

CHOICE OF LAW RULES APPLICABLE TO ELECTRONIC CONSUMER CONTRACTS ACCORDING TO ROME I REGULATION



University of Oslo
Faculty of Law

Candidate number: 20

Supervisor: Jon Bing

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1 Introduction

1.1 The subject matter addressed

With the development of electronic commerce, markets are expanding and consumers are getting more and more involved in trading across the borders. A fair share of electronic commerce transactions consists of business-to-consumer transactions. In domestic commercial operations a consumer has confidence concerning his or her¹ rights and is protected by the national legislative provisions through national judicial system. When the consumers contract with the suppliers from abroad the contractual relation involves more than one legal system and the law which governs these relations should be determined. And it can easily become the law which is unfamiliar to consumer. As Rothchild states, “attempts to enforce the laws of the consumer’s jurisdiction face both legal and practical roadblocks”². A mechanism able to guarantee the protection of the consumer in international transactions is therefore needed.

The international nature of electronic commerce, on the one hand, gives numerous opportunities for both businesses and consumers in terms of a wider choice and lower prices, but, on the other hand, poses numerous challenges to the protection of the consumers buying online. A consumer entering into contract through the Internet with a supplier from abroad cannot rely any more exclusively at national law provisions affording protection to him. The predictability as to the governing law and proper jurisdiction can easily be lost in on-line transaction. In the absence of specific “co-ordination” by private

¹ In the present work references to a consumer in the mail gender should be also regarded as the references to both genders

² Rothchild (1999), p. 899

international law rules, consumers can find themselves unprotected from the application of unfamiliar law and jurisdiction of foreign state.

On the other hand, affording a protection to consumers by application of the law of the country of habitual residence in all the cases where a contract between a consumer and a foreign supplier exists can constitute an excessive burden for on-line businesses. The risk for the supplier of being sued in any jurisdiction with the application of any of the existing consumer protection laws can deter him from doing business online. If the supplier is potentially exposed to all existing legal systems, it means that no legal certainty exists for him as to what sets of rules to follow while contracting with consumer electronically. Attempts to comply with all existing laws (by complying with the strictest set of rules) can outweigh much supplier's profits from trading through the Internet.

As S. van der Hof highlights, "a dilemma is whether to afford protection to Internet consumers, on the one hand, or to provide predictability to online businesses, on the other³". It is the uniform transnational rules which are called to solve the dilemma by striking a balance between interests of suppliers and consumers.

But why should the consumers be protected and why should this protection be extended from national level to the level of international trade (in particular for the level of electronic commerce)? The motivation of consumer's protection is that the consumer is traditionally regarded as a weak party to a contract for the following reasons. Consumer contracts are usually regarded as adhesion contracts, in the meaning that terms and conditions are designed by the supplier and cannot be negotiated or altered by the consumer. The adhesion contract can be defined as "*an agreement [...] in which one side has all the bargaining power and uses it to write the contract primarily to his or her advantage*"⁴. Contracts of this kind are concluded on "take it or leave it" basis⁵. A consumer can only accept terms and conditions in full or just forget about contracting with the particular supplier. So, if all

³ S. van der Hof (2003), p.166

⁴ Farlex Dictionary, available here: <http://legal-dictionary.thefreedictionary.com/adhesion+contract>

⁵ Ibid

contractual terms in electronic consumer contracts are made by a supplier exclusively and more likely are composed to his own benefit, it means that a consumer is weaker both contractually and economically.

National legal systems contain consumer protection rules in specific laws on consumer protection, civil codes and procedural codes. By national legislation the consumer protection is ensured through substantive law rules. In particular, national laws on consumer protection contain special rights for consumers, for example, the right of withdrawal from the contract, special obligations on the part of suppliers and special jurisdictional rules for consumers as weaker contractual parties more favorable than general jurisdictional rules.

It is apparent from the international nature of transaction that consumers take much more risks than in domestic trade. The consumers reasonably cannot exercise some of the substantive rights guaranteed nationally (for example, they cannot carry out prior checking of the goods) and they never can be sure about supplier's identity. Besides, the consumer is usually required to provide the supplier with his personal information as well as to leave his credit card details in order to make payments, which, of course, poses additional threats to consumer's privacy. Due to the development of new cross-border methods of trade (particularly, electronic commerce) international contracting has become much easier, the number of international transactions has grown up, and, as a result, the need to protect a consumer has appeared to be imperative.

Participation of consumers in electronic business is extremely beneficial for both businesses and consumers. The consumers can benefit from a wider choice and lower prices of the goods and services offered (which are low mainly due to the strong competition in the market for on-line products). The suppliers, in their turn, have a chance to reach new consumer markets and to gain huge profits out of electronic business due to growing number of operations and the low transaction costs. That is why encouraging consumers to participate in electronic commerce and improving their trust are ones of the

most important issues for suppliers, national governments and transnational organizations. In this respect in cross-border disputes arising out of consumer contracts, the legal protection of consumers should be afforded; otherwise they simply wouldn't contract with foreign suppliers.

Currently the protection of the consumers in cross-border trade in the EU is afforded through harmonized substantive rules and through harmonized private international law rules. Namely the latter mechanism constitutes the object of research of the present thesis.

Before starting to analyze private international law mechanism applicable to the consumer contracts throughout Europe, it's necessary to make a general introduction to the scope of private international law itself. Traditionally, it includes the following sets of rules:

- rules on jurisdiction deciding which country's courts have jurisdiction to hear the dispute;
- rules on choice of law deciding which country's substantive law is proper to settle the dispute on the merits; and
- rules on recognition and enforcement of the decision in a foreign state.

The last group deals mainly with public law issues and has little connection with the substance of the present work and that is why is not analyzed herein.

In European Union the private international law has been harmonized by the following instruments. The rules on jurisdiction as well as rules of recognition and enforcement are currently contained in the Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁶. The rules on choice of law governing the contractual relations are covered by the Rome Convention on the law

⁶ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter referred to as the Brussels Regulation)

applicable to contractual obligations in civil and commercial matters⁷ till 17th of December 2009. On this date a new Community document in the form of a regulation will enter into force. The new Rome I Regulation on the law applicable to contractual obligations⁸ is the main legal source for the present thesis. The Rome Convention is analyzed in this thesis because it is the predecessor of the Rome I Regulation, and therefore, it gives the basis for comparison.

The rules on jurisdiction (particularly for consumer contracts) as they appear in the Brussels Regulation will be considered in the present work also for comparative purposes. According to the Rome I Regulation recital 24, the consistency between the rules on jurisdiction in the Brussels Regulation and the rules on choice of law in the Rome I Regulation has to be maintained. The instruments exploit the same terminology and in some respects cannot be regarded separately.

The aim of the thesis is to analyze the new rules on the choice of law in consumer contracts contained in the Rome I Regulation, to find out characteristic features of the new regime and to identify possible difficulties connected with its application with the focus on the electronic consumer contracts.

1.2 Definitions and limitations

The first delimitation I would like to make is that the present thesis deals exclusively with the choice of law rules in consumer contracts falling within the legal framework of the European Union. The present thesis is focused on the choice of law in consumer contracts only, which should mean that the national substantive rules of the Member States on consumer protection are not examined and are not compared.

⁷ Rome Convention 80/934/ECC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (hereinafter referred to as the Rome Convention)

⁸ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (hereinafter referred to as the Rome I Regulation)

The thesis is limited to the study of choice of law rules only. Thus, rules on jurisdiction and enforcement do not fall within the scope of the thesis, and, as it was mentioned previously, appear herein only for the purposes of comparison. Furthermore, the thesis is strictly focused on the choice of law in contractual relations, which means that the relations appearing in the absence of the contract between parties (non-contractual relations) are not canvassed.

The scope of the thesis does not encompass the rules on the choice of law in business-to-business contracts. Thus the present author analyzes the rules on the choice of law applicable to *consumer* contracts only. Further, not all the aspects of the consumer contractual relations will be regarded but only those concerning electronic contracting with a consumer's participation.

The next point that should be clarified is the notion of consumer contracts in general, and electronic consumer contracts in particular. In the present thesis the consumer contracts (as well as the notion of consumer) are used in the meaning of Rome I Regulation Article 6. Thus, the consumer contract is “a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional)”⁹.

In the present thesis the electronic consumer contract should be understood as a consumer contract *concluded* by electronic means. This should mean that the thesis encompasses both electronic contracts which are concluded and performed via the Internet (for example, through downloading of the software from the website) *and* those which are concluded by electronic means but performed through the physical delivery (for example, buying a book through a webshop which is delivered by ordinary shipping).

The references to the other party of the contract (a consumer's counterparty) in the words “a supplier”, “a business”, “an enterprise”, “a seller”, “a trader” should be understood as a

⁹ The Rome I Regulation (2008), art 6

reference to the other party of the contract (“the professional” in the meaning of the Rome I Regulation Article 6) opposite to a consumer.

The concepts of consumer domicile or habitual residence of the consumer are not examined herein, but simply used in correspondence with the terminology exploited by the documents analyzed¹⁰. The interpretations of the notions in respect to the consumer¹¹ are left exclusively for national legislations. And, as it was mentioned previously, the present thesis is not focused on the analysis of the national law provisions, as it is not the study of comparative private law. Besides, the distinction between the concepts in respect to the electronic consumer contract interpretation “will seldom be of practical significance”¹².

1.3 The structure of the thesis

The thesis consists of three parts, the present Introduction (*Part 1*) and Conclusion (*Part 5*).

Part 2 of the thesis (*Private international law rules applicable to consumer contracts in European Union*) is intended to give the necessary background for further analysis of the Rome I Regulation. Therefore, the mechanism of private international law rules is explained in general features in subsection 1 of the first part. Further, the rules on choice of law contained in the Rome Convention and rules on jurisdiction in the Brussels Regulation are examined. Thus the objective of the Part 2 of the thesis is to analyze the development of private international law rules applicable to consumer contracts (particularly, electronic consumer contracts) within the European regulatory framework.

Part 3 (The Rome I Regulation on the law applicable to contractual obligation) constitutes the main part of the thesis which gives an overview of the Rome I Regulation, explains the need for adoption of this instrument (particularly connected with the development of new

¹⁰ The Brussels Regulation uses the term “domicile”, while the Rome Convention and the Rome I Regulation refer to “habitual residence”.

¹¹ The Brussels Regulation defines the concept of “domicile” for legal persons, while the Rome I Regulation defines the concept of “habitual residence” for legal persons and individual professionals.

¹² Stone (2000), p. 15

methods of distance selling). In this part the provisions of the Rome I Regulation applying to electronic consumer contracts are examined and compared to the provisions of the former Rome Convention, distinctive features of the new regime are indicated.

Part 4 (Implications of the requirements of the Rome I Regulation Article 6 for the businesses trading online) which is the final part of the thesis, surveys the problems the online businesses face in relation with the requirements of the Rome I Regulation Article 6 (1) (a) and (b) to consumer contracts in the light of electronic commerce. In this part the present author is also making an attempt to introduce alternative solutions to the problems arising in this respect.

2 Private international law rules applicable to consumer contracts in European Union.

2.1 Legal mechanisms ensuring the protection of consumers in EU

2.1.1 Affording the protection of consumers through the harmonization of substantive rules at supranational level

The basis for consumer protection constitutes the EC Treaty¹³ Article 95(3), stating that *“the Commission's proposals on the approximation of laws affecting the internal market must be based on a high level of consumer protection”*¹⁴.

During the last decades the European Community was working over the harmonization of substantive law rules on consumer protection. The result should be that at least the minimum protective standards is developed. Despite the legislative initiatives of the European Community (resulted in Electronic Commerce Directive¹⁵, Distance Selling Directive¹⁶, Unfair Contract Terms Directive¹⁷ and others), the harmonization of substantive law is still insufficient, because the directives “do not yet cover all the aspects of consumer law”¹⁸. Currently the harmonization of substantive law provisions can be regarded as an ultimate goal.

2.1.2 Affording the protection to consumers through the harmonization of private international law

¹³ EC Treaty (Consolidated version) 2006 C 321E

¹⁴ EC Treaty (Consolidated version) 2006 C 321E /79

¹⁵ Electronic Commerce Directive (2000)

¹⁶ Distance Selling Directive (1997)

¹⁷ Unfair Contract Terms Directive (1993)

¹⁸ Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation 14.1.2003 COM(2002) 654 final (hereinafter referred to as the Green Paper), p. 30, section 3.2.7.3.

In the absence of sufficient harmonized substantive law, an effective *private international law mechanism* helping to designate a proper jurisdiction and a law governing the contract is extremely needed.

Each country has its own set of private international law rules giving guidance to the court as to which law to apply to a dispute. It is very important to stress that this rules on designation of applicable law are far from uniform. Even the scope of private international law itself differs from country to country. For example, “in German or Portuguese law it only designates the rules concerning conflict of laws, whereas in other systems it also includes the rules concerning the international jurisdiction of the courts and the recognition of foreign judgments”¹⁹. Courts in different jurisdictions led by their private international law rules can designate different governing law to the same dispute. Such a complex situation, in the words of the European Commission, brings “inconvenience of a lack of uniformity and legal certainty”²⁰. And in order “to combat such inconvenience [...], the Member States have therefore chosen to harmonize their rules of private international law”²¹.

The outcome of unification of private international law rules by the Member States should achieve that “the same solution will be applied as to the substance irrespective of the court hearing the case”²².

The basis for harmonization of private international law rules was the EC Treaty²³ Articles 61 and 65 obliging the Council to adopt measures in the field of judicial cooperation in civil and commercial matters. The EC Treaty Article 65 among other such measures mentions measures for “promoting compatibility of rules on choice of law and jurisdiction”²⁴. Thus, following the EC Treaty, the Brussels Convention on jurisdiction and

¹⁹ The Green Paper (2003), p.8, section 1.2.

²⁰ Ibid, p.9, section 1.2.

²¹ Ibid

²² Ibid, p. 9, section 1.3.

