome I Regulation provides broad protections to consumers concerning the law applicable to consumer contracts. Consumers are granted the right to rely on the jurisdiction of their country of habitual residence, a right that cannot be waived by contract, provided that the contract was concluded as a result of the professional's commercial or professional activities being directed towards that country (Recital 25). This protection is also extended when the professional, while not operating directly in the consumer's country of residence, targets that country or multiple countries, including the consumer's country, and the contract is concluded as a result of such directed activities (Recital 25). However, a notable exception to this protection is for contracts concerning rights and obligations that constitute a financial instrument (Recital 28).

According to Article 6 of the Rome I Regulation, a contract entered into by a natur-

al person for purposes unrelated to their trade or profession (the consumer) with a professional will be governed by the law of the consumer's habitual residence, provided that the professional either (a) conducts their commercial or professional activities in the consumer's country of residence or (b) directs such activities to that country or multiple countries, including the consumer's country, and the contract relates to those activities.

As previously discussed in the context of targeting EU consumers, Celsius meets the criteria under Article 6(1)(b). According to CJEU guidance in C-144/09 *Hotel Alpenhof* a business is considered to have directed its activities to the consumer's state if it has a website accessible in that country, allows transactions for consumers in such country, and provides information that would attract consumers from that country (Chen, 2021). As it was explained in the previous section, Celsius easily meets these criteria.

Under Article 6(4)(d), this general consumer protection does not extend to contracts involving rights and obligations that constitute financial instruments, transferable securities, or units in collective investment undertakings. This reservation is significant and will be further examined below.

The Rome I Regulation does not provide any specific exclusions for bankruptcy or similar proceedings, but it does introduce an important caveat regarding financial instruments, transferable securities, or units in collective investment undertakings. This reservation is directly relevant to Celsius contracts and may or may not apply depending on the specific digital asset transacted and subsequently withdrawn between the consumer and Celsius. Decentralised currencies like Bitcoin are generally not considered financial instruments, securities, or units in collective investment undertakings under the MiCA Regulation<sup>4</sup>. Nevertheless, many other types of digital assets were transacted between Celsius and consumers. Celsius' own utility token (CEL token) would likely qualify as financial instruments, securities, or units in collective investment undertakings<sup>5</sup>, thus excluding contracts related to such transactions from the scope of the Rome I Regulation. Consequently, EU consumers affected by Celsius clawbacks may not universally rely on Rome I rules to invoke the protections of the law of their domicile.

Another relevant source of EU law for assessing the substantive law applicable to Celsius clawbacks is the Council Directive 93/13/EEC of 5 April 1993 on unfair

4. Recital 22 and Art. 4(3)(b) of MiCA; also see ESMA, 2024.

5. SEC charges against Celsius conclude that CEL token was a security (SEC, 2023).

terms in consumer contracts. This directive, which mandates minimum harmonisation, had to be transposed into the national laws of EU member states. The partially localised approach Celsius employed in targeting EU consumers – by presenting them with contracts in legal-English and subsequently subjecting them to clawback provisions under US law – could be deemed an unfair term under consumer contract law. Such a contract (more than 15,000 words (~60 standard pages) of legal English) (Celsius ToU, n.d.-a.) was clearly not in “plain, intelligible language” that an average consumer could easily understand (Article 5). Moreover, it creates a significant imbalance in the rights and obligations of the parties to the detriment of the consumer (Article 3.1). Under Article 6, such terms are “not binding on the consumer”, and consumers cannot “lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract”. CJEU in C-168/05 *Mostaza Claro* elaborated that these consumer defences cannot be circumvented by resorting to alternative jurisdiction rules (arbitration clause). The same shall apply to the imposed choice of non-EU law and jurisdiction.

Directive 93/13/EEC contains no exceptions for bankruptcy or similar procedures, nor does it limit its applicability based on the nature of services offered by Celsius, whether or not they are classified as financial services. The foundational rules of Articles 3, 5, and 6 have been uniformly transposed into the national laws of EU member states, and cannot be waived by a consumer through contractual clauses, effectively counteracting the unilateral power businesses possess to draft contractual terms under private law in consumer contracts (Schulte-Nölke, 2024). Unfair contractual terms defence based on national laws transposing the Directive 93/13/EEC could provide a strong line of defence for EU consumers if a clawback judgment issued by a US Bankruptcy Court, without regard for EU law, is sought to be enforced within the EU.

Thus, the assertion that New York law governs all contracts entered into by Celsius users, irrespective of their location, is in conflict with the EU legal framework, which is specifically designed to protect consumers from the overreach of foreign laws and jurisdictions. Even if clicking through the Terms and Conditions constitutes a valid contract that designates New York law as the applicable law, this does not mean that such a choice of law clause is valid or immune to the provisions of EU law. EU consumers remain entitled to the protections provided by EU law, even if Celsius attempted to bypass them by including a specific choice of law clause into their Terms of Use.