²³ EC Treaty (Consolidated version) 2006 C 321

²⁴ EC Treaty (Consolidated version) 2006 C 321E /68

enforcement, and recognition of judgments in civil and commercial matters 1968²⁵ was transformed into a Community instrument – the Brussels Regulation 2001. In 2007 a new instrument dealing with the choice of law in non-contractual obligations was developed (the Rome II Regulation on the law applicable to non-contractual obligations). After five years of preparatory work²⁶ a new framework for choice of law in contractual obligations was adopted also through transforming the Rome Convention into a Community instrument – the Rome I Regulation.

Within the present work the aforementioned documents will be analyzed²⁷. First of all the general mechanism of operation of private international law is explained. Afterwards it's necessary to have a look at the Rome Convention on the law applicable to contractual obligations 1980, which is still in force till 17th of December 2009, and at the Brussels Regulation. The analysis of these documents will give a background for the subsequent analysis of the Rome I Regulation.

2.2 The operation of private international law mechanism

Traditionally, private international law operates on two basic principles which are a “proper law” principle and a principle of “a freedom of choice”²⁸.

The principle of proper law (or “default law”²⁹) in private international law means that the relation between the parties should be regulated by the law of that country with which it is most closely connected in this relation. For example, an appropriate jurisdiction generally means that it is a jurisdiction which is “best placed to assess the facts and gather evidence”³⁰.

²⁵ Brussels Convention on jurisdiction and enforcement, and recognition of judgments in civil and commercial matters 1968 (hereinafter referred to as the Brussels Convention)

²⁶ The Green Paper of 2003, the Rome I Regulation of 2008

²⁷ Except the Rome II Regulation (as non-contractual obligation do not belong to the scope of the present thesis).

²⁸ The Green Paper (2003), p.10, section 1.4.

²⁹ Tang (2007), p.125

³⁰ Ibid

The principle of freedom of choice (party autonomy) means that the parties can designate a jurisdiction appropriate to hear their dispute and a law applicable to their contractual relations.

The mechanism of application of private international law rules can be shortly described as follows. If a dispute arises out of, for example, sales of goods contract (between the parties who are not consumers), first, it is necessary to decide which court is competent to adjudicate over the dispute. If the parties have chosen a court this court decides the dispute (aforementioned freedom of choice principle) provided that the prorogation agreement between the parties is valid. If the parties haven't agreed upon the court, their legal relationship has to be localised. This aim can be achieved with the help of "connecting factors". A connecting factor is a specific category used in private international law and it is considered to be a "localising element"³¹ of private international law rule. In order to connect a party with a particular jurisdiction and law, his physical presence (most often equivalent to domicile) is taken into consideration. In the light of electronic commerce the localising element of a conflict rule is the most difficult to apply (like for example, trying to determine the place where the contract is concluded within the Internet - *lex loci contractus*). That is why it is crucial to adapt existing private international law rules to "the development of distance selling techniques"³² by choosing appropriate connecting factors.

After the competent court is determined (using the connecting factor of, for example, defendant's domicile) it should designate a substantive law applicable to the dispute. Usually it designates the proper law by applying its national choice of law rules (*lex forum*). As for the case with jurisdiction, the applicable law can also be chosen by the parties (according to the principle of the freedom of choice).

³¹ Dicey and Morris, (1993), p.30

³² The Green Paper (2003), p.29, section 3.2.7.2.

The necessity of private international law rules in cross-border disputes, in particular arising out of electronic contracts, can hardly be overestimated. The purpose of both jurisdiction rules and choice of law rules is to ensure *certainty* and *predictability* for the parties as to the forum competent to hear the dispute between them and the law which applies to their dispute. In business to business contracts this purpose is complimented by the intention to choose the law and jurisdiction which is favorable for both parties (not necessarily their domestic law). As it was mentioned previously, consumer contracts are not individually negotiable and, therefore, the law favorable for both parties is hard to define. While drafting terms and conditions of a contract suppliers always have an opportunity to designate the law favorable to them as the governing law. Thus, if to imagine, that no special provisions protecting consumers exist, in case of dispute a consumer can be sued in an unfamiliar jurisdiction (the jurisdiction of the supplier) and unfamiliar rules of law chosen by the supplier apply.

The two aforementioned traditional principles of private international law (the principle of the proper law and the principle of the freedom of choice) are now complimented by the principle of “protection of the weaker party”³³. The principle is based on the presumption that the parties to a consumer contract are not contractually and economically equal. That is why legislator considers it necessary to protect the weaker party by the rules of law (in particular, private international law). The rules which are more favorable to the weaker party than the general rules (for business to business relations) should apply. The principle of the weaker party protection appears in the instruments of the private international law which are analyzed in the present work (the Brussels Regulation and the Rome I Regulation as well as their predecessors). Thus, the special rules on jurisdiction and on choice of law reflecting the principle of the weaker party protection are now contained in special provisions on consumer contracts, contracts of individual employment and others.

³³Ibid, p. 10, section 1.4.

2.3 The Rome Convention on the law applicable to contractual obligations

2.3.1 General scope and system of regulatory provisions of the Rome Convention

The Rome Convention on the law applicable to contractual obligations of 1980 was concluded by the EC Member States in order to harmonize the conflict rules of the Member States applicable to the contracts. It entered into force on the 1st of April 1992 after the necessary number of ratifications had been made. The scope of the Rome Convention is defined by the Article 1 very broadly and, thus, encompasses “all contractual obligations in any situation involving a choice between the laws of different countries” except those explicitly excluded in the paragraph 2 (wills and succession, rights arising out of matrimonial relations etc.).

The provisions of the Article 2 approve the universal application of the Rome Convention, saying, that any law designated according to its provisions should be applicable “whether or not it is the law of the Contracting State”.

The main rules (*lex generalis*) are formulated in the Convention in Articles 3 and 4 dealing respectively with situations where the parties have chosen the law and where they haven't. Thus the main principle of freedom of choice is formulated in Article 3, and guarantees that the law chosen by the parties will apply to the contract between them.

The general rule of the Article 4 in the absence of choice provides that if the law hasn't been designated by the parties, it has to be that of the country with which the contract is most closely connected. The principle of the closest connection operates with the help of “rebuttable”³⁴ presumptions as to the law which is the most closely connected. The Article 4 presumes that the contract is the most closely connected with the country in which “party who is to effect the performance which is characteristic of the contract”³⁵.

³⁴ Kaye (1993), p. 56

³⁵ The Rome Convention, art 4(2)

Together with *lex generalis* rules proposed by Articles 3 and 4, the Rome Convention introduces *lex specialis* rules designed for the protection of the weaker party in the Articles 5 and 6 (dealing respectively with consumer contracts and contracts of individual employment).

The most important for the purposes of the present work is the Article 5 which applies to consumer contracts and, therefore, has to be analyzed in detail.

2.3.2 The scope of the Rome Convention Article 5 containing consumer protection rule

According to the Article 5(1) its scope encompasses “certain consumer contracts for the supply of goods and service to a person (consumer) for the purpose which can be regarded as being outside his trade or profession”³⁶.

The *object* of the consumer contract in the meaning of the Article 5 is the supply of goods and services. The fact that nowhere in the Rome Convention the definition of goods and services is given brings uncertainty to the scope of the Article 5. In the sphere of electronic commerce its application is problematic (for example, to software downloaded from the provider’s website³⁷) for the following reasons. As uniform definition of goods and services is not given by the Rome Convention, the inclusion of particular items to the category of goods (or services) is left to the provisions of national legislation of each particular country that has ratified the Convention. In some national legal systems the application of the concept of goods and services to “immaterial goods”³⁸ is rather confusing. Thus Reifa gives an example of Scottish case of *Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd*, where the downloading of software was neither considered a

³⁶ Ibid, art5(1)

³⁷ Reifa (2004), p. 61

³⁸ Ibid

sale of goods nor a supply of services, but a *sui generis* supply³⁹. Further, Reifa gives the example of French law which states that the Article 5 of the Rome Convention refers to “*objets mobiliers corporels*” (“material goods”) only and not to immaterial goods such as software⁴⁰. Let’s take an example of a French consumer who concludes the contract with a foreign supplier for software downloading from the supplier’s website. Thus, hypothetically, a French court (if the consumer refers to his national court) can decide that the provisions of the Rome Convention do not apply to the contract because it falls outside the scope of the Article 5.

Besides, the Giuliano-Lagarde⁴¹ report mentioned that the goods in the meaning of the Rome Convention Article 5 do not include proprietary rights and intellectual property rights⁴² (this means that the licensing agreements were excluded⁴³).

According to the Article 5 (1), *the consumer* is regarded as “a person” who obtains the goods or services “for the purpose which can be regarded as being outside his trade or profession”⁴⁴. This definition is also quite uncertain as it refers to the consumer simply as to “a person” without going into details if this person is only natural or also legal. In the absence of interpretation of the notion of “a person” in the Rome Convention it is unclear whether small and medium sized enterprises could be regarded as “consumers” (as in contractual relations they often are in a position of a “weaker party”). Some authors supported the view that the legal persons could rely on protective provisions as soon as there is no explicit exclusion of them from the scope of the Article 5⁴⁵.

Thus, the scope of the Article 5 constitutes consumer contracts defined in the first paragraph of the Article and which satisfy criteria contained in the second paragraph. For

³⁹ Ibid

⁴⁰ Ibid

⁴¹ Giuliano-Lagarde report (1980), p.2

⁴² Ibid, p.10

⁴³ See f.ex, Reifa (2004) p.60-62, Chissick, Kelman (2002) p.127

⁴⁴ The Rome Convention art 5(1)

⁴⁵ See f.ex. Gillies (2008) p.75

the purpose of defining the scope of action of the Article 5 and for further comparison with the provisions of the Rome I Regulation, the substance of the special rule protecting the consumers and the requirements to the consumer contracts should be examined in the following parts of the present work.

2.3.3 The substance of the choice of law rule protecting the consumer

- 1) By paragraphs 2 and 3 Article 5 lays down a double rule: if the law is chosen by the parties, this law applies to the consumer contract, but "a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence" (Article 5(2)) (thus the principle of the freedom of choice of Article 3 is restricted in consumer contracts), and
- 2) if the choice of law between the parties is absent, the contract is governed by the law of the country in which the consumer has his habitual residence (Article 5(3)).

Therefore, the Article 5 foresees two kinds of contractual situations in none of which the consumer is deprived of protection afforded to him at least by the mandatory law of his domicile (the double rule).

Thus, the party autonomy is limited by the application of mandatory rules of the country where the consumer has his habitual residence⁴⁶. The effect of this provision leads to a situation called "dépeçage"⁴⁷ (from French "division"), i.e. meaning that the contract is divided into parts which are governed by the laws of two or even more countries. Let's take an example of the contract concluded between a French consumer and a German supplier. The supplier included in the terms and conditions choice of law clause designating his national law as the governing law. In this example if a dispute arises out of

⁴⁶ The Rome Convention, art 5(2)

⁴⁷ Tang (2007), p.125

the contract and the parties refer to the court, the court applies to the contract German law and French (country of habitual residence of the consumer) mandatory rules of consumer protection (provided one of alternative requirements of art 5(2) is met). By this the Rome Convention enables the court to apply accordingly “two distinct laws to the same contract”⁴⁸. Consequences of *dépeçage* in my opinion are rather negative because it deprives the parties of legal certainty. A possible way to address the situation of *dépeçage* is to exclude the freedom of choice completely and apply consumers’ or supplier’s national laws to all consumer contracts. In this way the legal certainty is guaranteed, but exclusion of the freedom of choice in favor of consumer’s law can become too burdensome for the suppliers (and vice versa).

The second part of the double rule of the Article 5 covers the cases where the choice of law is absent. According to the Article 5(3) the governing law in this case should be the law of consumer’s habitual residence). Thus, the law of supplier (as a party who is “to effect characteristic performance”⁴⁹) which has to be applicable according to general rule of the Article 4(2) “is displaced in its entirety by the law of consumer’s habitual residence”⁵⁰.

However, in order to benefit from the aforementioned protective choice of law rules the requirements of the Article 5 (2) analyzed should be met

2.3.4 Article 5(2) requirements to consumer contracts in the light of electronic contracting

In order to benefit from consumer protection provisions set down in art 5(2), the contract has to meet the alternative requirements, which are the following:

⁴⁸ The Green Paper (2003), p.28, section 3.2.7.1

⁴⁹ The Rome Convention, art 4(2)

⁵⁰ Kaye (1993), p. 204

- The conclusion of the contract has to be preceded by the specific invitation addressed to the consumer or by advertising, and the consumer has taken all the steps necessary on his part for the conclusion of the contract in the country of his habitual residence; or
- The other party or his agent received the consumer's order in the country of his habitual residence; or
- The consumer traveled from the country of his habitual residence to another country and there gave his order, if his journey was arranged by the supplier for the purpose of inducing the consumer to buy⁵¹.

The last two requirements won't be discussed as they have less connection with electronic contracts. As the outcome of the first requirement, the consumer who orders the goods via supplier's website is protected only if "in the country of his habitual residence the conclusion of the contract was preceded by a specific invitation"⁵² *and* if he "takes all the steps necessary for the conclusion of the contract" in the country of his habitual residence (in the meaning that he is actually physically present in this country at the time he concludes the contract). At the time of conclusion of the Rome Convention (1980) electronic commerce wasn't developed and that is why the document does not take an account to electronic contracting for the following reasons:

1) The Rome Convention disregards "mobile"⁵³ consumers who can travel to another country and make offers from a hotel room via the Internet. If a Swedish consumer having a vacation in France orders goods through the Internet from a German supplier, who had sent him a promotional advertising for these goods by e-mail, which the consumer read and took all necessary steps to conclude the contact while being in France, hypothetically, the Article 5 doesn't cover the contract because the requirements are deemed not to be met. In this case general rule of Article 4 applies, and the governing law is determined by the "closest connection" principle (which is the German law because the supplier is the party

⁵¹ The Rome Convention, art. 5(2)

⁵² Ibid

⁵³ Reifa (2004), p. 60

who is to effect the characteristic performance). In this example the consumer is left unprotected from the application of unfamiliar law. It can be argued that the provision is meaningless in the context of electronic commerce as it is based on the physical location of consumers. How can the presence of the consumer in his country of habitual residence be proved if he concludes the contract through the Internet? Of course it is possible with the help of technical means through IP address identification, but for suppliers it involves additional effort, time and money that can outweigh the benefit from the transaction with the consumer.

2) The requirement of “specific invitation” is completely confusing in the light of e-commerce. From some authors’ point of view, “the requirement is to be considered broadly, meaning that each commercial presentation of the professional supplier to potential customers is included”⁵⁴, and that “by placing promotional material [...] on open access to a website [...] the supplier issues an invitation or advertising at every place from which an internet user electronically requests the relevant material or facility”⁵⁵. For example, van der Hof offers to consider online offer directed to every consumer to whom it is available, unless it is explicitly restricted to consumers in a particular country or solely to professional parties⁵⁶.

In my opinion, the simple presentation of goods on the website is unlikely to be considered a “specific invitation”, which objectively should involve certain actions on the side of the supplier (like for example, sending promotional offers to the consumer’s e-mail address). Otherwise any business trading online would “specifically invite” all the consumers in the world even if the business is represented through a passive website⁵⁷.

However, unambiguous answer to the question what the “specific invitation” actually should mean in electronic commerce cannot be given. As the requirement was not clarified

⁵⁴ S. van der Hof (2003), p. 171

⁵⁵ Stone (2000), p. 8

⁵⁶ S. van der Hof (2003), p.171

⁵⁷ The websites’ classification will be explained later on during the analysis of the provisions of the Rome I Regulation

by the Rome Convention and no ECJ case law on the point exists, the presence of “specific invitation” could be evaluated only on case-by-case basis. Therefore, the application of the Article 5 depends on the subjective evaluation by a forum of supplier’s intentions to target a particular consumer (“specifically invite”). The provision definitely does not facilitate legal certainty and predictability and, in my opinion, is an obstacle to consumer protection in electronic contracting.

Thus, if the consumer contract does not satisfy the requirements of 5(2), the general rules of the Articles 3 and 4 apply:

- 1) In the case of the absence of choice, the contract will be governed by the law of supplier’s place of central administration (or habitual residence) according to the Article 4 of the Rome Convention because the supplier is the party who conducts characteristic performance (supply of goods or services).
- 2) If the law was chosen by the parties it applies without restrictions (by mandatory rules of consumer’s national law) according to the Article 3.

In these two cases consumer is not given any special protection.

The requirements of the Rome Convention Article 5 were also used by the Brussels Convention Article 13, but are not included any more in the modernized Brussels Regulation. In fact, it means that the same consumer can benefit from jurisdictional rules and sue the supplier in the court of his domicile, but if he, for example, concluded an electronic contract from abroad, the law applicable to the contract is not the law of his domicile and in the situation when the law is chosen he is not granted the protection by the mandatory rules of his national legislation.

2.4 The Brussels Regulation on Jurisdiction

The new Brussels Regulation replaced the Brussels Convention of 1968. It was adopted on 22 December 2000 and is in effect from the 1st of March 2002. The revision of the Brussels Convention was considered necessary in order to comply with the EC Treaty⁵⁸ Articles 61 and 65⁵⁹. Besides, even though it does not come directly from the wording of the Brussels Regulation, its adoption was invoked by the need to fit to new realities (particularly, to the development of electronic communications⁶⁰).

The Brussels Regulation recitals 5 and 19 stress the intention to secure continuity between the Brussels Convention, its case law, and the new Regulation. With the exception of several changes, the basic provisions of the Brussels Convention have been preserved. The most important changes *inter alia* have been made in relation to jurisdiction in consumer contracts and contracts of employment.

The jurisdictional provisions in the Brussels Regulation are composed in a system, which contains a basic jurisdictional rule, special (or alternative) and exceptional jurisdictional rules.

The basic rule contained in the Article 2 stipulates that the jurisdiction for the dispute has to be exercised in the Member State where the defendant is domiciled. The motivation for such a rule is that the defendant is considered to be a weaker party in the dispute and it's harder for him to secure his rights in the foreign jurisdiction.

In cases, defined by the Brussels Regulation, the jurisdiction other than the jurisdiction designated according to defendant's domicile can be appropriate. In particular, the Brussels Regulation establishes exceptional jurisdiction for consumer contracts. The Brussels Regulation recital 13 highlights that "in relation to [...] consumer contracts [...] the weaker

⁵⁸ EC Treaty (Consolidated version) 2006 C 321E

⁵⁹ The Regulation was needed for the purposes of establishing an area of freedom, security and justice (Article 61 of the EC Treaty) as one of the measures in the field of judicial cooperation in civil matters having cross-border implications (Article 65 of the EC Treaty)

⁶⁰ Øren (2004), p.27

party should be protected by rules on jurisdiction more favorable to his interests than the general rules provide for”⁶¹.

The Article 15 defines consumer contracts to which the Brussels Regulation Section IV is applicable. Thus, the contract should be regarded as a consumer contract if it is “concluded by a person, for a purpose which can be regarded as being outside his trade or profession”⁶² (the same way as the Rome Convention and the Brussels Convention, the Brussels Regulation does not indicate whether the person should be regarded as a natural person only or a legal person as well). The Article 16 gives the substance of the rule, saying that 1) the consumer can bring the proceeding before the court either in the Member State where the defendant is domiciled, or in the Member State where he is himself domiciled (in claims against a non-consumer party *alternative jurisdiction* is stipulated); and 2) the proceeding against the consumer can be brought only in the Member State of consumer’s jurisdiction⁶³ (*exclusive jurisdiction* of consumer domicile in claims against consumers).

The Brussels Regulation Article 17 deals with the choice of jurisdiction in consumer contracts. Thus, the parties can choose the jurisdiction other than indicated by the Article 16 only if it was agreed by the parties after the dispute has arisen, or if it allows the consumer to bring proceedings in courts other than those indicated in the Article 16 (i.e. gives the consumer more choices), or if the parties were domiciled or habitually resident in the same Member State at the time when the contract was concluded which confers jurisdiction to the courts of this Member State. Thus, the principle of the freedom of choice is limited in the Brussels Regulation. Particularly, the Brussels Regulation does not permit to deprive a consumer of the protection by choosing the jurisdiction outside the country of his domicile. In any case if the consumer contract satisfies the requirements of the Article 15 (1) (c) the consumer is entitled to refer to the court of his domicile.

⁶¹ The Brussels Regulation, recital 13

⁶² The Brussels Regulation, art.15(1)

⁶³ The Brussels Regulation, art.16

The part (c) of Article 15(1) is the most important for establishing jurisdiction in electronic consumer contracts. The Article 15 substitutes the Article 13 of the Brussels Convention which posed the same requirements to consumer contract as the Rome Convention (specific invitation and the requirement to take all steps necessary for conclusion of the contract by the consumer in the country of his residence). The new Brussels Regulation makes modifies the rule in order to apply it to electronic consumer contracts concluded via websites. Thus the consumer contract falls under the judicial protection of the Regulation if it “has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities”⁶⁴. So, first of all, the requirement of concluding the contract by the consumer in his country of domicile (present in the Brussels Convention) doesn't apply any more. The connecting factor was changed to the new one - “directing activities to (the country of consumer's domicile)” by the supplier instead of “receiving specific invitation in the country of consumer's domicile” by the consumer. The change intended to eliminate the obstacles to the legal protection of the consumers in electronic contracts. The problem that will be discussed further in the context of the Rome I Regulation, which exploits the same criteria, is that the Article 15 makes nothing more than simply introduces the notion “directing activities to” instead of giving a legal definition of the notion and clarifying it.

⁶⁴ The Brussels Regulation, art 15

3 The Rome I Regulation on the law applicable to contractual obligations

3.1 Background

The final text of the Rome I Regulation on the law applicable to contractual obligations was adopted by the European Parliament and the Council of the European Union on the 17th of June 2008. As it is stated in the Rome I Regulation Article 29, its provisions shall apply from the 17th of December 2009. The conversion of the Rome Convention into the Rome I Regulation was needed, first of all, in order to ensure consistency between instruments on private international law adopted on the basis of the EC Treaty Articles 61 and 65, namely the aforementioned Brussels Regulation and Rome II Regulation on the law applicable to non-contractual obligations. The harmonization of the conflict of law rules relating to contractual obligations was proclaimed “necessary for the proper functioning of the internal market”⁶⁵.

The process of transformation of the Rome Convention into a Community instrument was accompanied by two basic documents – by the Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation⁶⁶ and by the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations⁶⁷. The documents will be often referred to for the purposes of the present work.

As the Green Paper pointed out, the Rome Convention was the only one remaining instrument on private international law “still in the form of international treaty” and, at the view of the Commission, was not in consistence with “the entity” formed by the Brussels

⁶⁵ Proposal for a regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) (hereinafter referred to as the Proposal) (2005), p.4, section 3.1

⁶⁶ The Green Paper (2003)

⁶⁷ The Proposal (2005)

Regulation and the Rome II Regulation which compose “indissoluble set of Community rules of private international law”⁶⁸.

Thus, the initial intention of the Commission was not to change the content of the Convention, but to change its form in order to ensure the consistency with other Community instruments on private international law. The form chosen is a regulation, which is binding and directly applicable. A margin of appreciation usually allowed by the directives is considered unacceptable for the achievement of uniformity in the field of private international law.

One more advantage is that transformation into the regulation gives the Court of Justice the jurisdiction to interpret it in the best conditions that would facilitate the application of the standardized conflict rules in Member States⁶⁹. The advantage of the interpretation of the Rome I Regulation by the European Court of Justice (hereinafter referred to as ECJ) is in achieving uniformity of the terms common for the Brussels Regulation and the Rome I Regulation⁷⁰.

3.1.1 Modernizing the content of the Rome Convention

The need for modernization should be regarded in the context of the development of electronic communications and apparent developments in electronic contracting. Thus, the Green Paper expresses the need to change the private international law framework for contracts in order to fit to emerging “distance selling techniques”⁷¹.

Besides, the need for revising the Rome Convention Article 5 dealing with consumer contracts was also necessary for fulfillment of obligations before some Member States. For example, at the time of Austrian accession to the Rome Convention “the Member States

⁶⁸ The Proposal (2005), p.2, section 1.1

⁶⁹ The Green Paper (2003), p.13, section 2

⁷⁰ In relation to consumer contracts, for example, interpretation was given by the ECJ for the term “consumer” in its case law on the Brussels Convention on jurisdiction.

⁷¹ The Green Paper (2003), p.28, section 3.2.7.2.

undertook to consider the advisability of revising Article 5 concerning consumer protection”⁷². Thus Austria made its accession conditional to the revision of the Rome Convention Article 5⁷³.

The Green Paper mentions, that in the view of transformation of the Brussels Convention into a Regulation some of its provisions corresponding with the provisions of the Rome Convention were changed (for example, the Brussels Convention Articles 13-15 dealing with jurisdiction in consumer contracts). In order to achieve “the consistency of the body of conflict rules applicable in the Union”⁷⁴, these provisions of the Rome Convention had to be changed accordingly. For example, the inconsistency between the requirements to the consumer contracts had a result that the same consumer could benefit from *lex specialis* jurisdictional rules of the modernized Brussels Regulation, but couldn’t satisfy the requirements of the Rome Convention drafted in 1980, and that is why was deprived of the protection by conflict of laws rules. Besides, the Green Paper acknowledged that the requirements of the Article 5 “no longer seem adapted to the development of new distance selling techniques”⁷⁵.

3.2 System of provisions of the Rome I Regulation

The system of provisions of Rome I Regulation includes the following sets of rules:

- general rules applicable to all cases involving choice of law in contractual obligations (provisions concerning freedom of choice (Article 3), designation of law in the absence of choice (Article 4), overriding mandatory rules (Article 9) and other provisions); and
- special rules (*lex specialis*) which constitute exemptions from the general rules (Articles 3 and 4) for some types of contracts (Articles 5-8 concerning contracts of

⁷² The Green Paper (2003), p. 16, section 3

⁷³ Ibid

⁷⁴ The Green Paper (2003), p.17, section 3.1.1.1.

⁷⁵ The Green Paper (2003), p.29, section 3.2.7.2

carriage, consumer contracts, insurance contracts, and individual employment contracts).

The most significant changes occurred to the Article 4 of the Rome Convention (concerning the designation of the applicable law in the absence of choice), Article 7 (concerning the notion and the effect of mandatory rules). New provisions were introduced concerning contracts of carriage (Article 5), the legal subrogation (Article 15), the multiple liability (Article 16), and the right of set-off (Article 17).

3.2.1 General scope of application of the Rome I Regulation

The scope of application of the Rome I Regulation can be said to be unchanged compared with the Rome Convention. As its predecessor, the Rome I is applicable “*erga omnes*, i.e., in the absence of reciprocity and if it leads to the application of the law of a non-member state”⁷⁶. Universal application proclaimed by the Rome Regulation helps to avoid the parallel existence of “purely ‘intra-European’ applicable conflict rules and conflict rules “in relation to third States”⁷⁷.

Even with regard to the consumer contracts universal application of the Rome I Regulation is unlimited. Nothing in the Rome I Regulation prohibits choosing the law of the non-member country as the governing law. It differs greatly from the provisions of the Brussels Regulation which has, firstly, the general *inter partes*⁷⁸ limitation (according to the Article 2 a defendant has to be domiciled in a Member State) and special *inter partes* limitation in relation to consumer contracts (protects only the consumers who are domiciled in EU Member States (Article 15), and, secondly, the limitation of choice of forum (According to the Article 23 a prorogation agreement can designate only courts of the Member States).