For the EU consumers who did not transact (withdrew) financial instruments with

Celsius, the Rome I rules clearly apply, but even those EU consumers that transact (withdrew) digital assets that may be considered financial instruments, the applicability of New York substantive law to EU consumers could be contested on the grounds of unfairness, a fundamental independent safeguard in EU consumer law. A clause imposing New York law on EU consumers may be viewed as creating an imbalance under Directive 93/13/EEC, particularly given the complexities involved in understanding the divergent legal standards between the jurisdictions. Even US legal scholars acknowledge that American businesses frequently dictate and misuse choice-of-law clauses against consumers, leading to unfair contractual terms (Monestier, 2019; Wilmarth, 2020). It is noteworthy that the After MiCA Study acknowledges that Celsius “potentially mislea[d] users as to either exert enthusiasm in respect to some, or act in confusion and anxiety as to other crypto-assets”<sup>6</sup>, yet it does not comment on the legal implications of such behaviour.

It would likely be advantageous if the individual refrained from filing any paperwork (e.g., proof of claims) within the Celsius bankruptcy proceedings, as such filings are often cited in lawsuits as evidence of the individual's acceptance of New York law and jurisdiction. However, this additional filing does not negate the defence of unfair terms. Furthermore, given the circumstances, it may be argued that consumers acted under duress, as they were attempting to comprehend the magnitude of their financial losses and taking desperate measures to mitigate them.

### **3. Recognition and enforcement of US clawbacks against consumers in the EU – potential issues and defences**

It is neither certain nor warranted that the US bankruptcy judge presiding over the clawback lawsuits against the EU consumers will fully ascertain the complexity of the matter and the conflict of laws at issue. It is conceivable that default judgments (judgments in absentia) may be issued against consumers who fail to respond to the lawsuits or do not appear in the US litigation. Several factors suggest this outcome, particularly given that the US Bankruptcy Court has, thus far, shown little concern for international legal nuances and has, for example, relied uncritically on the applicability of Celsius' Terms of Use for all customers, including international consumers, without addressing conflict of law issues (Celsius Court Order, 2023, January 3). The US Bankruptcy Court initially showed little concern for the privacy and data protection issues affecting Celsius' international user base—a matter of extraterritorial fundamental rights under the EU General Data Protection

6. See p. 76 in After MiCA Study, 2024.

Regulation (GDPR) 2016/679 – agreeing to redact personal information only in response to motions filed after significant public outcry (Copeland, 2023). The personal data disclosure was so massive and concerning that the Internet Archive agreed to take down the cached version (InternetArchive, n.d.-a.), but the full data is readily available on a dark web as it was released in the Celsius Court Docket.

Judgments from US courts are not automatically valid and enforceable outside the United States. Recognition and enforcement of such judgments (sometimes also referred to as *exequatur*) remains subject to national law in individual EU countries, where any such judgment may be attempted to be enforced. Some countries have bilateral treaties governing the *recognition and enforcement* of US judicial awards, while others operate under “open systems”, where national law provides a framework for recognising foreign judgments. Regardless of this, EU member states rather uniformly follow the Brussels model approach to recognition and enforcement of foreign judgements (Stamboulakis, 2020, pp. 75-83). Although the recognition and enforcement process may differ somewhat between countries, most follow two key principles: (a) the foreign court’s judgment must observe principles of due process, be duly substantiated, and not be arbitrary; and (b) the enforcement of such a judgment must be compatible with the national legal system (Doris, 2015). Therefore, even in ‘open’ systems for recognising foreign judicial decisions, the national courts verify whether the foreign court that issued the judgment exercised proper jurisdiction and complied with applicable laws, and whether the judgment aligns with the public order (*ordre public*) of the recognising jurisdiction.

The *ordre public* ground for non-recognition of foreign judicial decisions is established in the EU founding treaties, EU public policy, and the national laws of all EU member states. This principle protects against scenarios where countries would otherwise be required to recognise and enforce a judgment that fundamentally contradicts the legal system of the recognising country (Wurmnest, 2012).

Celsius clawbacks present plausible incompatibilities with core recognition and enforcement principles in the EU member states. As it was argued in the previous section, EU public law applies directly to Celsius contracts with EU consumers, and under the EU rules, adjudicating clawbacks against the EU consumers in US courts is generally impermissible. Instead, the Celsius estate should have referred to the consumers’ countries of domicile.

An interesting separate issue is observance of due process with respect to affected parties in the Celsius bankruptcy proceedings. Clawback lawsuits are conditional on the defendant’s refusal of a settlement offer, which was provided to the defen-

dant. The problem lies in the fact that all notifications in the Celsius bankruptcy proceedings were sent via email to the addresses used by the parties in 2021, rather than through conventional channels, like regular mail in paper form. While the author cannot comment on whether this complies with US bankruptcy procedural rules, it raises significant concerns with respect to international parties, particularly consumers. All the consumer law considerations discussed in the previous section are relevant here. Moreover, it is likely that key procedural documents—including settlement offers—should have been served according to the rules of private international law, such as the 1965 Hague Convention on the Service of Judicial and Extrajudicial Documents, to which both the EU and the US are parties. The Hague process, however, is lengthy and costly, which may explain why the Celsius estate opted not to follow it.