⁷⁶ Yearbook of PIL (2009), p.168

⁷⁷ Ibid

⁷⁸ Ibid

3.2.2 Freedom of choice

The provisions of the Rome I Regulation concerning party's autonomy haven't been substantially modified. As in the Rome Convention the main rule is preserved and, as Article 3 (1) stipulates, the contract has to be governed by the law chosen by the parties. The Rome I Regulation maintains the parties' rights to choose as *lex causae* the law of the country which has no objective connection with the relationship between the parties, to make partial choices (dépeçage) (Article 5(1)), and to make choice of law at any time during the existence of contractual relation (Article 5(2)). The choice of law of the country which has no objective connection with the relationships of the parties is limited by the application of mandatory rules of the country which cannot be derogated from by the contract (the Rome I Regulation Article 3(3)).

The special provisions restricting the freedom of choice apply to consumer contracts and contracts of employment and they are aimed at the protection of the weaker party. The protection is ensured by the application of mandatory rules of the law that would be applicable in the absence of choice (law of the country of the weaker party's place of habitual residence) (Articles 6 and 8).

3.2.3 Applicable law in the absence of choice

The approach of the Rome Convention concerning the designation of law in the absence of choice according to Giuliano-Lagarde report⁷⁹ was based on "an intermediate solution"⁸⁰. It provided that a generalized rule applied to all the contracts (by finding the "most closely connected" law, which is the law of the country where the party who effects the characteristic performance habitually resides⁸¹). The Rome Convention's general rule allowed for the courts' discretion as to its application in each particular case (by this

⁷⁹ Giuliano-Lagarde report on the Convention on the law applicable to contractual obligations (1980) (hereinafter referred to as the Giuliano-Lagarde report)

⁸⁰ The Giuliano-Lagarde report (1980), p.9

⁸¹ The Rome Convention, art 4

depriving the party of ability to predict the governing law). The application of this generalized rule has become a challenge for courts and for parties, especially in cases where the party who was to effect the characteristic performance couldn't be determined (for example, in the contract of barter or joint venture).

To avoid the difficulties caused by unpredictability of the Rome Convention's system of designation of the governing law in the absence of choice, the Rome I Regulation has restructured the system. A current solution of the Rome I Regulation was also mentioned in Giuliano-Lagarde report as alternative and described as "a series of specific rules applicable to the various categories of contracts"⁸² (in the contrast to the Rome Convention's generalized rule applicable to all contracts).

Thus, for example, the Article 4(1)(a) states that the contract of the sale of goods shall be governed by the law of the country where the seller has his habitual residence. The Article 4 (1)(b) has an analogous choice of law rule for the contracts for the provisions of services (applicable law is the law of the country where the service provider habitually resides). As it can be seen from these provisions the factor of *characteristic performance* is preserved for sales of goods and for the provision of services contracts.

Other rules included in the Article 4 are based on the concept of "*closest connection*"⁸³. For example, rule in Article 4(1)(c) deals with the tenancy of immovable property which has to be dealt with by the law of the country where the property is situated.

The Article 4(2) refers to the concept of characteristic performance, which is applicable in cases when the contract is not covered by the rules of art 4(1). For cases where the party who is to effect characteristic performance cannot be determined (barter, counterparty, joint venture⁸⁴) the Rome I Regulation contains a subsidiary rule (art 4(4)). According to this subsidiary rule, if the law cannot be determined according to the catalogue of art 4(1) and

⁸² The Giuliano-Lagarde report (1980), p.9

⁸³ Yearbook of PIL (2009), p.174

⁸⁴ Ibid, p.175

with the help of the characteristic performance concept, the contract should be governed by the law of the country with which it is most closely connected.

Some degree of uncertainty brings the Article 4 (3), stating that, Article 4 (1) and (2) can be disregarded if the contract is *manifestly* more closely connected with a country other than indicated by them. Therefore the provision gives the discretion to a court to decide whether the main rules of the Article 4 can be ignored on a *lex forum* basis (if court indicates that some other legal system is manifestly more closely connected with the relationship than that one specified in the Article 4 (1) and (2)).

3.3 Special Provisions for Consumer Contracts

The new version of choice of law rules for consumer contracts is contained in the Article 6 of the Regulation and like its predecessor (the Rome Convention Article 5), it retains:

1) universal scope of application (without *inter partes* limitation): applies equally to EU-resident consumers and consumers from non-member states (as it was noticed above, it differs from the Brussels Regulation which grants judicial protection only to the consumers domiciled in EU) (though the Proposal for the Rome I Regulation⁸⁵ contained provision narrowing down the application of special consumer protection provision only to EU-resident consumers⁸⁶), and

2) party autonomy which is restricted by application of mandatory rules of a consumer place of residence, whichever law is chosen.

The final text of the Rome I Regulation differs greatly from the Proposal, which intended to exclude parties' autonomy in consumer contracts completely and to make a law of

⁸⁵ The Proposal (2005)

⁸⁶ *Ibid*, art 5, p.6

consumer's place of residence applicable in all the cases⁸⁷ (in order to address dépeçage and to bring legal certainty).

In comparison with the Rome Convention the Rome I Regulation has clarified the substantial scope of consumer protection provision by giving definitions of consumer, professional, consumer contract, and by amending the requirements to consumer contracts which are more appropriate for technological developments in international trade.

For the purposes of the present work the scope of the Article 6 of the Rome I Regulation (dealing with consumer contracts) has to be defined and compared to Article 5 of the Rome Convention. A particular regard should be given to the modernized requirements to consumer contracts which can be regarded as the most important change in respect to consumer contracts. The analysis of the Rome I Regulation Article 6 does not intend to be exhaustive and encompass all the aspects of consumer contracts; rather it concentrates on the aspects having influence on consumer contracts concluded electronically.

3.3.1 Scope of action of Article 6

The material scope of the Article 6 encompasses a consumer contract defined as “a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) and another person acting in the exercise of his trade or profession (the professional)”⁸⁸. Thus the present definition of consumer contract is given through the definitions of its parties. The definition does not mention the object of the consumer contract any more (according to the Rome Convention Article 5, the object of consumer contract had to be “supply of goods or services”). Previous definition of the object of consumer contract, as it was previously discussed, created obstacles to legal protection of the consumers who, for example, downloaded software which was not

⁸⁷ Ibid, art 5, p.6

⁸⁸ The Rome I Regulation, art 6

considered to be “goods or services” according to some legal systems⁸⁹. Contrary to the expectations of some commentators⁹⁰, instead of expressly including “immaterial goods”⁹¹ (like software downloaded) to the object of consumer contract, the Rome I Regulation excludes the link between the definition of the consumer contract and its object. Thus the Article 6 is technology neutral and applies to consumer contracts whichever their object is.

The current definition of the consumer contract repeats almost word by word the one contained in the Brussels Regulation Article 15. As Alferez notes, by this the Rome I Regulation “solves all interpretation doubts”⁹²(it is highlighted in recital 7 that substantive scope and provisions should be consistent with the Brussels Regulation and the Rome II Regulation). As it follows from the recital 7, terms used in all these instruments should have the same meaning.

Further the scope of the Article 6 needs to be clarified through definition of terms “consumer contract”, “consumer”, and “professional party”.

3.3.2 Definition of consumer contract

As it was mentioned above, the Rome Convention defined the consumer contract by making the reference to its object which was “a supply of goods or services” to the consumer.

Under the Rome I Regulation Article 6 the consumer contract is defined through the reference to its parties only. The reference to the object has been removed. Thus, the consumer contract means the contract concluded between the consumer and the

⁸⁹ For example France, as it was mentioned before in the context of the Rome Convention analysis

⁹⁰ For example, Reifa (2004), p. 63

⁹¹ Reifa (2004), p. 62

⁹² Alferez (2009), p.87

professional. The notions of the parties will be clarified in the following parts of the present work.

3.3.3 Definition of the consumer

For the first time the definition of a consumer is given through the reference to “a natural person”. The Rome Convention, as well as the Brussels Convention, contained only a reference to “a person who acted outside his trade or profession”.

For clarification of the notion of the consumer the regard should be given to the case law of ECJ on the Brussels Convention⁹³. Thus, in the case of *Bertrand v Paul Otto KG* ECJ held that *lex specialis* provisions of the Brussels Convention applied only to “those buyers who were economically weaker in comparison with sellers by reason of the fact that they are private consumers and are not engaged [...] in trade or professional activities”⁹⁴. In *Francesco Benincasa v Dentalkit Srl*, ECJ continued to elaborate the notion of consumer by adding the factor of the purpose of consumer contract, which had to be “purpose of satisfying an individual's own needs in terms of private consumption”⁹⁵.

Thus, ECJ in its case law set down the following criteria describing the consumer:

- 1) the consumer was regarded as economically weaker party, who
- 2) entered into the contract being outside his trade or profession, and
- 3) for the purposes of private consumption.

Thus, nothing in ECJ case law restricts the notion of consumer to natural persons only. I tend to agree with some commentators⁹⁶, who say that since legal persons (particularly small and medium sized enterprises) were not specifically excluded by the provisions of the

⁹³ With regard to synergy between the Brussels and the Rome Regulations (and, previously, the Brussels and the Rome Conventions) ECJ case law on the notion of “consumer” is relevant to the Rome I Regulation in the same extent as it is relevant to the Brussels Regulation

⁹⁴ *Bertrand v Paul Otto KG* (1978), para 21

⁹⁵ *Benincasa v Dentalkit Srl* (1997), para.17

⁹⁶ For example, Gillies, Kaye

Rome and the Brussels Conventions or by ECJ case law they could be regarded as consumers in situations where they were economically weaker parties to the contract.

However, some uncertainty brings the Rome I Regulation recital 23 which refers to some “parties regarded as being weaker” (and if not directly referring to consumers it might potentially refer to small and medium sized enterprises) which should be protected by conflict of laws rules that are more favorable to their interests than the general rules. However the Rome I Regulation doesn’t give any explanation which rules exactly have to protect these parties.

In any case, the definition of the consumer contained in the Rome I Regulation leaves no doubts concerning the notion of consumer, stating clearly that he has to be a natural person⁹⁷. Thus, the scope of *lex specialis* rule of the Article 6 is restricted to consumers - natural persons contracting outside their trade or profession.

3.3.4 The other party to the contract

For the very first time the Rome I Regulation clarifies a notion of the other party of the consumer contract. According to the Article 6(1) the professional is “a person acting in the exercise of his trade or profession”. The present definition refers to the professional in a general term as to “a person”. Thus the professional can be a legal person as well as a natural person (acting in the course of his “commercial or professional activities”)⁹⁸. The main rationale for defining a person as a professional (on the contrary to a consumer) is that this person has stronger position in the contractual relations (*i.e.* develops contractual terms by himself without negotiating them with the consumer) and that the contract falls within the scope of his trade or profession.

⁹⁷ The Rome I Regulation, art 6(1)

⁹⁸ The Rome I Regulation, art 6 (1)(a)

However, not all consumer contracts are eligible for protection under the Article 6. As in the Rome Convention, limitation of scope of application is made through additional requirements to consumer contracts introduced in the Article 6 (1) (a) and (b) and the Article 6 (4) which expressly exclude some contracts. If a consumer contract does not satisfy any of the requirements of the Article 6 (1) (a) or (b), in the case of the absence of choice of law it is governed by the Article 4 (if it is the contract of the sale of goods governing law is the law of the seller, and, therefore, the consumer is left unprotected). If the choice of law was made, it applies without limitations (mandatory rules of consumer's country of residence do not apply).

In the next part of the present work the new solution will be examined. First it is necessary to have a look at the substance of the protective rule (though it was not modified) and afterwards to examine the modified requirements for its application, which constitute the main change made in the Rome I Regulation in respect of the consumer contracts.

3.3.5 The substance of *lex specialis* rule for consumer contracts

In order to protect the consumers the Article 6 foresees two kinds of situations, namely, where the choice of *lex causae* has been made (art 6(2)) and where it is absent (art 6(1)).

Thus, a consumer contract:

- 1) is governed by the substantive law of consumer's habitual residence if choice of law hasn't been made by the parties; or
- 2) if the parties have chosen another law to regulate their contractual relations, this law applies, but the choice cannot deprive the consumer of the protection afforded to him by mandatory rules of the country where he has his habitual residence.

Basically the double rule left completely unchanged from the Rome Convention. As the Proposal for the Rome I Regulation stipulates, the rule was highly criticized because of the *dépeçage* ("often produced hybrid solutions in which the law applicable to the professional and the mandatory provisions of the law applicable to the consumer were applied in

parallel”⁹⁹). The Proposal intended to address the problem of dépeçage by the complete exclusion of the parties’ autonomy in consumer contracts and application of consumer’s law to all consumer contracts¹⁰⁰, but this solution wasn’t included in final text of the Rome I Regulation. As it was noticed by commentators, such an exclusion of parties’ autonomy “serves no purpose”¹⁰¹, as 1) it deprived consumer of the possibility to choose a law more favorable to him than the law of his residence, and 2) deprived the professional of advantage to choose the law familiar to him.

However, without substantially changing the scope of the special rule, the Rome I Regulation has changed the conditions of its application. The Rome Convention Article 5 requirements (specific invitation etc.) were substituted by “the *targeted activity* criterion already present in Article 15 of the Brussels I Regulation” and called “to take account of developments in distance selling techniques”¹⁰². As was also approved by the Proposal, this approach “was requested in the great majority of contributions in response to the Green Paper”¹⁰³.

For the purposes of the present work the changed conditions for application of consumer protection rule have to be analyzed in details.

3.3.6 Modified requirements to consumer contracts (Article 6 (1)(a) and (b))

According to the Article 6(1) (if the law has not been chosen by the parties) the consumer contract shall be governed by the law of the country of consumer’s habitual residence, provided that the professional:

- a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

⁹⁹ The Proposal (2005), p.6

¹⁰⁰ Ibid

¹⁰¹ Lando, Nielsen (2007), p. 39

¹⁰² The Proposal (2005), art 5

¹⁰³ Ibid

- b) by any means, directs such activities to that country or to several countries including that country¹⁰⁴.

According to the Article 6 (2) if the parties have designated the law applicable to the contract between them, this law applies to the contract according to the Article 3. However, the consumer is nevertheless protected by the mandatory rules of the country of his habitual residence which apply provided that the aforementioned requirements (art 6(1)) are met. Thus, the protection by the Article 6 is given to a consumer only if one of the alternative conditions of the Article 6 (1) (a) and (b) is fulfilled.

Both of the requirements are taken from the Brussels Regulation. For that end, the Rome I Regulation recital 24 explains that its provisions should be understood in conjunction with the Brussels Regulation Article 15. According to the recital 24 the consistency between the Regulations must be ensured through, first, reference to the concept of “directed activities” as a precondition for applying consumer protection rule, and, second, through harmonized interpretation of the concept in these two documents. Thus, as the consistency between the Regulations is crucial for understanding of the concept of “directed activities”, for the purposes of the present work the concept is interpreted in the light of both Brussels Regulation Article 15 and Rome I Regulation Article 6 and their preparatory materials.

As the modification of the requirements constitutes the main change of the rule in respect to the Rome Convention, it is, therefore, necessary to consider them in details. For this purpose the evaluation will be done separately for each of the factors.

- (a) Article 6 (1) (a) alternative requirement: The contract is concluded by a consumer and a *professional who pursues his commercial or professional activities in*¹⁰⁵ the country where the consumer has his habitual residence and the contract falls within the scope of such activities

¹⁰⁴ The Rome I Regulation, art 6(1)

¹⁰⁵ Italic added by the present author

The Brussels Regulation Article 15 (1) (c) contains the same requirement. The meaning of the word “pursue” is not explained by the Article 6 (as well as by the Brussels Regulation Article 15) and that is why it is actually very difficult to identify a real meaning of this requirement. In comparison to the second requirement “directs activities to” a country the criteria “pursues activities in” a country should probably point out stronger connections of the professional with the country of consumer habitual residence. According to Øren’s point of view, the term “pursue” should mean that, first, the business is carried out in a continuous and systematic way and, second, in comparison to “directing to” “pursuing in” should indicate more extensive level of substance in business arrangements, resources and accomplished transactions¹⁰⁶. It might be presumed that the notion should presuppose business’s presence in the country of consumer’s residence (through, for example, establishment, or through an agent, or otherwise).

If to interpret the notion in the light of the Electronic Commerce Directive¹⁰⁷ recital 19¹⁰⁸, it can be said that the place where the company pursues its economic activity constitutes its place of establishment (fixed establishment for indefinite period¹⁰⁹). By the same provision the Directive stresses that the place where the technology supporting the website is located and the place where the website is accessible are not considered the places of establishment. Thus, it is possible to presume that the place of pursuit of activity constitutes the place of establishment according to ECD, though it does not clear out what exactly the pursuit of activity means.

However, since no explanation is given by the preparatory materials to the Rome I and the Brussels Regulations and by the ECJ, the application of the requirement to electronic commerce is unclear (especially if it actually points out at physical presence of the seller in a particular country). Thus its application to online business and the difference between the

¹⁰⁶ Øren (2004), p.71-72

¹⁰⁷ Electronic Commerce Directive (2000)

¹⁰⁸ “The place of establishment of a company providing services via an internet website is [...] the place where it pursues its economic activity”

¹⁰⁹ Electronic Commerce Directive (2000), art 2(c)

requirements “directing to” and “pursuing in”, in my opinion, should be stated by the legislator or by the ECJ interpretation. I agree with Øren who suggests that in interpretation of the alternative, the reference to ”physical location of persons or things should be avoided in order to bring the legislation into conformity with electronic communications”¹¹⁰.

(b) Article 6 (1) (b) alternative requirement: The contract is concluded between the consumer and *the professional* who, by any means, *directs professional or commercial activities to*¹¹¹ the country of consumer’s residence or to several countries including this country and the contract falls within the scope of such activities.

First of all it is necessary to pay attention to the phrase “*by any means*”. The expression should be regarded as technology neutral and covering the activities carried out by the means of electronic communications as well as by other methods of cross-border sale. The intention of the Commission indicated in the Green Paper to adapt the new instrument to the development of distance selling techniques is reflected in this provision. As Øren mentions in this respect “in the context of electronic communications not only Internet websites will be relevant, but also electronic agents, electronic mail, newsgroups (...) also, commercial activities carries out through digital TV, digital radio and mobile phones”¹¹². Thus the provision intends to cover all current distance selling techniques as well as those which might appear in future.

The following component of the requirement is that the professional “*directs such (commercial or professional) activities to*” the country of consumer’s habitual residence or to several countries including this country.

The introduction of this requirement was called to address the technological development and make the application of the Article 6 independent from the localisation of some parts of

¹¹⁰ Øren (2004), p.72

¹¹¹ Italic added by the present author

¹¹² Øren (2004), p.74

the contractual relations. As it was proved by the analysis of the Rome Convention its inapplicability to electronic contracts was mainly connected with the requirement of localisation of the consumer's conduct. He was granted the protection only in a case when he entered into the contract being physically present in the country of his habitual residence and if he received the specific invitation in this country. The implication of this requirement in the light of electronic contracting was often unpredictable and, in my opinion, unjustified in relation to the consumer (for example in relation to a mobile consumer who enters into the contract being outside the country of his residence though the Internet). Realizing the inappropriateness of the consumer's conduct evaluation the Commission moved to the concept of "passive consumer"¹¹³ who is targeted by the business. The basis for evaluation introduced for the first time in the Brussels Regulation Article 15 (1) (c) and later in the Rome I Regulation Article 6 (1) (b), is the conduct of the professional party (namely, whether the professional party has an intention to target the consumer in the state of his habitual residence).

The intention of the requirement of "directing activity" is to bring legal certainty concerning *lex causae* into contractual relation. Gillies suggests in this respect that it is not difficult for a business to determine the law that applies to the electronic consumer contract because it should be the law of the country targeted by the business¹¹⁴. Therefore the business can predict the laws which apply to the transaction with the consumers from targeted countries and has possibility to comply with them.

The Proposal for Rome I Regulation stated concerning the new connecting factor of "directing activities" the following: "It also seems fair in economic terms: a consumer will make cross-border purchases only occasionally whereas most traders operating across borders will be able to spread the cost of learning about one or more legal systems over a range of transaction"¹¹⁵. Thus the motivation of the Commission for introducing the "directing activity" requirement was, first, to make the contractual relation predictable for

¹¹³ Alferez (2009), p.87

¹¹⁴ Gillies (2008), p.130

¹¹⁵ The Proposal (2005), p.6

the business (as he should know which consumers' markets he targets and comply with the laws of targeted countries) and, second, to afford the protection to the targeted consumers.

But what does the notion of "directing activities" indeed mean and how should it be interpreted? In order to answer these questions the attention should be paid to preparatory works for the Brussels and the Rome I Regulations.

During the preparatory works the Commission as well as the Parliament very often were referring to the notions of "passive", "active" and "interactive" websites. This classification of the websites reflects their way of conducting business through the Internet and it was connected to the concept of "directed activity". Therefore, the classification of the websites should be explained. The classification of websites came from US case law which introduced the "sliding scale" test¹¹⁶ for evaluation of web site activity for the purposes of jurisdiction. The "sliding scale" test was introduced "in order to determine whether the Internet activities can provide sufficient minimum contacts with a forum state"¹¹⁷. Thus websites were divided into passive, active and interactive according to the "sliding scale".

A web site that lets the consumers to enter into contract, obtain the product and make a payment (through, for example, PayPal) online is called "an *active site*". As it was stated in *Zippo Mfg. Co. v Zippo Dot Com*¹¹⁸, active site's activity involves "the knowing and repeated transmission of computer files over the Internet" (also reference from the case "where a defendant *clearly does business over the Internet*"¹¹⁹). The example of the active web site can be a site for software downloading¹²⁰.

The definition of "*passive website*" is also given in US case of *Zippo Mfg. Co. v Zippo Dot Com*. Thus the passive site is described as "a site that does little more than make

¹¹⁶ Øren (2004), p.84, Debussere (2002), p.347

¹¹⁷ Øren (2004), p.84

¹¹⁸ *Zippo Mfg. Co. v Zippo Dot Com* (1997)

¹¹⁹ *Ibid*, para.2

¹²⁰ Example taken from Debussere (2002), p.358

information available to those who are interested in it”¹²¹. Thus, the consumer should not be able to conclude the contract through such a website, but only can obtain, for example, characteristics of goods and services offered.

The third group of websites consists of “*interactive websites*” that allow for the exchange of information between the visitor to the website and the host computer¹²². As Debussere explains, through such a website “goods or services being sold cannot be directly transmitted”¹²³ (for example a camera or a book bought through a web shop), and, as this site lets the parties exchange the information and by this way the contract can be concluded via the website, but executed with the help of traditional delivery. The level of interactivity of the website according to US court practice is the subject to case-by-case evaluation, and, “some judges require a high level of interactivity and some do not”¹²⁴.

In the Proposal for the Brussels Regulation the Commission stated the following: “The concept of activities pursued or directed towards a Member State is designed to make clear that (*the consumer protective jurisdiction*¹²⁵) applies to consumer contracts concluded via an *interactive website* accessible in the State of the consumer’s domicile”¹²⁶.

Thus the Proposal for the Brussels Regulation set the following cumulative criteria:

- 1) The site has to be *interactive* (consumers must at least have a possibility to enter into contract via this website); *and*
- 2) The site should be *accessible* in the state of consumer’s domicile.

Besides, in explanation of the notion of the directed activity the Commission stated in the Proposal for the Brussels Regulation that the professional by directing his activity to the

¹²¹ Zippo Mfg. Co. v Zippo Dot Com (1997), para.2

¹²² Ibid

¹²³ Debussere (2002), p.346

¹²⁴ Debussere (2002), p.348

¹²⁵ The present author’s explanation

¹²⁶ Proposal for a Council regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (1999) (hereinafter referred to as the Proposal for the Brussels Regulation)

country of the consumer's domicile should create a necessary link with this country¹²⁷. The notion was further elaborated by the Parliament which stated in the preparatory works to the Brussels Regulation that the activity should be directed "purposefully" and in "a substantial way"¹²⁸. Thus, the notion intended to be very broad and "all-embracing"¹²⁹, but necessarily presupposed the intention of the supplier to target some particular consumer's state and some active steps taken by the supplier in order to target the state. However, nothing in the preparatory works explains what exactly the supplier should do in order to create the link. All the previous explanation of the Commission and the Parliament stipulated unambiguously that the mere accessibility of the websites is not sufficient in order to satisfy the requirement of "directed activity".

However, in the final versions of the Brussels Regulation as well as in the Rome I Regulation the notion of the directed activity is not explained. The Rome I Regulation recital 24 contains the only one guidance for the application of the requirement. Thus, the recital 24 states that the reference to the "concept of directed activity" should be the "*condition*" for the application of the consumer protection rule. Further, the recital stipulates that if the business targets its activities at the state of the consumer's residence it is not sufficient for the Article 6 to be applicable unless the contract was actually concluded "within the framework of its activities". What does it actually mean that the contract fall within the activities directed? An answer cannot be found neither in the text of the Rome I Regulation and the Brussels Regulation nor in the preparatory works. Øren explains it on the following example. If the business offering the digital product A to consumers domiciled in other Member States through his webshop, while a tangible product B is solely sold to persons domiciled within its own Member State through a physical shop, a cross-border contract concerning the product B will not trigger the protective provisions of the Brussels Regulation Article 15¹³⁰ (and, therefore, the Rome I Regulation Article 6).

¹²⁷ Ibid

¹²⁸ Amendment 36 in the Comments of the Parliament to the Proposal for the Brussels Regulation C146/97

¹²⁹ Øren (2002), p.78

¹³⁰ Øren (2004), pp. 99-100

Thus, the second condition is that the contract should fall within the scope of activities directed towards a particular consumer's market.

Furthermore, the recital indicates that the mere accessibility is not sufficient for the Rome I Article 6 to apply. However, after this statement the following sentence was added (though never discussed in the preparatory works to the Regulations): "the mere fact that an Internet site is accessible is not sufficient for Article 15¹³¹ to be applicable, *although* a factor will be that this *Internet site solicits the conclusion of distance contracts* and that *a contract has actually been concluded at a distance, by whatever means*"¹³². This sentence brings a great deal of confusion into the mechanism of the application of the consumer protection rule. Thus, what is clear from the statement, is that the website should be interactive or active (because passive websites do not solicit the conclusion of the contract) and, besides, it should be accessible in the country of habitual residence of a consumer. As the result of the interaction the contract should be concluded.

If the sentence after the word "although" did not exist no confusion would appear. But in the absence of any other explanation it may be concluded that the mere accessibility *is indeed sufficient* for application of the consumer protection rule in the case when the contract has been actually concluded through the interaction with the website.

By this statement the Commission and the Council introduced a "circular definition"¹³³: if the contract with consumer exists it means that the mere accessibility of the website in the country of a consumer's habitual residence is sufficient for application of the Rome I Regulation Article 6 even though the supplier has never taken any active steps to target a consumer in the country of his habitual residence.

¹³¹ The recital contains a quotation from the joint declaration of the Council and the Commission concerning the Brussels Regulation. That is why the recital contains a reference to the Brussels Regulation Article 15.

¹³² The Rome I Regulation, recital 24

¹³³ Debussere (2002), p.360

The recital 24 actually stipulates that it plays no role whether the consumer was indeed targeted, if the site is simply accessible and has enabled the consumer to conclude the contract. In my opinion the cited Joint Declaration makes the application of the protective provisions of the Rome I Regulation Article 6 extremely far-reaching. The nature of the Internet allows accessing to almost any website in the world, and a lot of these websites supply their products without paying any regard to the location of a consumer (like active websites offering, for example, music files for downloading). While ordering the goods through an interactive website the site can refuse to deliver them in a particular region (by this demonstrating that his activity is not directed to that region). For the traders operating through an active website it plays no role to which corner of the world to supply the goods if there is an Internet connection there.

In my opinion the term “directs to” should presuppose some active steps taken in order to target the consumer’s market, in wording of the Commission “to create a link”¹³⁴ with the particular market through, for example, e-mail offers, online advertisement and by other means.