Affected Celsius customers discovered the developments of Celsius bankruptcy either through email—assuming they received and checked it—or via online communities of Celsius victims, such as the Celsius group on Reddit (Reddit, n.d.-a.). Many Celsius customers on Reddit reported never receiving any communication or having access to their 2021 email addresses. It is highly likely that numerous affected consumers, particularly those not involved in such online communities, are unaware of the clawback lawsuits against them and may only find out once enforcement efforts begin in their home jurisdictions.

Observance of the Hague process for serving procedural documents is one of the tenets of due process in the clawback lawsuits against the EU consumers. Failures of the due process are absolutely critical for recognition and enforcement of the judgements in clawback cases, whether they will be issued as default judgements or not.

All the above mentioned jurisdiction and due process issues, as well as unfair contract term defences would come into play during the recognition and enforcement of the clawback judgements in the EU seems highly implausible.

The recognition and enforcement process may also provide an opportunity to challenge the legal grounds of the clawbacks themselves. In most countries, a strict precondition for *Actio Pauliana* is proof of wrongdoing or bad faith by the counterparty (Willems, 2012). Simply withdrawing funds from a Celsius account would not constitute wrongdoing or bad faith unless there were extenuating circumstances, such as insider knowledge. Therefore, it is unlikely that blanket clawbacks would hold up against a basic good faith defence in any EU jurisdiction.

Interestingly, even if the US had ratified the Hague Convention, judgments against EU consumers would still likely be disqualified from recognition under Article 6.2 of the Convention. This provision specifies that for a court to have jurisdiction in consumer cases, the consumer must explicitly consent to the court's jurisdiction through direct consent, either orally or in writing, rather than through a contractual clause.

Although official statistics are lacking, only a fraction of US civil judgments are currently recognised and enforced in the EU. Some EU countries are known to deny recognition of most US civil judgments, and the recognition of default judgments is limited, even in more liberal EU jurisdictions (Baumgartner, 2007). Thus, the likelihood of EU courts enforcing a US clawback judgment against EU consumers is, therefore, close to zero.

## Conclusions

The Celsius estate's clawback cases against EU consumers present complex and specific legal challenges, which are likely to intimidate and stress consumers, even if these clawbacks are legally flawed on several fronts. Defending against them in the US may not only be legally disadvantageous but could also mean surrendering key defences that are available to consumers under EU law.

As discussed in this article, EU consumers have strong and privileged defences under EU law against such clawbacks. Under the Brussels I (Recast) and Rome I Regulations, these clawbacks cannot be filed or adjudicated in US courts under US law. Additionally, there are major concerns regarding the unfair contractual terms imposed by Celsius on their EU customers, which may further undermine the legality of these claims. Moreover, there is significant legal doubt about the permissibility of the clawback claims themselves.

The EU law rather universally precludes the application of foreign law where it would undermine the rights of EU consumers. The imposition of New York law on EU consumers can be seen as a violation of these rights, particularly given the significant differences between US and EU consumer protection standards. The EU's stance on protecting its consumers from foreign jurisdictional overreach emphasised the broader commitment to maintaining the integrity of fundamental rights of the EU nationals amidst globalisation.

As currently filed, the Celsius clawbacks stand little chance of being recognised or enforced in EU countries. Unfortunately, the law cannot entirely prevent unscrupu-

lous parties from making unjustified claims against consumers, nor can it alleviate the resulting stress, anxiety and even unnecessary legal costs for consumers. The risk of unfavourable default judgments remains, though any responsible judge should be mindful of international law before issuing such sweeping judgments in this context. Hopefully, this article serves to highlight these legal concerns and helps prevent such outcomes.

There are also concerns about the Celsius estate's good faith in pursuing these clawbacks against EU consumers. In the author's opinion the clawbacks may be self-serving effort by the consultants managing the Celsius estate, aimed at generating lucrative work, and that the likelihood of success against international consumers was misrepresented in the Celsius bankruptcy proceedings.

The scale of the Celsius clawbacks is an important issue for EU consumer authorities and lawmakers to address. EU consumers would certainly feel more secure if there were authoritative and uniform public communication on this matter across the EU, especially since it was omitted from the After MiCA Study.

Finally, this situation suggests directions for the future improvement of EU jurisdictional and consumer law regulations. Providing additional clarity on the jurisdiction rules governing clawbacks against consumers – or even an outright ban on clawbacks against *bona fide* consumers – may be increasingly appropriate in a global online environment, where consumers often have little ability to understand the jurisdiction and applicable law of the counterparty.

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