Thus, to trigger the application of the Rome Regulation Article 6 and the Brussels Regulation Article 15 the objective existence of the contract between the parties is considered to be enough. If the site is interactive and if the consumer enters into the contract through the interaction with this website, the fact whether the supplier actually had an intention to target the consumer is not taken into consideration.

This consequence appears to be even more confusing in the light of the other factors stating that the reference to the concept of directed activity has to be a *condition* for applying the consumer protection rule and that the contract concluded should fall within the scope of this activity. The concept of directed activity as it appears in the Rome I Regulation and in the Brussels Regulation does not give a clear picture of how the mechanism of its application actually works.

¹³⁴ The Proposal for the Brussels Regulation (1999), p.16

In my opinion, the new conditions of application of the special rule of Article 6, though are more adapted to the realities of electronic contracting than those stipulated by the Rome Convention Article 5, but potentially can invoke problems in practice. In particular, the absence of the clear definition of “directing activities” and the absence of ECJ case law mean that the national courts are left without guidance as to how the websites’ activities have to be evaluated. Does this “directing-test” have to be based on assessment of website’s active steps to “target” consumers from some consumer’s market and on its intention to “ring-fence”¹³⁵, or the mere fact of the website’s accessibility is sufficient for assessment of website activity as targeting if the contract has been concluded?

According to the recital 24 the existence of the contract is actually determinant. Thus, if the website is merely accessible in the state of consumer’s domicile and by interaction with this website the consumer enters into contractual relations with the web trader, it means that the consumer protective rule of the Article 6 applies. In the commentary of Debussere to the Brussels Regulation, he states: “the new regime has ‘put the cat among the pigeons’ in business circles, since, henceforth, enterprises that are domiciled in an EU Member State can be sued in any EU Member State where their website is accessible, irrespective whether or not they focused their on-line business on that Member State”¹³⁶.

The matter is even more complicated comparing to the Brussels Regulation which provides the same requirements but protects only consumers domiciled in EU Member States. The universal scope of the Rome I Regulation presupposes its application without the reference to the Member States’ consumers. Thus, the situation which online suppliers face is extremely difficult. The next chapter will try to find out what options businesses have in order to avoid compliance with all the laws of the countries where their website is accessible.

¹³⁵ As it was proposed by the Parliament in its comments to the Proposal for the Brussels Regulation (see *EC Official Journal* 17 May 2001, C 146/98)

¹³⁶ Debussere (2002), p.362

4 Implications of requirements of the Rome I Regulation Article 6 for businesses trading online

4.1 The concept of “directed activity”: problems caused by the absence of definition

As far as the notion of “directing activity” is not clarified in the Rome I and the Brussels Regulations, the only one starting point left is the explanation given by the recital 24. The analysis of the recital 24 led to the conclusion that the mere accessibility of the website in the state of consumer’s residence can result in application of the Article 6. This in a fact means that if the law has not been chosen by the parties the governing law is the law of a consumer’s habitual residence. If the law has been chosen by the parties it will apply in parallel with the mandatory rules of the state of the consumer’s habitual residence.

Thus the situation when the consumer is not afforded the protection is hard to imagine if the contract with the supplier exists. This, of course, is accordant with the high level of consumer protection proclaimed by the EC Treaty Article 65. But on the other side it completely disregards the interests of professionals trading through the Internet websites (especially, through active websites). The concept of “directing activities” as it appears in the Rome I Regulation does not serve its initial purpose, which is in my opinion, to balance the interests of suppliers and consumers and to make their contractual relation predictable. The Rome I Regulation states that the directed activity is a condition for application of consumer protective rule, but indeed it stipulates some other conditions which are very easy to meet by any electronic consumer contract (the fact that the contract has actually been concluded through the website).

It might be more predictable to apply the law of the consumer’s habitual residence in all the cases. However, the application of the law of consumer’s residence to all consumer contracts can detract the suppliers from the participation in electronic transaction. And, vice versa, the application of the law of the supplier’s residence to all consumer contracts doesn’t seem accordant to the high level of protection of consumers introduced in the EU.

That is why the application of the “directing test” is called on to strike a balance between the interests of suppliers and consumers and to set some middle criteria for subjecting the supplier to the consumer’s law.

But how should this balance be achieved, which factors should be taken into account in determining whether the business actually targets the consumer?

For example, Geist proposes to apply a three-fold directing test (however designed by him for US law system):

- 1) it is necessary to identify the intentions of the parties as to the law applicable (through the contractual clause designating the *lex causae* if such a clause exists),
- 2) to take an account to the technology used to either target or to avoid specific consumer’s market, and,
- 3) to the factor of supplier’s knowledge (actual or implied) of targeting the particular consumer market¹³⁷.

Concerning the first factor (assessment of the applicable law) proposed by Geist, according to the Rome I Regulation Article 6 (2), the law chosen by the parties does not preempt the application of mandatory rules of consumer’s domicile. Thus this factor cannot be considered relevant in the context of the Rome I Regulation.

Concerning the second factor, Geist suggests that the failure by the business to use the technology which prevents the accessibility of its website in particular states should be regarded against the supplier and the failure to use such a technology could be interpreted against the supplier¹³⁸. This factor, in my opinion, should be considered relevant in evaluation of business conduct. However, I disagree that the use of the technology should be considered as an obligation for the supplier. This technology, of course, involves

¹³⁷ Geist (2001), p.40

¹³⁸ Geist (2001), p.57

additional expenses for businesses, which in any way find their reflection in the price of the goods or services offered (in such a way making the cost of electronic contracting higher, first of all for consumers). It is apparent to international nature of online business that a business trading electronically takes some risk of being exposed to unfamiliar jurisdiction and unfamiliar law, but it does so only as long as it brings profits. The use of technology as the requirement can become an excessive burden for some online traders, which can become an obstacle to the development of electronic commerce.

The factor number three is evaluating the supplier's actual knowledge of potential "targeting" of foreign jurisdictions and law. This factor used by Geist relates to non-contractual relations where website owner has the knowledge that the content can be regarded as illegal in some jurisdiction, and, therefore is irrelevant for the assessment of supplier's conduct in respect to consumer contracts.

One more important question arising in this respect is whether the subjective intention of the seller to target particular consumer has to be evaluated. This question wasn't being considered during the preparatory works. Some commentators support the point of view that the evaluation of the supplier's intentions should be "based on an objective assessment of all of the facts of the marketing activity concerned"¹³⁹. In my opinion this factor shouldn't be disregarded, especially when the intentions of the supplier are stated in unambiguous way (for example through the use of disclaimers). On the other hand, this factor also cannot be given too much weight because in situations when the supplier's intentions are not so obvious, to prove them in legal proceeding can be "difficult and costly"¹⁴⁰.

Any way it leaves no doubts that the notion of the directed activity should be clarified by the ECJ case law or through legislation. But what options does the business have until the explanation does not exist?

¹³⁹ Bygrave/Foss (2000), p. 118

¹⁴⁰ Øren (2004), p.89

The next subsection will describe the possible ways for the suppliers contracting electronically who want to manage “the applicable law risk”¹⁴¹.

4.2 Options for businesses

What can business do in order to avoid the application of all consumer laws of the countries where its website is accessible?

In the present situation the following can be proposed:

- 1) The businesses can choose to follow the policy of “the most restrictive common denominator”¹⁴². This means that the business can identify the set of the strictest consumer law provisions (at least mandatory law provisions) of the countries he can potentially target and follow them. For example, according to the Distance Selling Directive¹⁴³ Article 6 (1) the right of withdrawal should be exercised in at least 7 days. The business has to find out the most restrictive (for him) national implementation of the Directive and to follow it. If, for example, the business finds out that the longest term for the right of withdrawal in some country constitutes 14 days, he should follow it. It is, however, obvious that conducting such investigations is extremely burdensome for the suppliers in terms of cost, time and labor. Moreover, it is extremely doubtful that the suppliers can really compare all consumer protection laws of at least Member States, not to speak of such laws of all countries of the world (which he actually has to study with regard to universal scope of application of the Rome I Regulation defined in the Article 2).
- 2) The supplier can try to restrict the access to the website (to “ring-fence”): through a) the use of disclaimers on the websites, or b) through the use of special technology.

¹⁴¹ S. Van der Hof (2003), p.171

¹⁴² Smith (2004), p.148

¹⁴³ Distance Selling Directive (1997)

- a) Use of disclaimers on websites. Disclaimers can be defined as the statements indicating the intentions of the supplier concerning commercial operations which he puts on his website. Particularly, through the use of the disclaimers the supplier can specify his desire to contract (or not to contract) with consumers from a particular region. What can be pointed out in respect of the disclaimers, is that judging from the objective criteria introduced in the Rome I Regulation recital 24 (conclusion of the contract at a distance even if the consumer wasn't specifically targeted), it is unlikely that this factor would be given much weight if the contract has actually been concluded with a consumer. Besides, the use of disclaimers should be regarded as an attempt of the supplier to delimit his activity to some particular region only if the statement is truthful. Thus, for example, Waelde gives the following example¹⁴⁴. In the US case of *Euromarket Designs Inc v Crate&Barrel*¹⁴⁵ the website of Crate&Barrel indicated a clear attempt to limit the territorial applicability of the site exclusively to Ireland. However, the operation of the site didn't comply with its own disclaimer and let the users to select the United States for shipping. Thus in relation to the Crate&Barrel's website this false disclaimer cannot be regarded as attempt to "ring-fence" if actually the website solicited the conclusion of the contract with consumers outside the delimited zone¹⁴⁶.
- b) The use of the specific technology restricting the access to the websites by the consumers from ineligible countries or introducing the facility of a website enabling consumers to indicate their location can also be regarded as an opportunity for a business. Despite the availability of such a technology, it appears quite too expensive for some businesses trading online. As Debussere notices in this respect, if the websites are asked to do so, it can "result in legal uncertainty and a lot of costs for enterprises, which will constitute an important barrier to the development of e-commerce (especially the e-commerce activities for small enterprises), result in higher prices for consumers and lead to enterprises refusing to enter into e-contracts

¹⁴⁴ Edwards (2005), p.24

¹⁴⁵ *Euromarket Designs Inc v Crate&Barrel* (2000)

¹⁴⁶ Edwards (2005), p.24

[...]”¹⁴⁷. Thus, contrary to Geist’s “directing test”, the use of the technology can reasonably be expected on the part of large online sellers only. For small businesses and individual professionals its use cannot become a requirement, and the failure to use it shouldn’t have to be interpreted against them. Though this opportunity can appear quite expensive for the suppliers, but it can actually ensure that the suppliers won’t be exposed to unknown consumer’s law. As Smith proposes, it can be done through country-specific sites, which limit their accessibility to the selected country (countries) only¹⁴⁸.

Therefore, none of the proposed options can be regarded as perfect solution for the businesses as all of them involve additional efforts and expenses for businesses, which inevitably will be transferred to consumers through the price of the goods. Since the Rome I Regulation gives to the worldwide accessibility a meaning of the worldwide targeting, businesses are exposed to all consumers’ laws in the world.

The next option, though not for the suppliers but for the EU legislative bodies, is the achievement of “community minimum protection standard” by harmonization of substantive national law provisions. The alternative had little connection with the private international law. According to this approach, the consumer had to be protected by the Community’s unified substantive provisions. It could be difficult to find any arguments against this approach if this “minimum standard” covered all aspects of the consumer contracts. However, despite all legislative initiatives and already adopted documents (like the Distance Selling Directive¹⁴⁹, Unfair Contract Terms Directive¹⁵⁰) it is still insufficient. As the Green Paper comments on this alternative “EC directives do not yet cover all the aspects of consumer law, so protection via national law (designated through harmonized

¹⁴⁷ Debussere (2002), p. 362

¹⁴⁸ Smith (2004), p.148

¹⁴⁹ Distance Selling Directive (1997)

¹⁵⁰ Unfair Contract Terms Directive (1993)

conflict of laws rules) remains important¹⁵¹ (and ensured through the mechanism of private international law).

The harmonization of substantial laws on consumer protection is the most far-sighted solution able to make all suppliers' fears concerning exposure to all national law systems of law groundless. If the consumer protection laws converge, the risk for suppliers lessens¹⁵².

As commentators note, it is likely to be many years before the necessary level of harmonization is attained.

¹⁵¹ The Green Paper (2003), p.29, section 3.2.7.3.

¹⁵² Edwards (2005), p.25

5 Conclusion

Within the present work the new provision of the Rome I Regulation concerning consumer contracts have been analyzed. The particular regard has been paid to the application of these provisions to *electronic* consumer contracts.

It has been found out that the transformation of the Rome Convention into a new instrument was needed, first of all, in order to ensure consistency between harmonized instruments on private international law adopted on the basis of the EC Treaty Articles 61 and 65 (the Brussels Regulation on Jurisdiction and the Rome II Regulation on the law applicable to non-contractual obligations). The necessity of modernization of the Rome Convention's provisions should be regarded in the context of the development of distance selling techniques, in particular electronic contracting.

Though the comparison of the new and the preceding regime for the choice of law in consumer contracts it has been established:

- For the first time the consumer has been defined through the reference to “a natural person”. Thus the question whether small and medium sized enterprises can be included in the definition of the consumer does not arise any more.
- Together with the notion of the consumer the Rome I Regulation has clarified the notion of the other party of the consumer contract (“professional”). According to the Article 6(1) the professional can be a legal person as well as a natural person (acting in the course of his “commercial or professional activities”).
- The reference to the object of the consumer contract has been abolished in the Rome I Regulation (as the Rome Convention defined it as “a supply of goods or services”). It has been explained that the previous definition of the object created

obstacles to electronic contracting. The abolishment of this reference has made the definition of the Rome I Regulation technology neutral.

- The substance of the consumer protection rule has been left unchanged (i.e. in the absence of contractual choice of law, governing law is the law of consumer's place of habitual residence; if the law has been chosen by the parties, it applies to the contract, but its application cannot deprive the consumer of protection of the mandatory rules of consumer's place of habitual residence).

- The substance of the double rule has not been changed, however the conditions of its application has been modified significantly. Thus, according to the Rome I Regulation the consumer is granted the protection though the choice of law rules, provided that the professional:

- a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
- b) by any means, directs such activities to that country or to several countries including that country,

and the contract between the supplier and the consumer falls within the scope of such activities.

Among the positive effects of the solution introduced by the Rome I Regulation is the inclusion of mobile consumers through abolishment of the factor of consumer's location at the time when he enters into contract and sending him a specific invitation in the country of his habitual residence (the Rome Convention article 5).

It has been stipulated that the new requirements are taken from the Brussels I Regulation and are intended on evaluation of supplier's conduct (activity) in order to determine whether the contract falls under the protection.

As it has been established by the analysis of the new requirements that the most serious lapse in the Rome I Regulation is that the definitions of the concepts of "directed activity to" as well as "pursuing activity in" the country of consumer's habitual residence have not been given.

Some kind of guidance to the application of the concept of "directed activity" is given by the Rome I Regulation recital 24. However, it obviously confuses the notions of "directing activities to" and "being accessible in" and by this poses a threat on businesses of being subjected to any substantive consumer protection law existing in the world. Besides, the recital 24 establishes that the actual presence of the contract should mean that the consumer was targeted and it is sufficient for application of the consumer protection rule. Therefore, the guidance of the recital 24 completely disregards the intention of the business to target the consumer. The negative effect has been explained on the example of the active websites.

The reasonably predicted suggestion is that the notion of "directing activities" is interpreted by legislator for the purposes of the Rome I and Brussels Regulation. The competence to interpret conflict of laws provisions of the Regulations given to the ECJ can be a very good opportunity for the clarification of the notion.

In the last chapter of the work the possible ways for the business to avoid "worldwide targeting" have been given. Particularly, it has been proposed that the business can:

- 1) follow the strictest set of national consumer law provisions appointed through the comparison of the national laws of the countries he can

- potentially target (policy of the most restrictive common denominator);
or/and,
- 2) try to restrict the access to the website (to “ring-fence”) by using the disclaimers on the websites or the special technology.

However, it has been established that none of the proposed options can be regarded as a perfect solution for the businesses due to the fact that all of them involve additional efforts and expenses for businesses. These additional expenses, in my opinion, will inevitably be transferred to consumers through the price of the goods. Therefore, the negative effects on the development of electronic commerce (particularly, business-to-consumer transactions) can be caused.

Thus, the new requirements should be clarified and, by this, the interests of the consumers and the suppliers should be balanced. At the author’s opinion, the definition of the “directed activity” should be given in order to achieve certainty and predictability of the legal relations for both consumers and suppliers. The supplier’s intention to target (or not to target) should be taken into account.

However, as soon as the requirements are clarified the Rome I Regulation together with other instruments containing the harmonized rules on private international law becomes an effective mechanism for regulation of business-to-consumer transactions, particularly in respect of electronic commerce.

References

List of Judgements/Decisions

Short name	Full name
Bertrand v Paul Otto KG	C-150/77: <i>Bertrand v Otto</i> KG [1978] European Court Reports 1431
Euromarket Designs Inc v Crate&Barrel (2000)	<i>Euromarket Designs Inc v Crate&Barrel</i> , 96 F.Supp. 2d 824 (N.D. 111. May 16, 2000)
Francesco Benincasa v Dentalkit	C-269/95, <i>Benincasa v Dentalkit</i> , [1997] European Court Reports 3767
Zippo Mfg. Co. v Zippo Dot Com	<i>Zippo Mfg. Co. v Zippo Dot Com</i> , 952 F.Supp. 1119 (1997), available here: http://www.internetlibrary.com/pdf/Zippo-Manufacturing-Zip-Dot-Com-WD-Pa.pdf

Treaties/Statutes

Short name	Full name
Brussels Convention (1968)	Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, available here: http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm [visited 18.09.2009]

Brussels Regulation (2001)	Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal of European Communities 16.01.2001, L12/1
Distance Selling Directive	Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, Official Journal of the European Union L 144 , 04.06.1997
EC Treaty (Consolidated version)	European Union Consolidated Versions of the Treaty of European Union and the Treaty Establishing the European Community in Official Journal of the European Union C 321 29.12.2006; available here: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF
Electronic Commerce Directive	Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), Official Journal of the European Union L 178, 17.7.2000
Rome Convention (1980)	Rome Convention 80/934/ECC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, Official Journal L 266, 9.10.1980

Rome I Regulation (2008) Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Official Journal of the European Union L 177/6 of 4.7.2008

Rome II Regulation (2004) Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Official Journal of the European Union L 199/40 of 31.7.2007

Unfair Contract Terms Directive (1993) Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Official Journal of the European Union L 95, 21.4.1993

Preparatory works

Short name

Full name

The Giuliano-Lagarde Report M.Giuliano and P.Lagarde “Report on the [Rome] Convention on the law applicable to contractual obligations”, Official Journal 1980 C282 pp. 1-50; available here: http://www.uninova.sk/pf_bvsp/pdf/Text_GiulianoLagardeReport.pdf

The Green Paper

Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations

into a Community instrument and its modernization
14.1.2003 COM(2002) 654 final; available here:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0654:FIN:EN:PDF>

The Proposal

Proposal for a regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I); Brussels, 15.12.2005, COM (2005) 650 final, 2005/0261 (COD), available here:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0650:FIN:EN:PDF>

The Proposal for the Brussels Regulation

Proposal for a Council regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 14.07.1999 COM (1999) 348 final 99/0154 (CNS); available here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1999:0348:FIN:EN:PDF>

Comments of the Parliament to the Proposal for the Brussels Regulation, EC Official Journal 17 May 2001, C 146 available here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:146:0094:0101:EN:PDF>

Secondary Literature

Books

Short name	Full name
Chissik (2002)	M.Chissick, A.Kelman, <i>Electronic commerce Law and Practice</i> , Sweet and Maxwell, London, 2002
Dicey and Morris (1993)	L. Collins, “ <i>Dicey and Morris on the conflict of laws</i> ”, 12 th edition, Sweet and Maxwell, London, 1993
Edwards (2005)	L.Edwards (ed), <i>The New Legal Framework for E-Commerce in Europe</i> , Ashgate Publishing Limited, Hampshire, 2008
Gillies (2008)	L.Gillies, <i>Electronic Commerce and International Private Law: A Study of Electronic Consumer Contracts</i> , Hart Publishing, Oxford and Portland, Oregon, 2005
Kaye (1993)	P.Kaye, <i>The new private international law of contract of the European Community</i> , Dartmouth Publishing Company, Hants, 1993
Øren (2004)	J.S.T. Øren, <i>International Jurisdiction and Consumer Contracts: Section 4 of the Brussels Jurisdiction Regulation</i> , Complex, Oslo, 2004
Yearbook of PIL (2009)	A.Bonomi, P.Vonken, <i>Yearbook of Private International Law Vol X 2008</i> , European Law Publishers GmbH, Munich, 2009

On-line books:

Short name**Full name**

Farlex Dictionary

The free dictionary by Farlex available here:
<http://legal-dictionary.thefreedictionary.com/adhesion+contract>
(reference to adhesion contract used in the Chapter 1)

West's Encyclopedia

West's Encyclopedia of American Law, edition 2, the Gale Group, (2008); available here:
<http://legaldictionary.thefreedictionary.com/Adhesion+Contract> (reference to adhesion contract used in the Chapter 1)

Articles**Short name****Full name**

Alferez (2009)

F.J.G. Alferez, *The Rome I Regulation: exceptions to the rule on consumer contracts and financial instruments*, Journal of private international law, Vol.5, No.1, April 2009, p. 85-103; available here:
<http://www.ingentaconnect.com/content/hart/jpil/2009/00000005/00000001/art00004>

Bygrave/Foss (2000)

L.A.Bygrave, M.Foss, *International Consumer Purchases Through the Internet: Jurisdictional Issues Pursuant to European Law*, International Journal of Law and Information Technology, Oxford University Press, Vol.8, No.2, Summer 2000, pp. 99-138

- Debussere (2002) Debussere, Frederic, *International Jurisdiction over E-Consumer Contracts in the European Union: Quid Novi Sub Sole?*, International Journal of Law and Information Technology, Oxford University Press, Vol.10, No.3, 2002, pp. 344-366
- Geist (2001) Geist, Michael *Is there a There There: Towards Greater Certainty for Internet Jurisdiction*, 16(3) Berkeley Technology Law Journal, 2001; available here: <http://arxiv.org/abs/cs/0109012v1>
- S. van der Hof (2003) Van der Hof, Simone. *European conflict rules concerning international online consumer contracts*, Information and Communication Technology Law, Carfax Publishing, Vol.12, No.2, June 2003, pp.165-178
- Lando/ Nielsen (2007) O.Lando, P.A.Nielsen *The Rome I Proposal*, Journal of private international law, Vol.3, No.1, April 2007, p. 29-51; available here: <http://www.ingentaconnect.com/content/hart/jpil/2007/00000003/00000001/art00002>
- Reifa (2004) Reifa, Christine, *Article 5 of the Rome Convention on the Law applicable to Contractual obligation of 19 June 1980 and Consumer E-contracts: The need for reform*, Information and Communications Technology Law, Carfax Publishing, Vol.13, No. 1, 2004, pp.59-73

- Rothchild (1999) Rothchild, John, *Protecting the Digital Consumer: The Limits of Cyberspace Utopianism*. Indiana Law Journal. Vol. 74 (1999), p. 899, available here: <http://www.law.indiana.edu/ilj/volumes/v74/no3/rothchild.pdf>
- Smith (2004) Smith, Graham, *Directing and targeting: the answer to the Internet's jurisdiction problems? A discussion of directing and targeting internet activities towards a foreign country as the threshold test for triggering foreign law or jurisdiction*, Computer law review international, No. 5, 2004, pp. 145-152
- Stone (2000) Stone, Peter, *Internet consumer contracts and European private international law*, Information and Communications Technology Law, Carfax Publishing, Vol.9, No.1, 2000, pp.5-15
- Tang (2007) Tang, Zheng, *Parties' Choice of Law in E-Consumer Contracts*, Journal of private international law, Vol.3, No.1, April 2007, p. 113-136; available here: <http://www.ingentaconnect.com/content/hart/jpil/2007/00000003/00000001/art00005>

Annex (optional)

The Rome I Regulation

REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL
of 17 June 2008
on the law applicable to contractual obligations (Rome I)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular
Article 61(c) and the second indent of Article 67(5) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee (1),

Acting in accordance with the procedure laid down in Article 251 of the Treaty (2),

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, the Community is to adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market.

(2) According to Article 65, point (b) of the Treaty, these measures are to include those promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

(3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement that principle.

(4) On 30 November 2000 the Council adopted a joint Commission and Council programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters (3). The programme identifies measures relating to the harmonisation of conflict-of-law rules as those facilitating the mutual recognition of judgments.

(5) The Hague Programme (4), adopted by the European Council on 5 November 2004, called for work to be pursued actively on the conflict-of-law rules regarding contractual obligations (Rome I).

(6) The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

(7) The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (5) (Brussels I) and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to noncontractual obligations (Rome II) (6).

(8) Family relationships should cover parentage, marriage, affinity and collateral relatives. The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seised.

(9) Obligations under bills of exchange, cheques and promissory notes and other negotiable instruments should also cover bills of lading to the extent that the obligations under the bill of lading arise out of its negotiable character.

(10) Obligations arising out of dealings prior to the conclusion of the contract are covered by Article 12 of Regulation (EC) No 864/2007. Such obligations should therefore be excluded from the scope of this Regulation.

(11) The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations.

(12) An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.

(13) This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.

(14) Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.

(15) Where a choice of law is made and all other elements relevant to the situation are located in a country other than the country whose law has been chosen, the choice of law should not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement. This rule should apply whether or not the choice of law was accompanied by a choice of court or tribunal. Whereas no substantial change is intended as compared with Article 3(3) of the 1980 Convention on the Law Applicable to Contractual Obligations ("the Rome Convention"), the wording of this Regulation is aligned as far as possible with Article 14 of Regulation (EC) No 864/2007.

(16) To contribute to the general objective of this Regulation, legal certainty in the European judicial area, the conflict-of-law rules should be highly foreseeable. The courts should, however, retain a degree of discretion to determine the law that is most closely connected to the situation.

(17) As far as the applicable law in the absence of choice is concerned, the concept of "provision of services" and "sale of goods" should be interpreted in the same way as when applying Article 5 of Regulation (EC) No 44/2001 in so far as sale of goods and provision of services are covered by that Regulation. Although franchise and distribution contracts are contracts for services, they are the subject of specific rules.

(18) As far as the applicable law in the absence of choice is concerned, multilateral systems should be those in which trading is conducted, such as regulated markets and multilateral trading facilities as referred to in Article 4 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, regardless of whether or not they rely on a central counterparty.

(19) Where there has been no choice of law, the applicable law should be determined in accordance with the rule specified for the particular type of contract. Where the contract cannot be categorised as being one of the specified types or where its elements fall within more than one of the specified types, it should be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. In the case of a contract consisting of a bundle of rights and obligations capable of being categorised as falling within more than one of the specified types of contract, the characteristic performance of the contract should be determined having regard to its centre of gravity.

(20) Where the contract is manifestly more closely connected with a country other than that indicated in Article 4(1) or (2), an escape clause should provide that the law of that other country is to apply. In order to determine that country, account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts.

(21) In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorised as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract should be governed by the law of the country with which it is most closely connected. In order to determine that country, account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts.

(22) As regards the interpretation of contracts for the carriage of goods, no change in substance is intended with respect to Article 4(4), third sentence, of the Rome Convention. Consequently, single-voyage charter parties and other contracts the main purpose of which is the carriage of goods should be treated as contracts for the carriage of goods. For the purposes of this Regulation, the term "consignor" should refer to any person who enters into a contract of carriage with the carrier and the term "the carrier" should refer to the party to the contract who undertakes to carry the goods, whether or not he performs the carriage himself.

(23) As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of-law rules that are more favourable to their interests than the general rules.

(24) With more specific reference to consumer contracts, the conflict-of-law rule should make it possible to cut the cost of settling disputes concerning what are commonly relatively small claims and to take account of the development of distance-selling techniques. Consistency with Regulation (EC) No 44/2001 requires both that there be a reference to the concept of directed activity as a condition for applying the consumer protection rule and that the concept be interpreted harmoniously in Regulation (EC) No 44/2001 and this Regulation, bearing in mind that a joint declaration by the Council and the Commission on Article 15

of Regulation (EC) No 44/2001 states that "for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities". The declaration also states that "the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor".

(25) Consumers should be protected by such rules of the country of their habitual residence that cannot be derogated from by agreement, provided that the consumer contract has been concluded as a result of the professional pursuing his commercial or professional activities in that particular country. The same protection should be guaranteed if the professional, while not pursuing his commercial or professional activities in the country where the consumer has his habitual residence, directs his activities by any means to that country or to several countries, including that country, and the contract is concluded as a result of such activities.

(26) For the purposes of this Regulation, financial services such as investment services and activities and ancillary services provided by a professional to a consumer, as referred to in sections A and B of Annex I to Directive 2004/39/EC, and contracts for the sale of units in collective investment undertakings, whether or not covered by Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), should be subject to Article 6 of this Regulation. Consequently, when a reference is made to terms and conditions governing the issuance or offer to the public of transferable securities or to the subscription and redemption of units in collective investment undertakings, that reference should include all aspects binding the issuer or the offeror to the consumer, but should not include those aspects involving the provision of financial services.

(27) Various exceptions should be made to the general conflict-of-law rule for consumer contracts. Under one such exception the general rule should not apply to contracts relating to rights in rem in immovable property or tenancies of such property unless the contract relates to the right to use immovable property on a timeshare basis within the meaning of Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis.

(28) It is important to ensure that rights and obligations which constitute a financial instrument are not covered by the general rule applicable to consumer contracts, as that could lead to different laws being applicable to each of the instruments issued, therefore changing their nature and preventing their fungible trading and offering. Likewise, whenever such instruments are issued or offered, the contractual relationship established between the issuer or the offeror and the consumer should not necessarily be subject to the mandatory application of the law of the country of habitual residence of the consumer, as there is a need to ensure uniformity in the terms and conditions of an issuance or an offer. The same rationale should apply with regard to the multilateral systems covered by Article 4(1)(h), in respect of which it should be ensured that the law of the country of habitual residence of the consumer will not interfere with the rules applicable to contracts concluded within those systems or with the operator of such systems.

(29) For the purposes of this Regulation, references to rights and obligations constituting the terms and conditions governing the issuance, offers to the public or public take-over bids of transferable securities and references to the subscription and redemption of units in collective investment undertakings should include the terms governing, inter alia, the allocation of securities or units, rights in the event of over-subscription, withdrawal rights and similar matters in the context of the offer as well as those matters referred to in Articles 10, 11, 12 and 13, thus ensuring that all relevant contractual aspects of an offer binding the issuer or the offeror to the consumer are governed by a single law.

(30) For the purposes of this Regulation, financial instruments and transferable securities are those instruments referred to in Article 4 of Directive 2004/39/EC.

(31) Nothing in this Regulation should prejudice the operation of a formal arrangement designated as a system under Article 2, point (a) of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems.

(32) Owing to the particular nature of contracts of carriage and insurance contracts, specific provisions should ensure an adequate level of protection of passengers and policy holders. Therefore, Article 6 should not apply in the context of those particular contracts.

(33) Where an insurance contract not covering a large risk covers more than one risk, at least one of which is situated in a Member State and at least one of which is situated in a third country, the special rules on insurance contracts in this Regulation should apply only to the risk or risks situated in the relevant Member State or Member States.

(34) The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

(35) Employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by agreement or which can only be derogated from to their benefit.

(36) As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily.

(37) Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of "overriding mandatory provisions"

should be distinguished from the expression "provisions which cannot be derogated from by agreement" and should be construed more restrictively.

(38) In the context of voluntary assignment, the term "relationship" should make it clear that Article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations. However, the term "relationship" should not be understood as relating to any relationship that may exist between assignor and assignee. In particular, it should not cover preliminary questions as regards a voluntary assignment or a contractual subrogation. The term should be strictly limited to the aspects which are directly relevant to the voluntary assignment or contractual subrogation in question.

(39) For the sake of legal certainty there should be a clear definition of habitual residence, in particular for companies and other bodies, corporate or unincorporated. Unlike Article 60(1) of Regulation (EC) No 44/2001, which establishes three criteria, the conflict-of-law rule should proceed on the basis of a single criterion; otherwise, the parties would be unable to foresee the law applicable to their situation.

(40) A situation where conflict-of-law rules are dispersed among several instruments and where there are differences between those rules should be avoided. This Regulation, however, should not exclude the possibility of inclusion of conflict-of-law rules relating to contractual obligations in provisions of Community law with regard to particular matters. This Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation. The application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

(41) Respect for international commitments entered into by the Member States means that this Regulation should not affect international conventions to which one or more Member States are parties at the time when this Regulation is adopted. To make the rules more accessible, the Commission should publish the list of the relevant conventions in the Official Journal of the European Union on the basis of information supplied by the Member States.

(42) The Commission will make a proposal to the European Parliament and to the Council concerning the procedures and conditions according to which Member States would be entitled to negotiate and conclude, on their own behalf, agreements with third countries in individual and exceptional cases, concerning sectoral matters and containing provisions on the law applicable to contractual obligations.

(43) Since the objective of this Regulation cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to attain its objective.

(44) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland has notified its wish to take part in the adoption and application of the present Regulation.

(45) In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, and without prejudice to Article 4 of the said

Protocol, the United Kingdom is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

(46) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application,

HAVE ADOPTED THIS REGULATION:

Chapter I

Scope

Article 1

Material Scope

1. This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.

It shall not apply, in particular, to revenue, customs or administrative matters.

2. The following shall be excluded from the scope of this Regulation:

- (a) questions involving the status or legal capacity of natural persons, without prejudice to Article 13;
- (b) obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations;
- (c) obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;

- (d) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;
- (e) arbitration agreements and agreements on the choice of court;
- (f) questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body;
- (g) the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party;
- (h) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;
- (i) obligations arising out of dealings prior to the conclusion of a contract;
- (j) insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work.

3. This Regulation shall not apply to evidence and procedure, without prejudice to Article 18.

4. In this Regulation, the term "Member State" shall mean Member States to which this Regulation applies. However, in Article 3(4) and Article 7 the term shall mean all the Member States.

Article 2

Universal application

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

Chapter II

Uniform rules

Article 3

Freedom of choice

1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.
2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.
3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

5. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.

Article 4

Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:

- (a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;
- (b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;
- (c) a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;
- (d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;

- (e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;
- (f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;
- (g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;
- (h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.

2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

Article 5

Contracts of carriage

1. To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.

2. To the extent that the law applicable to a contract for the carriage of passengers has not been chosen by the parties in accordance with the second subparagraph, the law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply.

The parties may choose as the law applicable to a contract for the carriage of passengers in accordance with Article 3 only the law of the country where:

- (a) the passenger has his habitual residence; or
- (b) the carrier has his habitual residence; or
- (c) the carrier has his place of central administration; or
- (d) the place of departure is situated; or
- (e) the place of destination is situated.

3. Where it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

Article 6

Consumer contracts

1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession ("the consumer") with another person acting in the exercise of his trade or profession ("the professional") shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

- (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
- (b) by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities.

2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.

3. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4.

4. Paragraphs 1 and 2 shall not apply to:

- (a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence;
- (b) a contract of carriage other than a contract relating to package travel within the meaning of Council Directive 90/314/EEC of 13 June 1990 on package travel,

package holidays and package tours¹;

(c) a contract relating to a right in rem in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC;

(d) rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service;

(e) a contract concluded within the type of system falling within the scope of Article 4(1), point (h).

Article 7

Insurance contracts

1. This Article shall apply to contracts referred to in paragraph 2, whether or not the risk covered is situated in a Member State, and to all other insurance contracts covering risks situated inside the territory of the Member States. It shall not apply to reinsurance contracts.

2. An insurance contract covering a large risk as defined in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance¹ shall be governed by the law chosen by the parties in accordance with Article 3 of this Regulation.

To the extent that the applicable law has not been chosen by the parties, the insurance contract shall be governed by the law of the country where the insurer has his habitual residence. Where it is clear from all the circumstances of the case that the contract is

manifestly more closely connected with another country, the law of that other country shall apply.

3. In the case of an insurance contract other than a contract falling within paragraph 2, only the following laws may be chosen by the parties in accordance with Article 3:

(a) the law of any Member State where the risk is situated at the time of conclusion of the contract;

(b) the law of the country where the policy holder has his habitual residence;

(c) in the case of life assurance, the law of the Member State of which the policy holder is a national;

(d) for insurance contracts covering risks limited to events occurring in one Member State other than the Member State where the risk is situated, the law of that Member State;

(e) where the policy holder of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policy holder.

Where, in the cases set out in points (a), (b) or (e), the Member States referred to grant greater freedom of choice of the law applicable to the insurance contract, the parties may take advantage of that freedom.

To the extent that the law applicable has not been chosen by the parties in accordance with this paragraph, such a contract shall be governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract.

4. The following additional rules shall apply to insurance contracts covering risks for which a Member State imposes an obligation to take out insurance:

(a) the insurance contract shall not satisfy the obligation to take out insurance unless it complies with the specific provisions relating to that insurance laid down by the Member State that imposes the obligation. Where the law of the Member State in which the risk is situated and the law of the Member State imposing the obligation to take out insurance contradict each other, the latter shall prevail;

(b) by way of derogation from paragraphs 2 and 3, a Member State may lay down that the insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance.

5. For the purposes of paragraph 3, third subparagraph, and paragraph 4, where the contract covers risks situated in more than one Member State, the contract shall be considered as constituting several contracts each relating to only one Member State.

6. For the purposes of this Article, the country in which the risk is situated shall be determined in accordance with Article 2(d) of the Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and, in the case of life assurance, the country in which the risk is situated shall be the country of the commitment within the meaning of Article 1(1)(g) of Directive 2002/83/EC.

Article 8

Individual employment contracts

1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.

2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.

4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.

Article 9

Overriding mandatory provisions

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

Article 10

Consent and material validity

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.

2. Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.

Article 11

Formal validity

1. A contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded.

2. A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries

where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.

3. A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation, or of the law of the country where the act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time.

4. Paragraphs 1, 2 and 3 of this Article shall not apply to contracts that fall within the scope of Article 6. The form of such contracts shall be governed by the law of the country where the consumer has his habitual residence.

5. Notwithstanding paragraphs 1 to 4, a contract the subject matter of which is a right in rem in immovable property or a tenancy of immovable property shall be subject to the requirements of form of the law of the country where the property is situated if by that law:

(a) those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract, and

(b) those requirements cannot be derogated from by agreement.

Article 12

Scope of the law applicable

1. The law applicable to a contract by virtue of this Regulation shall govern in particular:

(a) interpretation;

(b) performance;

(c) within the limits of the powers conferred on the court by its procedural law, the

consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;

(d) the various ways of extinguishing obligations, and prescription and limitation of actions;

(e) the consequences of nullity of the contract.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place.

Article 13

Incapacity

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

Article 14

Voluntary assignment and contractual subrogation

1. The relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person ("the debtor") shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.

2. The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.

3. The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.

Article 15

Legal subrogation

Where a person ("the creditor") has a contractual claim against another ("the debtor") and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether and to what extent the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.

Article 16

Multiple liability

If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the law governing the debtor's obligation towards the creditor also governs the debtor's right to claim recourse from the other debtors. The other debtors may rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor.

Article 17

Set-off

Where the right to set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted.

Article 18

Burden of proof

1. The law governing a contractual obligation under this Regulation shall apply to the extent that, in matters of contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

2. A contract or an act intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 11 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

Chapter III

Other provisions

Article 19

Habitual residence

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. The

habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.

2. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

3. For the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract.

Article 20

Exclusion of renvoi

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation.

Article 21

Public policy of the forum

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy ("ordre public") of the forum.

Article 22

States with more than one legal system

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

2. A Member State where different territorial units have their own rules of law in respect of contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units.

Article 23

Relationship with other provisions of Community law

With the exception of Article 7, this Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations.

Article 24

Relationship with the Rome Convention

1. This Regulation shall replace the Rome Convention in the Member States, except as regards the territories of the Member States which fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299 of the Treaty.

2. In so far as this Regulation replaces the provisions of the Rome Convention, any reference to that Convention shall be understood as a reference to this Regulation.

Article 25

Relationship with existing international conventions

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.

2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

Article 26

List of Conventions

1. By 17 June 2009, Member States shall notify the Commission of the conventions referred to in Article 25(1). After that date, Member States shall notify the Commission of all denunciations of such conventions.

2. Within six months of receipt of the notifications referred to in paragraph 1, the Commission shall publish in the Official Journal of the European Union:

- (a) a list of the conventions referred to in paragraph 1;
- (b) the denunciations referred to in paragraph 1.

Article 27

Review clause

1. By 17 June 2009, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If appropriate, the report shall be accompanied by proposals to amend this Regulation. The report shall include:

- (a) a study on the law applicable to insurance contracts and an assessment of the impact of the provisions to be introduced, if any; and
- (b) an evaluation on the application of Article 6, in particular as regards the coherence of Community law in the field of consumer protection.

2. By 17 June 2010, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person. The report shall be accompanied, if appropriate, by a proposal to amend this Regulation and an assessment of the impact of the provisions to be introduced.

Article 28

Application in time

This Regulation shall apply to contracts concluded after 17 December 2009.

Chapter IV

Final provisions

Article 29

Entry into force and application

This Regulation shall enter into force on the twentieth day following its publication in the Official Journal of the European Union.

It shall apply from 17 December 2009 except for Article 26 which shall apply from 17 June 2009.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Strasbourg, 17 June 2008